

DCA Consultation on Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

Submission from:

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My submission takes the form of a general section of comments divided by category followed by shorter comments related to the specific questions asked in the highly restrictive 'consultation' document.

General comments

Format and costings used in the Consultation Exercise

1. The questions are framed to imply implicit support for the Government's proposals and the assumptions on which these proposals are based. Therefore this exercise fails to meet the requirements of a proper public consultation.
2. The fact that these highly-restrictive questions are based on a false premise further invalidates this exercise as a public consultation. There have been several attempts by members of the public to obtain the raw data behind the figure put forward by the Government as the total cost of implementing the Freedom of Information Act. To date, both the raw data and the methodology used by Frontier Economics have been kept secret. It is a central tenant of academia and, indeed, the scientific method, that for a conclusion to hold merit, the raw data and methodology behind it must be published. In the absence of such evidence, one must consider the conclusion as nothing more than mere unsubstantiated speculation.
3. The costing method appears to be based on political motivation or 'spin' rather than empirical evidence. This supposition is supported by the fact that no effort appears to have been made to account for the costs of continued government secrecy. For example, the House of Commons has spent at least £17,000 fighting FOI requests from the public for a detailed breakdown of MPs' expenses. Numerous councils have spent tens of thousands of pounds blocking requests by the public for restaurant and fire safety inspections. Public funds have been used to pay external and internal lawyers to find ways of blocking disclosure. Such wasteful and unnecessary costs are a direct result of the poor drafting of the legislation and an absence of forthright central guidance. Keeping information secret is more costly than public disclosure yet these costs are not included in the Government's calculations. In the United States where this data is available, it has been found that for every dollar spent declassifying old secrets, federal agencies spend approximately \$134 creating and storing new secrets.¹

¹ "Secrecy Report Card 2006" conducted by OpenTheGovernment.org. Available online at: <http://www.openthegovernment.org/article/articleview/193/1/68?TopicID=>

4. The costings take no account of the financial benefit of freedom of information to the overall economy. For example, the public disclosure of official information under FOIA in the United States is largely responsible for the rapid growth of that country's \$750 billion² information industry. In addition, FOI has saved countless millions by revealing corruption and inefficiencies.

5. There is no consideration of the costs associated with the current FOIA regime's overly complex bureaucracy and lack of enforcement. A law designed to be used by the public should be drafted in such a way that it is understandable to the common man. For example the United States federal Freedom of Information Act takes up one page and is straightforward and written in plain English. By contrast the UK law is close to 90 pages of poorly worded verbiage. It allows for all sorts of ambiguity and interpretation which leads directly to an undue burden on the public purse through countless guidance notes and legal consultation (needed to interpret the poorly drafted law). These costs should be included in the overall cost of Government secrecy.

6. The consultation fails to consider the full burden to the UK taxpayer of the current FOIA regime. To be clear, the law allows access to existing information; it does not require the public body to create new information. It is a simple democratic principal that the public – who provide the funding and in whose name public information is collected in the first place – should have easy access to the fruits of their largesse. Accessing information in the current system is like buying a train ticket only to show up and be refused access to your seat or possibly asked to pay a second time. The public have already paid for this information, therefore they have a right to see it.

7. The estimate fails to include the cost of the survey commissioned by Frontier Economics nor the 53-page consultation document. Nor indeed, the not inconsiderable sum to run this public consultation. As such, let this submission serve as its own written FOIA request for the detailed costs, both monetary and in terms of staff manhours of:

- a. the survey commissioned by Frontier Economics
- b. the drafting of the Regulations
- c. the drafting and running of the public consultation
- d. the drafting of new guidance related to the Regulations

8. The real problem with the implementation of the FOIA is not the cost, but the delays and lack of enforcement that make the law almost useless. I attach as an example, a study I conducted for a client about Tesco. In most cases the answers I received were superficial and showed a clear failing of the records-keeping systems of government. In addition, a good number of departments failed to provide an answer to my request within 20-working days if at all. One way of judging the value for money of the Freedom of Information Act is on the amount of public information released to the public. Currently the House of Commons provides full answers to less than 25 percent of FOIA requests³ - a clear indicator that performance values are suffering. The proposed changes would only make this situation worse and thus make the law of even less value to the public. Instead of making the system even more bureaucratic, the solution is to adopt the recommendations put forward last summer by the Constitutional Affairs Select Committee.

² Peter Weiss's "Borders in Cyberspace" paper about the relative benefits of closed and open access to public data. The [HTML version](#) here, [the PDF](#), here.

³ Hansard: 1 Mar 2007 : Column 1451W

9. In conclusion, due to the inaccurate cost model used and the party political wording of the questions in this consultation, this exercise fails to meet the criteria of a proper public consultation exercise.

FOI is essential for the information economy

10. In the UK the public cannot access the raw data created and maintained at their expense. In addition, a restrictive copyright regime stifles innovation using this public sector data. It is noteworthy that the UK's database and information industry lags well behind that of the United States. Pioneers in this country who use official data to create new products and innovations have all faced obstruction from UK public bodies either from issues of access, copyright or usurious fees. For example, the architects of www.publicwhip.com and www.theyworkforyou.com were threatened with prosecution when they first set up their sites. One of these programmers also attempted to build a Statute Law Database⁴ (as the Government had failed to do so after 10 years) but was prevented from doing so by the Department for Constitutional Affairs' refusal to release the necessary data under the FOIA.

11. It can't be right that innovative campaign groups and companies must use Googlemaps for the geospatial needs when this country has its own mapping agency funded since its inception by the taxpayer. In the US, open and unrestricted access to public sector information has resulted in the massive growth of the information industry, specifically in the geographic information and environmental services sectors. Similar growth has not occurred in the UK due to restrictive government information practices, primarily the ineffectual freedom of information act. Studies have shown that there is significant economic benefit to opening up official data to the public. The table below shows the comparable economic and investment values of public sector information in the EU and US.

Economic Potential of PSI in Europe and US⁵		
In EUROS	EU	US
Investment value	9.5 billion	19 billion
Economic value	68 billion	750 billion

12. The conclusion from such studies is that it is counter-productive, even in the short term, to restrict access to, and charge for, public sector information.

FOI builds responsible, informative journalism, leading to an informed and civically engaged electorate.

13. The polemical style of much British journalism is due in large part to the difficulty obtaining official information. It is noteworthy that the UK lacks any organisation devoted to computer-assisted reporting – a type of investigative journalism that is well developed in the US and Scandinavia where freedom of information laws are much stronger and well-developed. I have worked with several organisations to try and build up this type of analytical

⁴ Guardian "[Access denied to the laws that govern us](http://www.guardian.co.uk/2006/nofreelaw/)" available also at <http://www.yrtk.org/2006/nofreelaw/>

⁵ PIRA International (2000) Commercial Exploitation of Europe's Public Sector Information. Final Report for the European Commission, Directorate General for the Information Society.

journalism in the UK but the difficulties are enormous. Firstly, our FOI law is too weak to provide a strong right of public access. Delays are endemic and jeopardise the value of the information when/if it is finally released. Secondly, decades of secrecy have allowed inconsistency and error to infect most public records databases to a degree that I did not see while working in the more transparent United States. Some British records are virtually unusable because of their poor quality. I use as an example a survey I did of police attendance rates to 999 response calls. I discovered for no good reason, each of the 43 forces compiled their data using different criteria making accurate comparison difficult. In addition, some forces had such poor record keeping that they had no way of knowing how often police actually attended 999 calls. Finally, there is the issue of restrictive copyright of public information that prevents the easy use and re-use of official information.

14. If the government wants to encourage legitimate reporting techniques then it needs to provide an efficient and timely mechanism to make this type of reporting cost effective. This mechanism should be the Freedom of Information Act. In the US, the federal FOIA combined with strong state FOI and public records laws means there is no demand for an information black market. Having worked as a journalist in the US for eight years, I never once came across a reporter who had used a private detective to gather information. There was simply no need. All the information needed was available in the public domain.

15. By contrast in the UK, trying to access information legitimately couldn't be more time-consuming and difficult. Obstacles are constantly put in one's way and everything the government does encourages the creation of an information black market economy. Now we are going to jail reporters who access information illegitimately, but a more effective solution to this problem would be to create incentives for to use legitimate information gathering tools. The main way of doing this would be to make the FOIA more effective.

16. These proposals will only make the financial case for using FOIA even weaker. As part of my consultation business, I once applied to set up an FOI unit for *The Times* newspaper. Although keen on the idea, the company did not believe FOIA was effective enough to warrant any additional costs. Yet this is the same company that authorized a payment of more than £100,000 for a private detective to gather information for the *News of the World*. Obviously, someone made a judgment about the most effective use of money to gather information and it was not through the Freedom of Information Act. This speaks very poorly of the current law. It should always be easier to act within the law rather than outside of it, yet this is clearly not the case.

17. One of the strongest benefits of freedom of information is that it replaces propaganda and polemic with empirical evidence. Citizens now have a more factual and detailed understanding of problems facing local schools, councils, the criminal justice system, the NHS and, of course, central government. We know, despite rhetoric that the NHS is "better than ever", that at least 13 NHS trusts are technically bankrupt, with no chance of meeting a legal obligation to balance their books. We know that prosecution rates vary across Britain in what amounts to a postcode lottery of justice, and that police increasingly use cautions for serious crimes such as rape and burglary. We know the number of school pupils expelled for drugs and violence, how many of those on probation have committed violent crimes, which restaurants are failing their hygiene inspections and the details of many private finance contracts signed by public authorities. We have a list of post offices scheduled for closure, the surgery success rates of some surgeons and know that hospitals in England are each charging patients up to £1.5 million a year for parking.

18. All these requests could easily be refused under the proposed regulations and our public life would be much poorer. If we are to call ourselves an informed electorate then we need access to information. Otherwise, this country must drop the pretence that it is in any way a democracy composed of informed citizens.

Comments to specific consultation questions

Question 1 - Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (i.e. a 'ready reckoner') for how long a page should take to read be included in the Regulations or guidance?

19. The Regulations fail to accurately calculate the true cost of FOI as stated above. They ignore the costs of government secrecy, excess complexity and lack of enforcement of the legislation and the savings resulting from increased public accountability. The proposed changes would serve only to increase costs by making the law even more complex and ambiguous than it already is, thereby putting a further burden on public bodies that would then have to commission further legal advice, draw up new guidance and fight more costly legal battles.

20. The proposed addition of reading, consulting, thinking and examining time is entirely subjective and open to abuse. Refusals citing this regulation would be vulnerable to legal challenge thereby increasing the burden on public bodies.

21. Already, Baroness Ashton has indicated that more advice and assistance will be required if the regulations go through, yet this cost is not included in the official estimate. In addition, the workload of the Information Commissioner – who is already stretched beyond his capacity as evidenced by his increasing backlog of appeals – will increase, and as a result he will need increased funds to manage his growing caseload.

Question 2 - Does the inclusion of thresholds in the regulations provide sufficient flexibility, taking into account the differing complexity of requests received?

22. No. The regulations as they are written would prohibit those requests that are most beneficial to the public while allowing those that are simplistic, superficial and of limited public benefit. Such a system does not provide value for money as the requests allowed are not beneficial to the public as a whole.

Question 3 - Are the thresholds the right ones to make sure the balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?

23. No. There already exists an imbalance between the resources of the state and that of the private citizen. Efforts should be made to streamline the FOI process so that the law is open to all. The FOIA pertains to information that has already been paid for by taxpayers so it stands to reason that such information should be easily available to them.

Question 4 - Are the regulations as drafted the best way of extending the aggregation provision?

24. In relation to paragraph 5, the “aggregation” proposal will lead to costly confusion over whether an individual is working individually or in concert with an organisation. For example, will bureaucrats conduct social network analysis to figure out for whom a freelance journalist or researcher is working? This type of aggregation will inevitably lead to costly legal challenges and a further waste of public funds.

25. The proposal to aggregate requestors by type will penalise those bodies working in the public interest such as journalists, academics, campaigners and lawyers. This proposal will further differentiate the UK from the rest of the global FOI community. In the United States, for example, it is precisely these sorts of requestors who receive the benefit of fee waivers, yet in the UK these regulations will mean they are targeted for special persecution.

Question 5 - Do the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the regulations or can this be dealt with in the guidance?

26. The regulations are vague and ambiguous like the rest of the Freedom of Information Act. As a result, rejected FOI requests citing these regulations will be vulnerable to costly and time-consuming legal challenge. The same points would apply to any new guidance.

Question 7 - Are these the right factors?

27. No. These proposals change the ‘applicant-blind’ principal that is a pre-requisite of any good freedom of information legislation. Aggregation by type must be abandoned.

Question 8 - What guidance would best help public authorities and the general public apply both the EIRs and the Act effectively under the new proposals?

28. Instead of creating even more guidance (at greater public expense), efforts would be better spent enforcing the current legislation in a timely and tough manner and also simplifying the existing legislation.

Report on FOI requests made by Heather Brooke

I made a number of FOI requests on or around 12th December 2006 for a client related to meetings, events and other interaction between ministers and supermarkets, in particular Tesco. Some departments provided prompt and professional replies (HM Revenue & Customs, DWP, Information Commissioner's Office), but others ignored the law completely (eg HM Treasury, Cabinet Office) or delayed the request for months using the public interest extension (DEFRA, DTI).

Cabinet Office – two requests made 12th December 2006 for information about meetings and events with Tony Blair (and senior Number 10 staff) and supermarket reps. On 24th January, Cabinet Office wrote seeking clarification (missing the 20-working day statutory deadline). They claimed they could not answer the request but after pressure they agreed to answer in a narrower format – eg meetings of just Tony Blair and just Tesco. Response 28th February to say that Chief Exec of Tesco and his wife have been guests at Chequers. Unfortunately information came too late to be of use to the client.

HM Treasury – two requests made 11th December 2006 – no response to date despite chasing. On 29th January, I received the following email:

Thank you for your email. We are aware that the reply is overdue and we are sorry it is late. There are a number of requests asking about meetings and appointments of ministers and senior officials, work is underway to gather the information together and assess it to enable a response to be made. I am sorry that this is causing a delay in responding to your request. We are doing all we can to speed the work up.

*Regards,
Ashley Britten*

This is a clear violation of the law, yet there is remedy I can seek to address this breach.

Dept Trade & Industry – two requests made 11th December. In response to events, the DTI responded: “A search of our records found no Ministerial attendance at events organised by these companies over this period. Please note that this does not include political events (such as Party Conferences), events that Ministers may have attended in a private capacity, or events that Ministers may have attended in their capacity as a Constituency MP. With regard to events that may have been sponsored by these companies, the DTI does not hold a record of commercial sponsors of industry-led events and seminars.”

In response to meetings, the DTI has used the public interest extension claiming they won't be able to answer until 12 March. As of 8th March (almost three months after the request) I still have not had an answer

Office of Fair Trade – one request made 27th November for information about investigations or correspondence related to the Tesco loyalty card database – The OFT replied in time stating they held no information related to this subject.

Information Commissioner's Office – one request made 27th November asking for info about investigations and complaints against Tesco in relation to the Data Protection Act. Received full response within the time period.

Home Office/Identity & Passport Agency – one request made 2 January. Received response stating: “I am writing to advise you that the IPS does not hold the information you

have requested as no records exist of any member of staff or ministers meeting with Tesco or its representatives in relation to the National Identity Scheme, or consulting Tesco or Dunnhumby about buying the Clubcard database.”

Department of Work and Pensions/ Child Support Agency – one request to both made 27th November. Received response in time stating: “Both DWP & CSA have never entered into negotiation with Tesco or any other store to access information from store or loyalty cards. Also Fraud Investigation Service have never used store or loyalty card information in any investigation. The information required when requesting store/loyalty cards would not be of value in an investigation. Our contact is more likely to be to request wage/employment details.” In addition, neither DWP or CSA have policies allowing for the exchange of information in relation to supermarket store cards or any type of loyalty cards.

Dept for Transport – one request for meetings between John Prescott and supermarkets about car park tax: “I am sorry to report that following extensive enquiries with relevant areas of this department and a similarly extensive search of our paper and electronic records, we have been unable to locate the information you requested.”

Department for Communities and Local Govt – request made 13th December 2006 for meetings and info about supermarket car park tax. Dept having trouble locating documents from 1997/8 on parking tax (poor records management) and will only begin searching if I agree to fees. They stated in an email received 15th February 2007: “We have no easy means of establishing either if or when the Deputy Prime Minister met any representatives of the supermarkets in 1997 or 1998. Therefore we cannot know for sure without searching the files, of which there are a considerable number, for the notes of any meetings that might have taken place. We must calculate the fee, and it must be paid, **before** the work is carried out. When deciding whether you wish to pay the fee, you will want to bear in mind that we may not find any of the information that you request.”

DEFRA – two requests made 11th December 2006 for meetings and events – Department has utilised the public interest extension for meetings and I did not receive an answer until 22nd February 2007. In response to the request for events DEFRA responded that two took place and gave me the details.

HM Revenue & Customs – one request made 27th November 2006 – partial response Nov 30. Full answer 20th December including report which states: “The Loyalty Card schemes provide a very straightforward way of collecting data on UK consumers...” Some items in report are redacted, “because disclosure would prejudice the assessment or collection of taxes/duties or assist tax/duty avoidance or evasion.” I could challenge this exemption but the information will be of no use in the time it will take to go through the appeals process. Additional information disclosed: “HMRC Large Business Service (LBS) (previously IR Large Business Office and HMCE Large Business Group) has no agreement with Tesco related to accessing information that Tesco holds on its customers. No approaches have been made by the LBS to Tesco for store card data. We are aware of just one request made by HMRC to another supermarket as part of a PAYE enquiry into an unrelated employer.”