DEPARTMENT OF CONSTITUTIONAL AFFAIRS

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

RESPONSE FROM THE NATIONAL UNION OF JOURNALISTS

March 2007

1. INTRODUCTION

The National Union of Journalists is the UK's largest journalists' organisation. Its 38,000 members work in newspapers, new media, broadcasting, magazine and book publishing and in government and private public relations. The NUJ has been since its formation 100 years ago committed to promoting the freedoms of expression and information.

The Union's response to this consultation has drawn on information from a wide range of opinion within our industry and reflects a high level of concern at the proposals. The response focuses on issues that directly affect our members' ability to fulfil their professional obligation to inform the public about the activities of their elected representatives and officials working for public authorities. There is a rare unity among the various elements of the media – publishers, editors and working journalists; employers' associations and unions alike – that the proposed amendments would unfair in principle and damaging in practice.

We are aware of major points of principle concerning the costing of FoI applications that are being raised by others, and we are content, in the interest of concision, to leave those points to others. The bulk of our concerns relate to the consequences of the proposal to aggregate the cost of requests from a single source and to impose the ban on further requests with the 60-day time limit.

We are attaching our responses to the questions circulated by the DCA but wish to register an objection to the prescriptive nature of the questions, which do not allow responses the question the need or the rationale for the amendments.

2. FREEDOM OF INFORMATION

In 1989 the International Federation of Journalists sent a fact-finding mission to the UK to assess the state of press freedom. The mission pronounced, in summary, that in Britain there was "complete freedom of expression. Everybody is free to express a badly informed opinion." They were confirming Britain's then reputation as a secretive society in which press and public were allowed less official information than in other western countries that enjoyed freedom of information laws. The NUJ had campaigned for a Freedom of Information Act in line with the policy of the Labour and Liberal Democratic parties since the 1970s and we warmly welcomed the Act when it was introduced.

We were aware of criticisms that it was weaker than campaigners had wanted and that its introduction was delayed, but were not too troubled about this: we felt that in the long term the drawbacks would be heavily outweighed by the advantages. Freedom of Information was important enough to be worth waiting for.

We are pleased too with the operation of the Act. Some people had worried that journalists would not utilise the Act to its full potential, owing to the oft-remarked decline of the practice of investigative journalism in the UK media. The union launched a programme of courses to train members in the efficient and productive use of the Act and we have been gratified by the extent to which it has been taken up, particularly in the local press. It had been expected that broadsheet national papers and TV documentary strands would line up applications in line with investigations they were carrying out -- and it was probably little surprise that to start with some popular national papers came up with outlandish requests -- but it was a pleasant surprise that local papers took it up in such a big way.

This appreciation has been the greater because of concerns often expressed by the NUJ and others that local newspapers have in recent years been falling short of their duty to keep their communities well informed. This trend has been caused by drastic reductions in editorial spending by the newspaper chains that control virtually the entire sector. It meant reporters were increasingly confined to their offices instead of being able to get out and about in the communities. FoI has provided a means to help them maintain their role as information providers to the public. There is a widespread feeling that the DCA's proposals will gravely imperil this function.

3. CONSIDERATION AND CONSULTATION TIME

3.1 The public interest

The DCA's research shows that a small proportion of application took a disproportionately large amount of time, yet this is hardly surprising. It is statistically inevitable and the assumption that this makes them problematical must be challenged. It can be relatively simple to supply a single piece of information of personal interest to an individual, and procuring information of greater public importance to large numbers of people is likely to take longer. It is a major fault in the proposals that this public interest is nowhere taken into account. An impression is given that freedom of information is a luxury that authorities cannot afford, rather than the essential component of our democracy that it is becoming. The NUJ believes that a fair assessment of the effort required to meet requests must consider the public interest.

Possibly the most high profile recent FoI revelation was that of the minutes of BBC Board of Governors meetings in January 2004. The person who brought the request, an NUJ member, has said that the cost far exceeded the limits. The BBC of course declined to comply (though not on the cost grounds that it could have used if it wished) and the matter went to the Information Commissioner and Tribunal. But now there would be no appeal against refusal to comply with requests except over the accuracy of the cost calculations. Many such important potential revelations would be stopped.

The work of journalists in bringing out information of public importance is a crucial element of the Freedom of Information regime. It may cost more for instance to collate comparative figures on the operation of a public service but it also is worth more to the public. The NUJ regrets that there has been no attempt to balance the factors involved in this way.

3.2 Challenging the costs

As the regulations are drafted it appears there is to be no appeal against a refusal based on cost grounds, save over the method of calculating the anticipated cost. There must at the least be an appeal to the Commissioner to allow a public interest consideration to override the cost limits.

There is a further cost element that has not been quantified: the savings to the public resulting from journalists' requests. When inefficiencies in the provision of public services are revealed the authorities concerned may be able to make savings, but there

seems to have been no attempt to take this into consideration either. In fact the estimated saving of £11 million a year over the whole of the public service, including hundreds of agencies, seems a tiny amount in any case, even without taking these points into consideration.

The DCA will no doubt be familiar with the research by the charity Public Concern at Work that shows these supposed savings will be more than outweighed by the cost for introducing them: a figure of £12.2 million has been calculated for one official in each of the 100,000 public bodies to read the new rules and guidance restricting FoI requests.

3.3 The modus operandi

About 10 per cent of FoI enquiries come from journalists. These requests are more likely to be efficient than those from members of the public or from campaign groups more concerned with the outcome than the process. Journalists are experienced in seeking information, they know what they want, they know how the authorities or agencies concerned operate and how they hold information. If they are making repeated applications to the same authority or agency they become familiar with the procedures and can term their requests precisely to minimise the effort required to answer them.

In these circumstances the introduction of consideration and consultation time into the cost calculations will be misleading and unfair. An authority that resents applications in a certain area will be able to declare costs that in reality do not apply, because they have considered, consulted on and researched information in the area concerned already.

4 THE AGGREGATION OF REQUESTS

The effects of lumping together requests from a single source would be entirely arbitrary. Whether an organisation or individual can seek public information would depend on when they made their last request to the authority concerned. Clearly this will be serious for campaigning groups whose applications are by definition made to a limited range of authorities, and they are presumably the target of the proposals, but there will be an equally serious effect on the press. This will be manifest particularly in five ways:

4.1 Local papers

Much of the good work that local media have done over the last two years would be undone by the proposals. As with campaigning groups, their FoI applications go to a restricted range of authorities: their local councils, NHS trusts, county constabularies and so on. If even unrelated applications are aggregated by cost the authorities will easily be able to calculate that they bust the "appropriate limits" – especially as non-national institutions operate to thresholds only 75 per cent of the national figure while hourly costs are at the £25 national rate.

4.2 Specialist reporters

Much of the most effective use of the Act has come from specialist reporters, who know their areas well and can direct their applications precisely to authorities and agencies they also know well. If the proposals were enacted they could find themselves suddenly unable to pursue a lead to an authority in their area of expertise because other applications made in the course of their work, possibly on subjects not directly related, had exceeded the appropriate limit and their hands would be tied for 60 working days. They would be unable do their jobs properly, to submit requests that other parties would be perfectly at liberty to submit. There is a blatant injustice here.

4.3 Freelance journalists: restraint of trade

A freelance journalist in this position could be prevented from working. Many freelances specialise in precise areas of reporting that mainstream publications may not have covered by inhouse staff. They are commissioned regularly by editors but will find themselves losing work if the draft regulations are adopted. A specialist writer whose applications have passed the appropriate

limit would have to turn down commissions for work that might rest on FoI applications: other journalists, who have less expertise in the area concerned but have not made FoI applications, might then take the work instead, and the expert journalist who might have put years of investment into developing the specialist would be unfairly disadvantaged. For such enterprising journalists the draft regulations would be anti-competitive, a restraint of trade: they would be deprived of work through no fault of their own.

4.4 Large national organisations

While the work of local media and specialist individuals would be affected, so at the opposite extreme would be large national media such as the BBC and national newspapers. Many of these have established groups or departments of people dedicated to making FoI applications. To restrict their work to the appropriate limit maximum per authority for 60 days would be absurd. A large proportion of their activity will suddenly become impossible. These organisations are committing resources to utilising a law introduced to assist the public. They are helping to make it work. It mystifies the NUJ why the government should now be trying to undermine its own law.

4.5 National surveys

Among the more productive uses of FoI have been applications to authorities nation-wide drawing out statistics on matters of concern. A good example was on January 28 this year when the New of the World published the results of a nation-wide survey on the number of convicted paedophiles living at unknown addresses, carried out through FoI requests to each of the 43 police forces in England and Wales. Though opinion may differ on the News of the World's pursuit of paedophiles, no-one would deny this is a matter of public interest. Yet, had the News of The World happened to have made an FoI request calculated to have cost up to £450 by one police force in the previous three months, that survey would new be impossible.

There are two further factors that must be taken into account:

4.6 Equality of opportunity

In the days before Freedom of Information the NUJ's attention had been drawn to the phenomenon known to journalists as

"greylisting", through which authorities and agencies tried to obstruct enquiries from journalists whose work they found uncomfortable. It involved a ban on press officers responding to enquiries from certain journalists, whose enquiries were to be referred to managers. The practice was time-consuming and unproductive for all concerned. It was used particularly by the Health and Safety Executive: four journalists who were being subjected to this treatment brought in the NUJ to take up their cases and improvements were secured. The NUJ believed that such days were past. It does not want to see a repeat of a regime in which some journalists making enquiries to government agencies are less equal than others.

4.7 Subterfuge

The DCA is no doubt aware that there has been discussion among journalists working in the FoI field about the possibility of surreptitious requesting, should the draft regulations come into force. Volunteers might be lined up to submit requests on behalf of journalists whose ability to work had been blocked by the cost of requests they had submitted in the past. It would be like the use of "fronts" to submit scripts to film producers on behalf of "blacklisted" writers in the McCarthy period in the USA. It would be a recipe for confusion and would certainly not make life easier for officials dealing with the requests. It is hard to believe that this is a situation the government would wish to bring about.

5. THE EXPERIENCE IN IRELAND

The DCA is no doubt aware that the Republic of Ireland adopted a Freedom of Information Act in 1997. The NUJ had been heavily involved in campaigning for it. In 2003 it was severely weakened when the government introduced mandatory fees. Figures released by the Irish Information Commissioner show that the overall number of requests fell by more than a fifth – from 18,443 in 2003, to 14,616 in 2005. The numbers made to important central government departments fell even more drastically: by 57 per cent to the office of the Taoiseach (Prime Minister), by 71 per cent to the Department of Finance, and by 58 per cent to the Department of Enterprise, Trade and Employment. The NUJ is not attempting a direct comparison, because the UK government is not introducing mandatory fees, but it is exercised by the fact that a similar fall in use of the legislation is what the UK government is seeking to achieve by different means.

6. CONCLUSION

Freedom of Information has been one of the positive human rights-based reforms of the present government. The NUJ perceives in the proposals to amend the regulations an element of "putting the genie back in the bottle". To undermine the opportunities that FoI has presented to citizen would be utterly unjustified by any other circumstances. Other restrictions on civil liberties have been justified by the war on terror, the fight against organised crime, restricting immigration and so on – and even these have been publicly questioned. There is no such consideration with Freedom of Information. The NUJ can see little more at stake than bureaucratic convenience.

It may be that the DCA's intention in devising the aggregation system was to restrict the use of the Act by campaigning groups acting in their own interests. This would be unjustified in itself: a true democracy must to be prepared to tolerate people who are out to make things difficult for agencies of the state. But the draft makes no distinction between campaign groups and the press, whose function is very different. This may have been an oversight but it is a serious one; even if journalists do make nuisances of themselves in their quest for information that officials would rather keep hidden, there is a significant difference of purpose. The purpose of the press is to inform the public, not to pursue a private or sectional interest. It would be astonishing if the DCA did not grasp this distinction.

The draft regulations are arbitrary, devious and small-minded and unfair. The union welcomes recent government assurances that the amendments will not be rushed in by the stated deadline of mid-April and is confident that the careful consideration of the responses will lead to the draft regulations being abandoned.

Department for Constitutional Affairs
Justice, rights and democracy

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List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please email your completed form to: informationrights@dca.gsi.gov.uk **Thank you!**

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?
Comments:	The regulations are already too prescriptive. In common with every other organisation representing users of the Act we reject the very imposition of the limits. But what a loaded question: there is an assumption that the limits must be imposed. This is hardly meaningful "consultation".

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

Comments: No it does not. There must at the last be a "public interest" consideration that can override the cost limits.
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?
Comments: The thresholds should not include calculations for consultation and reading time. Again, why do you not pose questions that allow for this response? If there have to be caps then reading and consultation together must not be enough to push one or a group of applications over the threshold. There is a danger that officials could calculate their own time thinking about and consulting over something they might be ill disposed towards until the clock runs out.
Question 4. Are the regulations as drafted the best way of extending the aggregation provision?
Comments: Again you do not put the question whether the aggregation provision should be extended at all. The effect will be arbitrary, however they are drafted.
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?
Comments: If the factors were positive they should be in the regulations but as drafted they should be in guidance – the less force they have the better.

Question 6. Are these the right factors?
Comments: No

Question 7. What guidance would best help public authorities and the general public apply both the EIRs and the Act effectively under the new proposals?
Comments: As we understand it the EIRs are governed by EU regulations and not even Lord Falconer, for all his powerful connections, can vary them. There should be no variance between these two categories of information applications.