

The Society of Individual Freedom

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PO Box 744

BROMLEY

BR1 4WG

Telephone 01424 713737 from inside the UK or 44 1424 713737 from outside of the UK.

General enquiries: chairman@individualist.org.uk

Website: www.individualist.org.uk

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

Submission to the Department for Constitutional Affairs (DCA)

The proposed changes to the FOIA rules - the allowing of time taken considering a FOI request to be put towards the cost of administering a request and the aggregating of unrelated requests – will have a substantial effect on the utility of the FOIA.

It is pointless to speculate on the number of requests which will be affected, because (1) much will depend on how the new regime is interpreted by ministers and public servants and (2) in the nature of things it is impossible to meaningfully estimate how many requests will never be made because of the tightening of the regime. (For these reasons we make no detailed answers to the seven questions at Annex A of the Draft Regulations*). The important thing to understand now is that even if the changes affect only a relatively small number of FOI applications, the potential for harm is considerable because the temptation will be for ministers and public servants to deliberately elongate the consideration time to put “difficult” requests out over the cost limits. It would be naive to the point of imbecility to imagine that this will not happen.

In theory it would be possible for a challenge to be made to costings which take the cost of the request beyond the cost limits, but that would not be a practical proposition for the vast majority of refused requests. It is improbable that the Information Commissioner could, even if he wished to get involved, meaningfully deal with substantial numbers of appeals against refusals on the ground of cost – his office has only around 200 staff to deal with the entire administration of queries and complaints relating to the DPA and the FOIA. and complaints about FOIA refusals are already taking an age to deal with (they have not cleared straightforward complaints sent six months ago).

There is of course the option of judicial review, but that is simply beyond the reach of most individuals or organisations and, in any case, if a large number of applications for judicial review suddenly materialised they would be subject to great delay., and delay is very often a killer for someone making an FOIA request. The media need information when a story has a natural topicality; someone trying to find out about how a relative died in an NHS hospital requires that information quickly because it may effect civil and criminal legal action and so on.

The claim that the changes will save a significant amount of money does not stand scrutiny. The Frontier Economics report commissioned by the DCA (Independent Review of the impact of the Freedom of Information Act – suggests that the savings would be £11.8 million , an utterly trivial amount in the context of Britain's national budget expenditure approximately £500 billion in the financial year 2006/7).

As for the question of ministerial and public servants' time being taken up by FOI requests, it is quite conceivable that this will increase not decrease if the changes are made. Difficult requests will probably be resisted more strongly, that is, more consideration time will be deliberately taken if it is thought that will push the request over the charging limits. There will also be a general temptation for politicians and public servants to spend additional time considering a request simply because the time can be set against the cost limits, for it is human nature to use a facility when it exists. In addition, ministers and public servants may find themselves engaged in further work because of increased challenges to refusals on the grounds of cost.

The purpose of the FOIA

The purpose of the FOIA is to give access to data with a public aspect, most notably data generated by government both national and local. This is an essential part of the democratic process for two reasons. First, without access to the information, the citizen is left ignorant of what is being done in his or her name. Second, if politicians in Government and public servants can hide information, their behaviour becomes democratically irresponsible because there is, by definition, no one to call them to account.

Politicians of all parties should reflect on the fact that no party is in perpetual government and that all politicians have much to gain through the existence of a strong FOI regime. The general utility of such a regime for opposition parties is obvious, but it is also a powerful tool for Government backbenchers who may need information for a subject of special interest to them or where they are at odds with their own Government.

Censorship is the prime agent of abuse by those with power. Take away the ability to censor and incompetent, illegal and dishonest behaviour becomes vastly more difficult to accomplish or sustain. The greater the information available to those outside Government and public service, the greater the check on official misbehaviour. That fact should be kept to the front of this debate.

***Questionnaire**

We would welcome responses to the following questions set out in this consultation paper.

Reading/examination time

Q1. 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?

Consultation and consideration Time

Q2. Does the inclusion of thresholds in the Regulations provide sufficient flexibility, taking into account the differing complexity of requests received?

Q3. 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?

Aggregation

Q4. Are the Regulations as drafted the best way of extending the aggregation provision?

Q5. 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?

Q6. Are these the right factors?

Other matters arising — Environmental Information Regulations

Q7. What guidance would best help public authorities and the general public apply both the EIRs and the Act under the new proposals?

Thank you for participating in this consultation exercise