

## Consultation response

Information Rights Division  
Department of Constitutional Affairs  
6.16 Selbourne House  
54-60 Victoria House  
London  
SW1E 6QW

DATE: 13 March 2007  
TO: Laurence Fiddler  
RESPONSE BY: Ingrid Gubbay  
Which? Principal Campaigns Lawyer

### Which? response to the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees ) Regulations 2007.

#### Introduction

*Which?* is the largest consumer organisation in Europe with around 700,000 members. Entirely independent and not-for-profit, we are funded through the sale of our *Which?* range of consumer magazines and books. We exist to make individuals as powerful as the organisations they come across in their daily lives.

#### Background

The Freedom of Information Act (FOIA) is a fundamental indicator of how well a participatory democracy is functioning in the UK and of how transparent the processes and machinations of government are to its citizens.

Greater access to information which is generated by public authorities on behalf of citizens, and paid for by ordinary taxpayers, is essential for ensuring a highly informed electorate who can meaningfully engage with Government agencies who have a major impact on people's lives.

#### Our view

Which? is strongly **opposed** to the draft regulations. We note that our view is shared by over 100 MPs from all parties in the House of Commons who have supported EDM 845 and that the Constitutional Affairs Select Committee in its June 2006 report "*Freedom of Information: one year on*" concluded that the problems

they identified with the FOIA would not "*justify a review of the fees regulations, but it would demonstrate a serious shortcoming in some public authorities' records management systems*".

Though we hope the regulations will never be presented to Parliament, we also believe the regulations are so contentious that if they are ever presented to Parliament they should be subject to the positive resolution procedure.

We suggest that, rather than trying to save about one third of the £36 million spent on FOIA - a small sum when compared with overall Government spending - the Government should actually be investing **more** resources in making FOIA work as intended, including better funding for the Office of the Information Commissioner.

We also believe that the FIOA has not been in force long enough for the proposed changes to be either justified or necessary.

### Detailed Comments

We welcomed the Government's decision to bring into force the FOIA which provided a general right of access to recorded information held by public authorities subject to conditions. We have consistently used the FOIA strategically in a range of areas including health, food, consumer market information and personal finance matters both to ensure the integrity of the work and research we conduct, and also to provide important information and advice to consumers.

It is disappointing now to see that the DCA seems to have taken a determined course toward retreating on the commitment towards a more open and transparent Government. In presenting the proposed draft regulations in this very advanced form we believe the DCA has missed a fundamental step in the consultation exercise, namely the preliminary question of whether it is necessary and/or proportionate to individual and organisational requesters to introduce these changes.

The consultation, such that it is, pre-supposes that the draft regulations have a sound basis for change; we disagree that they do. The proposal to aggregate claims is wrong in principle, and whether intentional or otherwise, will have the effect of reducing legitimate claims at a time when public authorities and the general public are still coming to grips with the operation of the Act. We believe the regulations are questionable and possibly challengeable at law.

In particular our concerns centre around two aspects of the proposals; **the proposed new costs thresholds (DR6) and aggregation of claims (DR7).**

## 1. Draft Regulation 6. (DR6)

The proposals contemplate a de minimus level below which costs associated with consultation and/or consideration are not to be taken into account. These are set at £100 for central government and £75 for wider public sector. The ceiling costs are to be £400 for and £300 respectively.

These threshold and ceiling provisions would apply separately to consultation and consideration activities to ensure that a request cannot exceed the appropriate limit because of the costs either of consideration or consultation activities alone. This in turn it is suggested is insurance against requests being rejected purely because they are 'sensitive' or 'difficult'.

DR6 also proposes to include new costs which had not been previously included in the costs of compliance with a request under the Act. The new costs proposed are for examining the requested information, costs of consulting with other bodies about the request, and the costs of determining whether an exemption applies, including deciding on the public interest balance for qualified exemptions.

The costs of consideration and consultation time would be estimated at £25 per hour. Costs are to be subject to a reasonableness test exercised by individual authorities as to the estimated costs of each of these activities.

Our objections to these proposals are threefold.

Firstly, FOI should ideally be used as an avenue of last resort for obtaining Government information. Public authorities can significantly reduce costs by increasing the amounts of information they proactively publish on websites, annual reports and other public documents, so that the need to use the act is minimised. We note that many local and other public authorities have increasingly begun to do this. Which? has been greatly encouraged by the decision many local authorities took to publish the hygiene scores of local food outlets, largely as a result of a Which? led FOIA campaign last year.

We are very concerned that these regulations may well act as a disincentive to this positive development. In particular, some sectoral regulators who have been very slow in taking up the spirit of FOIA have more recently begun to engage in dialogue as a result of FOIA requests for information about their individual enforcement activities and initiatives.

Secondly, 'any mechanism for disclosing Government information must have regard to issues of access and equity. Policies of charging for Government information run

the risk of 'double taxation' if the information was created and collected at taxpayer's expense'<sup>1</sup>. It would be hard for the Government to argue that such information was not generated at the taxpayer's expense.

It is our view that, even with the assistance of 'guidance', Public Authorities will vary greatly as to how they will apply an assessment of what are reasonable costs which will broadly reflect current levels of inconsistency of knowledge which we have found exist across the public sector in applying the exemptions to the FOIA.

We found that when we sent requests for the same information under both the FOIA and EIR to a large number of local authorities concerning food hygiene inspections, the responses ranged from definite refusals to supply of everything including files. Sometimes these were from neighbouring authorities, thus defying any rational explanation.

The wide margin of discretion afforded to public authorities to deny access to requests on the basis of unreasonable costs creates in our view an avenue which may easily be exploited (or seen to be exploited), another layer of complication and a barrier to access for the requester.

Which? suggests that, if these new costs are to be included, then at least the upper limit of £600 and £450 should be increased. We think that the thresholds should be increased by £400 and £300 respectively so that the new thresholds should be £1000 and £750 respectively, and be kept under regular review. In addition no request should be refused on the grounds of costs alone.

## **2. Draft Regulation 7 (DR7)**

The second issue of paramount concern to us is the proposal to increase the scope for aggregation of claims.

The proposal in its current form will result in a restriction on Which? of the information we seek under the FOIA. We note that DR7 does provide that requests can only be aggregated where it is 'reasonable in all the circumstances' to do so. One of the elements of what is reasonable, but which will not be expressed in the regulations, is whether the 'requester is an individual who is not making the request in the course of business or professions'.

This would effectively tie up organisations like Which? and other not for profit organisations who represent public interests from obtaining information crucial to

---

<sup>1</sup> Administrative Law, Third Edition 1999 : Douglas and Jones, Federation Press at p81

consumers and the broader community. We would say that this is an example of a criterion which could become by constant usage a blanket exclusion on the basis of 'reasonableness'.

One example of how DR7 would impact adversely on Which? and consequently on consumers is the recent dentistry campaign conducted by our health team.

As you may be aware, Primary Care Trusts (PCT) became responsible for commissioning dentistry services in their local areas in April 2006. The requests are directed at what the PCTs are doing to discharge that responsibility and their responses are being linked up with our market research results for analysis and publication in a forthcoming Which? Dentistry Policy Report. The report will be distributed widely, including to Government and the PCTs themselves to help them identify gaps in the provision of this essential service. The PCTs responses form an important part of a market research exercise investigating patient's experiences of gaining access to dental services.

Formal FOIA requests were sent out on 23 October 2006 to 152 PCTs across the country. Several responses were received within the same month, a further 56 by the New Year, 18 more by end of February 2007 and the balance are still outstanding. The nature of the material sought is not contentious and therefore all requests so far have been allowed.

The Which? team spent some time negotiating the timeframe for the return of the requests with PCT officials affording them extensions of time to consider and gather the information. This courtesy reduced the time pressure on officials allowing them some flexibility and relieving the administrative burden on the authorities to deliver within the statutory time limits.

Significantly, the nature of these requests had the support of the Chief Dentistry Officer Dr. Barry Cockcroft who observed that no other body is undertaking this important work at this time.

FOIA is now key to Which?'s ability to carry out rigorous analysis to ensure the integrity of its information. Ultimately though, it is providing a vital function for communities in helping secure greater accountability of public authorities towards their constituents at a local level.

Significantly for Which?, DR7 would allow a public authority when calculating the appropriate limits, to aggregate the costs of requests for information received from the same person or persons who 'appear to be acting in concert or in pursuance to a campaign'. This section is aimed at campaigners with no reference to those organisations and individuals who act in the 'public interest'. Furthermore, it allows

civil servants to make subjective decisions about whether the previous conduct of requesters has been 'uncooperative' or 'disruptive'.

Our view is that this is a disproportionate response to the issue of how to handle requests for 'sensitive' Government information which tests the boundaries of the new Act. This should not result in a sanctioning of requesters, but rather a rigorous evaluation of how best to promote the FOIA and bolster public confidence in the openness of Government.

We believe that the answer therefore lies in greater investment for FOIA/EIR individual staff and departments in training and IT infrastructure to enable them to respond in line with the current legislative regime, rather than seeking to amend the FOIA through the draft regulations.