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Briefing for Adjournment Debate, 7 February 2007

FREEDOM OF INFORMATION: FEES REGULATIONS

Summary

- **The government is proposing to introduce new regulations which would severely restrict access to information under the Freedom of Information Act. These would allow public authorities to refuse a significant proportion of the FOI requests they currently receive.**
- **Up to 20,000 requests which presently have to be dealt with by public authorities could be refused on cost grounds under the proposals, according to a report commissioned by the government. The resulting savings would amount to some £11.8 million of the Act's total annual cost of £35.5 million.**
- **This would have a severe effect on the amount of information released under the Act, and would particularly affect those requests which contribute to public debate on matters of concern and to the scrutiny and accountability of public authorities.**
- **The public interest in disclosure would be overlooked altogether under the new proposals.**

- **The damage done by the proposals would be out of all proportion to the relatively modest savings likely to be achieved.**

Background

The Freedom of Information Act 2000 received Royal Assent in November 2000, but did not come fully into force until January 2005. It applies to an estimated 100,000 public authorities in England, Wales and Northern Ireland (Scotland has its own FOI legislation). It provides a right of access to recorded information held by an authority, subject to the Act's exemptions and to a provision which may require disclosure of exempt information on public interest grounds. It is enforced by the Information Commissioner and Information Tribunal.

The Act has led to the disclosure of substantial amounts of previously undisclosed information.¹ The Constitutional Affairs Committee found that the Act:

“has already brought about the release of significant new information and that this information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits resulting from this legislation. We are impressed by the efforts made by public authorities to meet the demands of the Act. This is a significant success.”²

According to the Information Commissioner, Richard Thomas:

“The Freedom of Information Act really has made a significant impact across the whole of the public sector. There is little doubt in our minds that most public authorities are taking the issue very seriously and the majority do seem to be coping.”³

“Despite the challenges it has presented, the Freedom of Information Act is working and is making a significant impact. It is not easy for politicians or officials to move from the comfort of official secrecy to the glare of public

¹ See for example Campaign for Freedom of Information, “500 Stories from the FOI Act's First Year”, <http://www.cfoi.org.uk/pdf/FOI%20Disclosures.pdf>

² Constitutional Affairs Committee, Freedom of Information - One Year On. June 2006, HC 991, page 3.

³ Oral Evidence to the Constitutional Affairs Committee, 14 March 2006, Q.2

scrutiny. But I pay tribute to the serious approach adopted by so many public authorities. Most have recognised - even where their own enthusiasm was limited - that legal obligations must be honoured and they have wanted to make the law work sensibly and constructively. The enlightened - and they are growing in number - have woken up to the benefits of adopting a positive attitude to informing their public."⁴

"Freedom of information is transforming the way we are governed. It challenges unnecessary official secrecy and brings into the open more and more information about the activities of government and other public services. The new law - a very ambitious endeavour - has had a major impact across the whole of the public sector. And it is working."⁵

Charges and the appropriate limit

Most FOI requests are dealt with free of charge. Applicants cannot be charged for the time officials spend responding to their requests (though photocopying and postage costs can be recovered). Authorities can refuse a request if the costs of dealing with it exceed the "appropriate limit".⁶ This is £600 for government departments and £450 for other public authorities.

In deciding whether the limit has been reached authorities can take into account the time they estimate would be needed to *determine* whether they hold the information and to *locate, retrieve* and *extract* it. Staff time is costed at a fixed rate of £25 an hour. These provisions are set out in fees regulations made under the Act.⁷

Authorities are also entitled to aggregate requests for similar information made within 60 days of each other by the same person or people apparently acting in concert or as part of a campaign. One effect of this is to prevent an applicant from circumventing the cost limit by breaking a large request which would exceed the limit into several smaller requests, each within it.

Requests can also be refused if they are vexatious. The Information Commissioner has adopted a broad definition of this term, which extends to requests which

⁴ Information Commissioner, Annual Report 2006

⁵ Information Commissioner, FOI Progress Report. October 2006.

⁶ Freedom of Information Act 2000, section 12(1)

⁷ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 made under FOI Act

impose a significant burden on authorities but which clearly have no serious purposes or are manifestly unreasonable.⁸

The government's proposals

The government is proposing to make two significant changes to the existing rules.

- (1) authorities would in future be able to take account of the costs of the time spent *reading* the information, *consulting* other bodies about it and *considering* whether to release it, in deciding whether the £600 or £450 limits have been reached. The time spent searching for and extracting the information would continue to be included, as at present.
- (2) authorities would be able to aggregate *unrelated* requests made within a 60 working day period by the same individual or organisation, if it was reasonable to do so in the circumstances, and refuse them all if the combined costs exceeded the £600/£450 limit.

(1) READING, CONSULTATION AND CONSIDERATION TIME

This provision would affect requests which required significant amounts of discussion or 'thinking' time. The more complex, unfamiliar or contentious the issues raised by a request, the more time authorities are likely to spend considering it and the more likely it is to be refused under the new proposals. The proposal takes no account of the merits of the request or the public interest in the information concerned.

Complex or new requests

Any request which raises a complex issue, particularly one that has not been considered before, would be at risk of being refused under the proposals. Such

⁸ "The Commissioner's general approach will be sympathetic towards authorities where a request, which may be the latest in a series of requests, would impose a significant burden and: clearly does not have any serious purpose or value; is designed to cause disruption or annoyance; has the effect of harassing the public authority; or can otherwise be fairly characterised as obsessive or manifestly unreasonable." *Information Commissioner, Freedom of Information Act Awareness Guidance No 22, Vexatious and Repeated Requests.*

requests are by their nature time-consuming, at least at first, because they challenge long-held assumptions.

Once the initial decision has been taken, follow-up requests for similar information can often be dealt with relatively easily. The time spent considering the initial request may be thought of as a long term investment, which may ultimately open up an entire class of previously withheld information.

If such requests can be turned down merely because of the consultation and consideration time involved, it may be difficult for the FOI Act to address new issues in future. The Act may stagnate, permitting disclosure only of information similar to that which has previously been released but erecting substantial barriers to the release of new types of information.

Politically contentious requests

Politically contentious requests also involve substantial consideration and consultation time.

The mere fact that a minister chooses to become involved in an FOI decision may itself be enough to take costs over the £600 limit. A report on the costs of the FOI Act commissioned by the government from *Frontier Economics* consultancy indicates that 1 in 5 requests to government departments are referred to ministers⁹. A minister's involvement, and the time of the staff he or she discusses the issue with, may itself be enough to tip many requests over the threshold.

The inclusion of consideration time will:

- prevent scrutiny of politically contentious matters, since such requests are likely not only to be referred to ministers but also to consume more official time generally. Requests which suggest that a policy is not working, an error has been made or a problem is worse than has been admitted would be more likely to be refused on cost grounds, limiting the Act's contribution to political accountability;

⁹ Frontier Economics, Independent Review of the Impact of the Freedom of Information Act, A Report Prepared for the Department for Constitutional Affairs, October 2006, page 38

- protect ministers themselves from scrutiny, since requests about their own conduct or decisions are normally referred to them, adding to the hours and increasing the chances of a cost refusal;

Requests requiring consultation

Requests which had implications for several different departments or authorities would also be much more likely be refused under the new proposals. Any request requiring significant interdepartmental consultation - for example on identity cards and data sharing - might be refused largely because of the time departments spend discussing the issue with each other.

Minutes of meetings involving a variety of different authorities or organisations might become largely inaccessible because of the time needed to consult the relevant representatives about any access request, explain the Act's requirements and respond to their queries.

For example emergency planning to cope with major disasters involves substantial inter-agency co-operation, often in the form of a Local Resilience Forum. The minutes of one such body in Leicestershire involves representatives of Leicestershire County Council, Leicestershire Constabulary, Leicestershire Fire and Rescue, East Midlands Ambulance Service, the Environment Agency, the Health Protection Agency, the Armed Forces, Leicester NHS Trust, the Primary Care Trusts, Government Office for the East Midlands, Leicester City Council, Oadby & Wigston Borough Council, Hinckley & Bosworth Borough Council, Harborough District Council, Melton Borough Council, Charnwood Borough Council, North West Leicestershire District Council and Blaby District Council.¹⁰

This body publishes its minutes, but if a similar body wished to resist disclosure in future it could achieve this merely by ensuring that it consulted each of the participating authorities about an unwelcome FOI request. The cost of doing so, and taking account of any representations made, is likely to ensure that the cost limit would be exceeded. At present, such requests would only be refused if the minutes themselves were exempt.

¹⁰This local resilience forum publishes its minutes on its web site - see:
<http://www.localresilienceforum.org.uk/files/upload/Minutes%20LRF%2015.6.05%20-%20WEBSITE%20COPY.pdf>

Manipulation

Authorities which wished to resist disclosure could ensure that requests were considered by as large a group of officials as could plausibly be included. The more people who attended a meeting to discuss a request, the more hours would be accumulated and the more likely that the request could be refused. Meeting would not actually have to take place, as an estimate of the time needed would do.

Similarly, it will be possible for authorities to deliberately boost the costs of requests by ensuring that lawyers, ministers, or other authorities potentially affected by disclosure are consulted, where they might not otherwise have been.

Although, applicants would be entitled to complain to the Information Commissioner if they believed this was occurring, the Commissioner has a substantial backlog of complaints, including a significant number which have been under investigation for over a year. Many requests are not allocated to an investigating officer until several months after they have been received by the Commissioner's office.

Ceilings and thresholds

The draft regulations contain two measures intended to provide some limited safeguard.

The maximum cost of consideration time would be capped at £400 for government departments or £300 for other authorities. A similar ceiling would apply separately to consultation time. This means that consideration time *alone* or consultation time *alone* could not account for the whole of the £600 or £450 cost limit. However, a combination of the two (eg £400 of consultation time plus £225 of consideration time) would exceed the £600 limit and lead to the request being refused. Other combinations (eg £200 consideration time plus £200 consultation time plus £225 for locating and retrieving the information) could also take a request over the limit.

The draft regulations also propose minimum thresholds of £100 for central government or £75 for other authorities. If consideration time or consultation time did not exceed these thresholds, it would not be counted at all. However, if consultation or consideration did exceed this threshold the *full amount* (not just the amount by which the threshold was exceeded) would be counted. For central

government, at least, the cost of external consultation is generally above the £100 threshold, limiting the value of this provision.¹¹

2. AGGREGATION OF REQUESTS

At present, authorities can aggregate the costs of requests for *similar information* made within 60 days of each other and refuse them if the combined cost exceeds the £600 or £450 limit.

The government is now proposing to allow authorities to aggregate *unrelated* requests made by the same individual or organisation to a particular authority if it is “reasonable in all the circumstances” to do so. If the combined cost exceeded the cost limit, all requests could be refused.

This is a potentially severe sanction. It could, for example, mean that a newspaper, campaigning organisation or MP was limited to a just single request to a particular authority in a three month period.

The consultation paper sets out the factors that it proposes should be taken into account in deciding whether aggregation is reasonable. They include:

- The level of disruption caused to the authority by having to answer a series of unrelated requests, particularly if the same staff would have to deal with them all at the expense of their ordinary duties.
- Whether the applicant is an individual or is acting in the course of a business or profession. The consultation paper suggests that “*it may be more reasonable to aggregate requests made by a company or by an individual acting for commercial or professional purposes*”.¹² The press are not specifically mentioned, but seem likely to fall into the less favoured group.
- the applicant’s previous record. The consultation document says it may be more reasonable to aggregate requests made by a person who had made a large number of requests to the authority in the past “*or whose conduct in relation to previous requests has been uncooperative or disruptive*”.

¹¹ The Frontier Economics report suggests that when government departments do consult externally, they do so for an average of 5.1 hours (Figure 6, page 26). The cost of this would amount to £127.50 which, as it exceeds the £100 threshold, would be counted in full. This suggests that the minimum threshold will usually not provide a safeguard in relation to consultation time

¹² Consultation paper, paragraph 39.

The last two factors are extremely disturbing. They fundamentally undermine one of the Act's central premises, that decisions should be "applicant blind" and should depend on the consequences of disclosing information, not the identity or conduct of the requester.

Similarly, to suggest that applicants should be penalised for failing to co-operate with an authority, is to completely distort one the key principles of the legislation.

This approach appears completely at odds with that described by Lord Falconer, the Constitutional Affairs Secretary, last May, when he said: "*our FOI regime is blind to both the identity and purpose of requests. It is rightly blind. The decision whether to disclose must be based on an objective application of the principles to the information requested, irrespective of who has asked, and for what reason. The information released must be evaluated against how it promotes empowerment, and how it improves good decision-making.*"¹³

It is equally unjustified to suggest that people acting in an individual capacity are necessarily more deserving than those with a professional interest in their request. Individuals may of course be seeking information in order to protect themselves from unfair treatment by a public authority or to participate in local decision-making. They may also be prompted merely by passing curiosity or obsessive interest in trivial issues. The professional or business requester may indeed have a commercial motive for seeking the information, or may be concerned at a failure to meet safety standards or to properly assess the consequences of a policy. If any distinction is to be made it should be based on the public interest in the information concerned, not on the identity of the person seeking it.

The missing factor: the public interest

Remarkably, none of the proposed factors refers to the public interest in disclosure. In deciding whether to aggregate requests, the one thing that authorities are *not* invited to take into account is the value of the information to the public. The central principle of the Act - the public interest - is conspicuously absent.

¹³ Speech at the International Conference of Information Commissioners in Manchester, 22 May 2006. <http://www.dca.gov.uk/speeches/2006/sp060522.htm>

The impact of the changes

A report commissioned by the Department for Constitutional Affairs from the *Frontier Economics* consultancy has attempted to assess the costs of the FOI Act.

The report suggests that -

- the total cost of the FOI Act across the whole public sector, including the cost of the Information Commissioner and Information Tribunal is £35.5 million annually¹⁴ (This compares to the £322 million spent annually by the Central Office of Information.¹⁵)
- approximately 120,000 FOI requests are received across the whole public sector annually¹⁶
- The two changes proposed by the government would allow up to 20,000 FOI requests which currently have to be dealt with to be refused on cost grounds in future, regardless of their merits¹⁷
- The savings resulting from these proposals would amount to approximately £11.8 million annually¹⁸

No assessment of the public benefit resulting from these requests that would be refused in future has been made either by Frontier Economics or, apparently, by the government. However:

- the government accepts that the proposals “would have a greater effect” on journalists, MPs, campaign groups and researchers than on private individuals.¹⁹
- It is likely that the 20,000 requests that would be rejected on cost grounds in future would predominantly involve requests from the above groups.

¹⁴ This is made up of £24.4 million costs to central government (a figure which includes the costs of the Information Commissioner and Tribunal) and £11.1 million to other public authorities. Frontier Economics report, page 1.

¹⁵ Central Office of Information, Annual Report 2005-06

¹⁶ Frontier Economics report, page 1

¹⁷ Frontier Economics report, Table 1, page 5

¹⁸ Frontier Economics report, Table 14, page 54. This suggests that including reading, consideration and consultation time would lead to a saving of £4.7 million in central government staff time and £5 million in staff time elsewhere in the public sector. Aggregating non-similar requests is estimated to save £0.9 million of staff time in central government and £1.2 million of staff time elsewhere in the public sector.

¹⁹ Consultation document, page 42

- This would involve a disproportionate and marked effect on those requests which contribute to public debate and to the scrutiny and accountability of public authorities.
- The damage done to the FOI Act would be out of all proportion to the relatively modest savings envisaged.

Campaign for Freedom of Information
6 February 2007

COMMENT ON THE GOVERNMENT'S PROPOSALS

"we see no need to change the FOI Fees Regulations"

The Rt Hon Alan Beith MP, Chair Constitutional Affairs Committee, 16.12.06

"This is an insult to the public intelligence and a negation of one of the Labour government's most important reforms."

Financial Times, Leader 18.12.06

"There are better targets for penny-pinching than the cheap and effective Freedom of Information Act, but watering it down might make official lives a bit easier."

Economist, 19.12.06

"These regulations represent a direct attack on the spirit of the law, once heralded by Labour as the end of the culture of Whitehall secrecy."

Robert Verkaik, Independent, 28.12.06

"Ostensibly, this is being done to save £12 million a year, but in reality it is an attempt to curb the prying that has gone too far for Labour's liking."

Philip Johnston, Daily Telegraph, 8.1.07

"It is difficult to see this as anything other than a deliberate attempt to protect government from media and FOI scrutiny."

Fleet St Lawyers' Society, Submission to DCA, 13.12.06

"We believe that the proposals...are fundamentally flawed."

Society of Editors, Submission to the DCA, 23.11.06

"These [proposals] could have a hugely detrimental effect upon use of the FOI Act at local level."

Newspaper Society, Submission to DCA 29.11.06

"This seems to subvert the original intentions of the freedom of information legislation."

BBC, Submission to DCA, 11.12.06

"If the government's proposals are meant to kill off frivolous use of the act, they are likely to kill off much serious research in the process."

Prof. Duncan Tanner, University of Wales Bangor, Letter to Guardian, 21.10.06

"These proposals risk weakening the power of the Act to promote robust accountability and sound public decision making."

UNISON

"the proposals would have a particularly damaging effect on a particular class of request namely those that are complex, voluminous or on matters of political sensitivity."

Friends of the Earth, Submission to DCA. 9.11.06

"If these restrictions are passed then stories of genuine public interest will not see the light of day."

Roy Greenslade, blog, 27.11.06

"What is strikingly inconsistent about the government's case is that it is based on the misapprehension that FoI requests are getting in the way of efficient government"

Paul Francis, Political Editor, Kent Messenger, Letter to Guardian, 6.12.06

"Incredibly, given the way that the Act is already heavily stacked against the release of information, the Government is considering making it even easier for public bodies to refuse requests."

Paul Dale, Chief Reporter, Birmingham Post, 4.1.07

"it would be a terrible backward step if after just two years, ministers succeed in putting up the shutters again."

Cambridge Evening News, Editorial 30.11.06