

# The Campaign for Freedom of Information

Unit 109, Davina House  
137-149 Goswell Road  
London EC1V 7ET  
Tel: 020 7831 7477  
Web: [www.cfoi.org.uk](http://www.cfoi.org.uk)  
Email: [admin@cfoi.demon.co.uk](mailto:admin@cfoi.demon.co.uk)



The Rt Hon Lord McNally  
Minister of State  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

16 May 2013

I am writing to further explain our concerns about the government's proposals to make it easier for public authorities to refuse FOI requests on cost grounds.

The Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000 (Cm 8505) proposes measures to reduce requests causing "disproportionate burdens" for public authorities.

The main proposals are:

- (1) to allow the time which officials spend considering a request and redacting exempt information to be taken into account in deciding whether it can be refused on cost grounds (para 15)
- (2) to reduce the cost limits themselves from £600/£450 to some lower amounts (para 18)
- (3) to permit unrelated requests made by one person or group to be refused where these become so frequent as to become 'disproportionately burdensome' (para 19)
- (4) to introduce charges for appealing to the Information Rights Tribunal (para 24).

Any one of these measures would have a potentially serious impact on the operation of the Act. Together they would substantially undermine the Act.

The government says it wants to focus on "those who impose disproportionate burdens on public authorities by making what may be considered as 'industrial' use of the Act." (para 13)

In fact, the first two of these proposals are not targeted either at “disproportionately” burdensome requests or at “industrial” scale requesters. They would make it easier for authorities to refuse all FOI requests including those of modest scope and substantial public interest. They are not solutions to the problems identified.

Moreover, recent decisions of the Upper Tribunal, now reflected in new guidance from the Information Commissioner (IC), have addressed the government’s concerns.

### **Changes to the cost limit**

We are particularly concerned at the suggestion that, in deciding whether the cost limit has been reached, authorities should be able to take account of the estimated time officials would need to spend *considering* whether to release information. At present, only the time spent finding and extracting the information is counted.<sup>1</sup>

#### *New, complex and contentious requests*

Requests raising new, complex or contentious issues are likely to require substantial consideration time. If that time counts towards the cost limit, such requests may be refused without the substantive issues being addressed and regardless of the public interest in the information.

Requests which would extend openness into new areas could be refused merely because of the time needed to consider the issues. There may be nothing inherently time-consuming about such requests. The problem may simply be that officials are unfamiliar with the issues. Once these have been addressed - and in particular once relevant Commissioner and Tribunal decisions are available - such requests may be speedily handled in future. That stage may never be reached under the proposals.

Requests about controversial news reports or political events may lead to prolonged internal discussions. The fact that an issue is new and unfolding may add to the consideration time. Ministers often take a personal interest in requests with political implications for their departments’ work, again increasing the discussion time. All these factors would add to the chances of requests of obvious public interest being blocked on cost grounds.

Any request involving a difficult decision under the Act’s public interest test is also likely to be refused. In 2012, some 2,000 central government requests took more than 20 working days because extra time was thought necessary to consider the public interest.<sup>2</sup> In 2005, Lord Falconer, then Secretary of State for Constitutional Affairs, explained that such time extensions often worked in favour of disclosure.<sup>3</sup>

---

<sup>1</sup> A request can be refused if the estimated cost of dealing with it would exceed £600 for government departments or £450 for other authorities. These limits correspond to 24 and 18 hours of time respectively, calculated at a fixed rate of £25 per hour. Only the cost of establishing whether information is held and locating, retrieving and extracting it is taken into account.

<sup>2</sup> Ministry of Justice, Freedom of Information Statistics: Implementation in Central Government 2012 Annual and October - December 2012 (Q4), Table 15.

<sup>3</sup> Lord Falconer said: “In a number of cases, departments have needed additional time to consider whether the public interest lies in favour of disclosure or retention. Whilst this may involve a longer wait for some requests, this reflects our dual responsibilities under the Act. A duty to disclose – but also a duty to consider the public interest factors thoroughly and scrupulously. And in many cases such extensions work in favour of disclosure. In many cases - such as the disclosure of details of subsidies paid under the Common Agricultural Policy I mentioned earlier – additional time considering the public interest leads to a positive outcome.” Speech at the FOI Live conference, 16.6.05

The reverse would be the case under the new proposals. Any request raising a challenging or finely balanced public interest question would be likely to be refused because of the consideration time. To penalise requests because public interest issues require careful consideration would be perverse.

At the time of writing, the possibility of a referendum on whether Britain should remain in the EU is high on the political agenda. Under the new proposals any FOI request about the issue might be refused because it would take too much time to decide whether the balance of public interest favoured disclosure or confidentiality. Yet the whole purpose of the Act is to ensure that disclosure decisions are taken in the public interest.

Consideration time is also vulnerable to manipulation. An authority may assert that it needs to involve its lawyers where this might not be strictly necessary or consult more widely about a request than it might otherwise have done. The extra estimated costs may tip a request over the limit.

In other cases, an estimate made in good faith may reflect the fact that the staff involved are less experienced, less well trained and less used to dealing with complex issues than their counterparts elsewhere. It is difficult to imagine what objective criteria can be applied to the length of time that officials should expect to spend thinking about an issue which they have never encountered before.

At present the cost limit is frequently exceeded because of the *volume* of information sought. Requesters can often obtain some information by reducing the request's scope. This will not be an option where the problem is the complexity of the issues. For example, an authority may have to decide whether information obtained in particular circumstances is subject to an obligation of confidentiality. There may be nothing the requester can do to avoid this issue.

#### *Reducing the cost limit*

The second proposal is that the £600 and £450 cost limits should themselves be lowered. Again, this cannot be regarded as a measure to deal with disproportionately burdensome requests. It would apply to *all* requests.

The cost limit is an absolute bar to disclosure based solely on the number of hours of work involved. It takes no account of the public interest in disclosure, however compelling. It does not address the problem, which in the government's words is to reduce burdens "without an excessive impact on transparency".<sup>4</sup>

#### *Unrelated requests*

The third proposal, would allow unrelated requests from the same individual or group to be refused where their frequency makes them disproportionately burdensome. That does at least appear to address the purported problem. However, the proposal seems similar to that proposed in 2006-07 by the Blair administration. That would have allowed all unrelated requests made to the same authority by one person or organisation within 60 working days to be aggregated for cost purposes, so that they could be refused if their total cost exceeded the cost limit.

---

<sup>4</sup> Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, paragraph 18

This would have unreasonably targeted local and specialist journalists or organisations whose work focuses on particular authorities. Local newspapers, which cover a variety of different issues involving their councils, would be the first casualties. A single request about school examination results might be enough to reach the cost limit. Thereafter the whole newspaper - not just the individual journalist - might be barred from making any further FOI requests to that authority for the next quarter, even if they involved entirely different issues such as child abuse, road safety or library closures. The public is likely to benefit from that information and authorities should have to provide it. Rationing requests based on such an oversimplified simple formula would be at a real cost to accountability.

### **The Upper Tribunal's rulings**

Since the government's proposals were published the Upper Tribunal has issued its first rulings on section 14(1) of the Act which deals with vexatious requests. These directly address the issue of disproportionate burden which the government says underlie the new proposals.

The Upper Tribunal stated:

*'The purpose of section 14 must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA.'* (para 10) (my emphasis)

It ruled that the test to be applied in considering whether a request is vexatious is whether it involves:

*'a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.'*<sup>5</sup> (para 82) (my emphasis)

This is a substantially broader approach than that which the Information Commissioner had previously adopted. The IC's previous guidance set out five factors relevant to the question of whether a request is vexatious, namely:

- *Can the request fairly be seen as obsessive?*
- *Is the request harassing the authority or causing distress to staff?*
- *Would complying with the request impose a significant burden in terms of expense and distraction?*
- *Is the request designed to cause disruption or annoyance?*
- *Does the request lack any serious purpose or value?*

It continued:

*"To judge a request vexatious, you should usually be able to make relatively strong arguments under more than one of these headings."*

However, the Upper Tribunal has now ruled that it is not necessary to satisfy more than one criterion:

*"one particular factor alone, present to a marked degree, may make a request vexatious even if no other factors are present."*

---

<sup>5</sup> Information Commissioner v Devon CC and Dransfield, [2012] UKUT 440 (AAC)

It also suggested that the IC's guidance may need to be revised to adopt "*a holistic and broad approach*" to vexatious requests which should emphasise:

*"the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality"*<sup>6</sup>.

In a separate decision the Upper Tribunal expanded on another aspect of the issue. The ICO has previously held that if an authority wishes to reject a single request solely because of the costs, it is obliged to rely on the cost limit and cannot treat the request as vexatious. The Upper Tribunal observed that while it would be good practice to do this, even a single extremely burdensome request could be refused as vexatious solely on the basis of cost.<sup>7</sup>

These decisions represent a significant widening of the meaning of 'vexatious'. They are binding on the First Tier Tribunal (FTT) and the Commissioner.

They make the government's proposals redundant in their own terms. No further restrictions are necessary to cover anyone making what the government calls 'industrial use' of the Act. Nor are additional measures necessary to deal with requests for information which is 'voluminous but easy to locate' and so cannot be refused under the cost limit. The Act now addresses these situations.

Even before the Upper Tribunal ruling, the FTT had found some such requests to be vexatious:

- In March 2012 the tribunal found that a single request for 438 reports of the Independent Police Complaints Commission was so "grossly excessive" in its demands on time as to be vexatious. The request had not been refused under the cost limit, presumably because the reports could easily be located.<sup>8</sup>
- In October 2012, the tribunal found that a request for all internal guidance on a council's handling of housing and council tax benefit claims was vexatious because of the time required to exclude all exempt information from disclosure. The volume of information was so great that it would have required 31 days of work to process.<sup>9</sup>

The Upper Tribunal's approach incorporates two features which are absent from the government's proposals.

First, it targets the *particular* requests which involve disproportionate burdens or manifestly unjustified, inappropriate or improper use of the Act. The government's approach, on the other hand, would apply to *all* requests regardless of any such characteristics.

Second, the decision on vexatiousness takes account of the request's *merits*. Before concluding that a request is vexatious an authority must consider whether there is 'an adequate or proper justification' for it such as an 'objective public interest in the

---

<sup>6</sup> Dransfield, para 45

<sup>7</sup> Craven v Information Commissioner and DECC [2012] UKUT 442 (AAC)

<sup>8</sup> EA/2011/0222, Independent Police Complaints Commission & Information Commissioner

<sup>9</sup> EA/2012/0047, Salford City Council & Information Commissioner & Tiekey Accounts.

information sought' or whether the requests represent 'genuine attempts' to hold authorities to account.<sup>10</sup> If there is a serious purpose it must be sufficient to justify the work that the request involves. The government's proposals contain no such tests. They focus solely on the costs of requests and disregard their benefits.

### **The IC's new guidance**

Following the Upper Tribunal's decision, the IC has issued new guidance setting out a substantially broader approach to vexatious requests.<sup>11</sup> This states:

*"public authorities should not regard section 14(1) as something which is only to be applied in the most extreme circumstances, or as a last resort. Rather, we would encourage authorities to consider its use in any case where they believe the request is disproportionate or unjustified." (my emphasis)*

This is clearly going to lead to many more requests being refused as vexatious. The guidance states that a request which would impose a grossly oppressive burden on the authority in terms of considering exemptions and making redactions may be vexatious. Other potential indicators include requests for relatively trivial information which would require disproportionate effort, a pattern of persistent 'fishing expeditions' by the same requester, round robins for information of no discernable value, unreasonable persistence in seeking to reopen an issue which has been comprehensively addressed and the making of requests which are frivolous, futile, made for the sole purpose of amusement or primarily used to vent the requester's anger. But the authority will need to consider whether the requester has a serious purpose which justifies any detrimental impact on it.

The Upper Tribunal's binding decision, coupled with the IC's new guidance, expressly address the government's concerns. It would be wholly unreasonable for the government to proceed with its own proposals now.

### **Charges for Tribunal appeals**

The government is also considering introducing charges for appealing to the Information Rights Tribunal. Unlike many tribunals which deal primarily with private rights, FOI appeals involve disclosure to the general public often on matters of public interest.

Charges are not necessary to deter unreasonable appeals: cases with no reasonable prospect of success are routinely struck out.

The fee for an appeal on the papers to the Immigration and Asylum tribunal is £80 and the fee for an oral hearing is £140. Similar charges for FOI appeals would deter many requesters with well founded cases from appealing. It would also slow the development of case law. This will deprive authorities and requesters of the clarity and cost savings that flow from settled law.

For example, when the Act came into force, the section 40 exemption for personal information was particularly troublesome and time-consuming. It was often unclear whether requested information fell within the definition of 'personal data' at all, in

<sup>10</sup> Dransfield, paras 26 and 36

<sup>11</sup> Information Commissioner, 'Dealing with vexatious requests', Version 1, 15.5.13

what circumstances disclosure would be 'unfair' and how the complex balancing test between the legitimate interests of the public and those of the individual whose privacy might be affected should be applied.<sup>12</sup>

A series of tribunal and court rulings have since clarified the interpretation of this exemption. As a result, many of these once complex decisions are now amongst the easiest and least time-consuming to take. Had fees been charged for appeals, it is likely that some of these issues would not have reached the tribunal and the present clarity would not have been achieved.

A related point could be made about vexatious requests. In December 2008 the IC revised his approach to vexatious requests following criticism of his guidance in two Tribunal decisions. The revised guidance made it slightly easier for public authorities to find requests vexatious.<sup>13</sup> The recent decisions have made the approach still more favourable to authorities. This position is unlikely to have been reached had charges for appeals been required.

## Other issues

### *Contractors*

We have elsewhere highlighted the threat to the public's rights to information about public services provided by contractors as the FOI Act does not apply to contractors.<sup>14</sup> The right of access is limited to information which the contractor holds 'on behalf' of the authority which in turn depends on the precise terms of each contract. Significant information is likely to be excluded from access.

The government has accepted that this is a problem, yet maintains that the solution to this dilution of legal rights is greater reliance on *voluntary* disclosure.<sup>15</sup> The FOI Act was designed to replace voluntary disclosure by an enforceable right so we are dismayed to see this fundamental principle being reversed. Several countries' FOI laws, including those of New Zealand<sup>16</sup> and Ireland<sup>17</sup> already include measures to address this problem. The UK should follow suit.

### *Delays*

There are excessive delays in responding to some FOI requests. For example, in 2012 the Treasury took more than 120 working days to respond to each of 78 requests, the majority of which had been made the previous year. The full length of these delays is not stated: some may have taken as much as a year or more. Twenty seven internal reviews to the Treasury took over 100 working days to complete.<sup>18</sup> Again, the full extent of the delays is not known.

These delays are possible in part because authorities can take 'reasonable' extensions to the 20 working day response time to consider the public interest.<sup>19</sup> The

<sup>12</sup> Data Protection Act 1998, Schedule 2, paragraph 6

<sup>13</sup> The IC's original guidance provided that a request could not be vexatious unless it imposed 'a significant burden' on the authority and *also* met at least one of four other criteria. Following the Tribunal rulings the IC dropped the prerequisite of a 'significant burden'. Instead, authorities were normally expected to show that more than one of five criteria (one of which was significant burden) was satisfied.

<sup>14</sup> [www.cfoi.org.uk/pdf/foipostlegscrutiny.pdf](http://www.cfoi.org.uk/pdf/foipostlegscrutiny.pdf)

<sup>15</sup> Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000, paragraph 55

<sup>16</sup> Section 2(5) of the Official Information Act 1982 (New Zealand)

<sup>17</sup> Section 6(9) of the Freedom of Information Act 1997 (Ireland)

<sup>18</sup> [www.cfoi.org.uk/foi250413pr.html](http://www.cfoi.org.uk/foi250413pr.html)

<sup>19</sup> Freedom of Information Act, section 10(3)

maximum length of these extensions is not specified in law. There are no statutory time limits at all for internal reviews.

The government has rejected the Justice committee's recommendations for explicit statutory limits for both stages. The government has also rejected the modest recommendation that authorities be required to publish annual statistics on their compliance with time limits. Central government statistics are already available but figures for many other authorities are not. It could hardly be regarded as burdensome for authorities to do this, given that most already monitor their timeliness and their figures could be published in a single paragraph.

#### *The Open Government Partnership*

The UK government is currently lead co-chair of the "Open Government Partnership" an international network of 58 governments working with their own country's civil society organisations to promote openness. The prime minister has announced his intention of making the UK "the most open and transparent government in the world". The government already claims to be "one of the most" open and transparent in the world.<sup>20</sup>

We are bemused by this claim which appears to assume that all that is needed to be a world leader in openness is the publication of more datasets. At a conference on 17 October 2012 the Cabinet Office minister Francis Maude complained of how little use was being made of the datasets that had been published, urging those present to encourage their colleagues to take greater interest in them. There is an obvious irony in the government trying to persuade the public to make more use of the information *the government* wants to us to have, while seeking to restrict access to that which people are asking for themselves.

The FOI Act should be at the heart of the government's efforts to become more open and we urge the government to address its shortcomings and, above all, not to proceed with the proposed restrictions.

Yours sincerely

Maurice Frankel  
Director

---

<sup>20</sup> Cabinet Office press release CAB 103-12, 2.12.12