

# The Campaign for Freedom of Information

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## **Government's FOI reforms would block difficult FOI requests**

*A Commentary on the Government's Response to the Justice committee's report on  
Post Legislative Scrutiny of the FOI Act*

*Campaign for Freedom of Information  
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The government is proposing significant changes to the Freedom of Information Act to make it easier for public authorities to refuse time consuming FOI requests. The proposals revive the controversial measures unsuccessfully advocated by the Blair administration in 2006. Their impact will not be limited to voluminous requests: they may make it harder to get answers to modestly sized requests.

Ministers also say they are considering introducing charges for appealing to the Information Rights Tribunal - a measure likely to discourage many appeals from being made.

The good news is that there will be no charges for making FOI requests and no new blanket exemption to prevent access to policy discussions - though the rules governing the ministerial veto will be relaxed. Ministers have also agreed to make it easier to prosecute authorities which deliberately destroy requested records in order to block disclosure.

But the government has rejected measures to tighten up the time limits for responding to FOI requests, saying this would add to the burdens faced by authorities. They have also agreed to introduce a new exemption to protect research data.

The government's announcement<sup>1</sup> is a response to recommendations of the Justice select committee's post legislative scrutiny of the FOI Act.<sup>2</sup>

### **Time consuming requests**

Requesters will be most directly affected by proposals to change the rules allowing authorities to refuse requests on cost grounds. Requests can now be refused if the cost of *locating, retrieving* and *extracting* the information exceeds certain limits.<sup>3</sup> The government wants to also count the cost of *considering* the request and '*redacting*' exempt information. Adding these activities would allow many more requests to be refused on cost grounds.

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<sup>1</sup> [www.justice.gov.uk/downloads/publications/policy/moj/gov-resp-justice-comm-foi-act.pdf](http://www.justice.gov.uk/downloads/publications/policy/moj/gov-resp-justice-comm-foi-act.pdf)

<sup>2</sup> <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96vw.pdf>

<sup>3</sup> The limit is £600 for government departments and £450 for other authorities, calculated at a standard £25/hour rate.

The Ministry of Justice (MOJ) says it wants to address requests that are time consuming to deal with but cannot be refused if the records are easily found. If that is the objective, a measure specifically targeted at that situation should be sought.

Allowing consideration and redaction time to be included across the board could mean that requests raising contentious, complex or unfamiliar issues would always be at risk of being refused. The Act may become incapable of dealing with challenging requests that need careful thought.

Some requests will be time consuming only because the issues are new to the authority. Once the key issues have been worked out - and in particular once case law has developed - these may be easy to handle. Requests affecting privacy are a good example. When the Act was introduced, the complex interplay between the FOI right of access and the obscure exemption for personal information, based on the Data Protection Act, was poorly understood and difficult to deal with. The substantial case law that has become available means that many requests involving this exemption are now easily decided. This stage would never have been reached if authorities could have refused the requests at the outset because they required too much 'thinking time'.

At present, it is often possible to overcome a cost refusal by narrowing a request's scope, so that it applies to fewer records. But this will not help if the problem is caused not by the number of records but by the complexity of the issue involved.

The process is also vulnerable to manipulation by the authority which might choose to consult (or estimate that it would need to consult) more staff than were strictly necessary, boosting the consideration time and increasing the chances of a cost refusal.

The Justice committee had rejected the consideration time option, arguing that the time needed to decide whether exemptions applied was subjective and depended on the individual FOI officer's abilities. The government says the existing rules are just as subjective but work well. But the two situations are not comparable.

The current rules mainly apply to the time spent *finding* information. If many files have to be searched authorities will often check to see how long it takes to search a small sample and extrapolate from that. The ICO sometimes checks the files itself and may reject unnaturally ponderous time estimates.

Estimating how long is needed to consider exemptions and the public interest is vastly more difficult. It depends on the complexity of the information, the novelty of the issues, the experience and judgment of the FOI officer, the number of exemptions, the volume of information, how many other staff have to be consulted and how long they need, the time spent consulting third parties, the level of internal opposition to disclosure and how much that adds to consideration time and the extent to which ICO or Tribunal precedents have to be identified and considered.

The government says it will try and develop a methodology that allows such calculations to be applied “in a uniform manner across all public authorities”. It seems very unlikely that this can be done.

The MOJ estimates that counting consideration and redaction time would allow an additional 4% of requests to central government and 10% of requests to other authorities to be refused. These figures are based on research carried out by Ipsos MORI, who asked a sample of authorities to measure the time they actually spent on each aspect of handling requests received during a one week period in December 2011.<sup>4</sup> But the *actual* time authorities spend on requests may not be a reliable guide to the time they *estimate* they would need before doing the work, particularly if they know that opinion within the authority is divided, and that prolonged internal debate is likely.

#### *Aggregating requests*

The government says it is also considering limiting access where one person, or one group, make such frequent unrelated requests that they become disproportionately burdensome. Currently, authorities can refuse *similar* requests made within a 60 working day period if their total cost exceeds the £450 or £600 limit. But they cannot aggregate the cost of *unrelated* requests.

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<sup>4</sup> [www.justice.gov.uk/downloads/publications/policy/moj/post-legislative-assessment-of-the-foi-act.pdf](http://www.justice.gov.uk/downloads/publications/policy/moj/post-legislative-assessment-of-the-foi-act.pdf)

In 2006, the government proposed that unrelated requests to an authority by the same individual or organisation within 60 working days could also be aggregated and refused if their total cost exceeded the limits.

The coalition government now appears to be resuscitating this proposal too. It says it wants to tackle those making “industrial” use of the Act. Again, if that is the objective, it should be addressed by a measure targeted at those making vast numbers of requests.

This proposal may catch anyone making more than 1 or 2 requests to an authority in a three month period. Local newspapers, which cover a range of different issues involving their councils, would be the first casualties. A single request about school exam results might be enough to reach the cost limit. Thereafter the whole paper - not just the individual journalist - might be barred from making any further FOI requests to the authority for the next quarter, even on different issues such as child abuse, road safety or library closures.

Both the consideration time and aggregations proposals were advanced by the Blair administration in 2006 but dropped by Gordon Brown when he became prime minister in 2007. He explained that they “*might have placed unacceptable barriers between the people and public information. Public information does not belong to Government, it belongs to the public on whose behalf government is conducted.*”<sup>5</sup>

The coalition government says it will also consider a third measure: reducing the cost limits themselves. These are presently set at £600 for government departments and £450 for other authorities, representing 24 and 18 hours of staff time. The select committee had recommended only a modest change, cutting the time allowed by two hours. The government says this would have a minimal impact and is considering a more substantial reduction to these limits. This too would hit requesters across the board, not just those making disproportionately heavy use of the Act.

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<sup>5</sup> [http://news.bbc.co.uk/1/hi/uk\\_politics/7062237.stm](http://news.bbc.co.uk/1/hi/uk_politics/7062237.stm)

## **Charging**

However, the government, like the select committee, has rejected the idea of charging for requests saying this would undermine the Act's objectives - a welcome move. It recognises that "the increased openness, transparency and accountability of public authorities brought about due to FOIA have lead to significant enhancements of our democracy."

Some authorities had suggested that charges should apply only to commercial bodies - and they included the media under this term. The government has rejected this proposal saying that distinguishing between requests based on the applicant's identity or purpose would be expensive, difficult to enforce and easily circumvented. It would also be at odds with the government's transparency agenda which promotes access to data by commercial users to promote economic growth.

## **Charging for appeals**

The government has raised the possibility of charging for appeals to the Information tribunal. It says there are already charges for appeals to some tribunals, like the Immigration and Asylum tribunal. However, information rights cases may have wider implications than those of other tribunals. A disclosure under FOI is treated as a disclosure to the public at large and not purely as a private matter affecting the appellant.

The fees 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 would undoubtedly deter many requesters from appealing against Information Commissioner decisions. The tribunal increasingly relies on its power to 'strike out' appeals with no reasonable prospect of success. Just over 1 in 4 appeals by requesters are now struck out.<sup>6</sup> However, charges would undoubtedly deter many requesters with well founded cases from proceeding with appeals they may be likely to win. This would also reduce the rate at which new case law emerges.

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<sup>6</sup> In the period from 1 June 2012 to 5 December 2012, the First Tier Tribunal published decisions in 82 appeals by requesters, of which 22 were struck out.

### **Policy advice and the veto**

The government has decided against introducing a new exemption to protect policy formulation or cabinet discussion. It agrees with the Justice committee that it is difficult to assess whether FOI has affected the government's ability to discuss proposals frankly. But it says there is a perception that FOI does not provide sufficient protection for internal discussion - which is problematic in itself and could become a self-fulfilling prophecy. However, it accepts that the existing exemptions for policy formulation and ministerial communications, coupled with the ministerial veto, provide 'sufficient protection for these types of sensitive information'.

It also says that the government's formal policy on use of the veto focuses primarily on the need to protect cabinet material and will be revised to make it easier to use the veto in relation to other information.

The Campaign's view is that any increase in the use of the veto would be unwelcome, particularly as the government can already appeal against any ICO decision to the Tribunal and against any Tribunal decision to the upper Tribunal and Court of Appeal.

### **Delays**

The Justice committee had called for tighter statutory time limits for responding to FOI requests and carrying out internal appeals.

Authorities can extend the normal 20 working day response time for an unspecified 'reasonable' time to consider the Act's public interest test. The Information Commissioner's office (ICO) recommends that extensions should not exceed a further 20 working days, but in 2011 central government exceeded this target in 44% of cases where an extension was taken.<sup>7</sup> Many requests were only answered after extensions of over 6 months.<sup>8</sup>

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<sup>7</sup> Ministry of Justice, Freedom of Information Act 2000 – Statistics on implementation in central government 2011, Table 15.

<sup>8</sup> See the Campaign's submission to the Justice committee at: [www.cfoi.org.uk/pdf/foipostlegscrutiny.pdf](http://www.cfoi.org.uk/pdf/foipostlegscrutiny.pdf)



Similar delays occur at the internal review stage. There are no statutory time limits at all for these reviews under FOI - and they sometimes take many months. In an early case, the Department for Business, Enterprise and Regulatory Reform took 431 days - a year and nine months - to complete one.<sup>9</sup>

The committee recommended statutory time limits for extensions and internal reviews - but the government has rejected both, claiming they would add to the burdens on public authorities.<sup>10</sup> Instead, it will amend the code of practice under section 45 of the Act to encourage authorities to respond to requests and complete internal reviews within 20 working days, unless there is good reason to take longer. These recommendations already appear in ICO guidance. Adding them to the code of practice is unlikely to make any difference.

The committee also recommended that authorities be required to publish statistics showing how often they complied with existing time limits, an inexpensive measure which would at least identify poor performers. Central government and some authorities already do this voluntarily. Disappointingly, the government has rejected even this minimal requirement.

### **The shredding offence**

There is more positive news. The government now accepts that it is very difficult for the ICO to prosecute authorities which deliberately destroy or alter requested records to prevent disclosure. A prosecution must be brought within 6 months of the offence occurring - but by the time a complaint reaches the ICO and has been examined, this limit has usually expired. The government has agreed to amend the law to allow a prosecution within 6 months of the ICO *becoming aware* of the offence, a change first advocated by the Campaign in 2009. But it has turned down the Justice committee's more demanding alternative of allowing prosecutions in serious cases to be brought in the Crown court as well as the magistrates court, where the 6 month limit would not apply and higher penalties could be imposed.

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<sup>9</sup> Decision Notice FS50121519, 1.12.08

<sup>10</sup> The government also wrongly claims that the ICO already has the power to force laggardly authorities to complete internal reviews by a specified deadline. In fact, ICO has no such power under the FOI Act, since there is no legal requirement to carry out internal reviews under FOI. It can, however, address equivalent delays under the Environmental Information Regulations.

## **Contracting out**

The contracting out of public functions is a growing threat to the right of access, as contractors are not subject to FOI. The Justice committee suggested that authorities should continue to rely on contractual disclosure provisions, requiring the contractor to provide information to the authority to enable it to respond to FOI requests. This approach has significant limitations: contractual provisions often do not apply to all relevant information.<sup>11</sup> In any case, a contractual disclosure agreement can only be enforced by the *authority*, not by the requester. Authorities will be reluctant to take action for breach of contract over an FOI issue, not least because of the expense of going to law. The Information Commissioner has no jurisdiction over contractors and cannot enforce a contractual disclosure requirement.

The MOJ accepts that contractual provisions may not bring all information about the contract and its delivery within the Act's scope. It encourages authorities and contractors to nevertheless comply with FOI requests voluntarily. It says that if this 'light touch approach' fails it will consider other steps, including making contractors subject to the Act in their own right.

The Campaign's view is that the Act should be amended to establish that information held by a public authority contractor about the contract and its delivery is automatically deemed to be held on the authority's behalf. This would ensure that this information was always within the Act's scope, though disclosure would depend on the exemptions.

## **Research data**

The government has agreed to create a new FOI exemption for data obtained from a programme of research. This would bring the Act into line with the Scottish FOI Act, which already has such an exemption. The exemption is likely to apply to information obtained in the course of a continuing programme of research whose disclosure would

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<sup>11</sup> Under section 3(2)(b) of the FOI Act, information which is held *on behalf of* an authority by another person is considered to be held by the authority and is therefore subject to the Act. The difficulty is knowing what information a contractor holds on the authority's "behalf". Only information which the contract specifically requires the contractor to record or disclose is likely to be covered. Clauses which merely require the contractor to co-operate with the authority in answering FOI requests - but do not define what information is disclosable - may be of little practical value.

prejudice the research or the interests of the researchers or the authority - subject to the public interest test.

### **Other changes**

The government:

- has decided against amending the Act to specifically allow ‘frivolous’ requests to be refused. It says these can already be refused as vexatious. It will amend the s.45 code of practice to provide further clarity on vexatious requests and to advise on the handling of anonymous or pseudonymous requests
- does not agree with the Justice committee that publishing the names of requesters in disclosure logs would reduce the burdens (presumably by drawing public attention to heavy users of the Act). The proposal would also have data protection implications, it says. Nor does it propose to encourage authorities to inform requesters of the cost of responding to their requests, as a way of discouraging excessive use of the Act.
- will consider adding provisions to the s.45 code to encourage authorities to become more efficient in their handling of requests.
- will consider simplifying the process for adding or removing authorities from the Act’s scope, so as to automatically cover more bodies.