

The Campaign for Freedom of Information

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**Response to Court and Tribunal Fees:
Consultation on further fees proposals**

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Summary

The Campaign for Freedom of Information does not support the proposal to introduce fees for appeals against decisions of the Information Commissioner (IC) to the First-tier Tribunal.¹

We think the proposed fees, of £100 for a case determined on the papers and £600 for an appeal involving an oral hearing, will deter many requesters from pursuing potentially successful appeals under the Freedom of Information Act (FOIA) or Environmental Information Regulations (EIR). It will be the public, and in particular the public interest in the accountability of public authorities, that will be damaged.

FOI and the public interest

The FOIA and EIR are generally described as ‘applicant and motive blind’. This is because, in making decisions, authorities must address the question of whether the requested information can *be made public*, not whether it can be disclosed to the *particular applicant*.² Applicants who obtain information are free to make it public (subject to copyright) and once information has been released to a requester it cannot normally be withheld from anyone else who might ask for it. In the words of the Information Tribunal the legislation ‘*is about disclosure to the public and public interests. It is not about specified individuals or private interests*’.³

In recognition of the fact that disclosure is taken to be to the world at large, the government and the Information Commissioner have both encouraged public authorities to publish significant disclosures in ‘disclosure logs’ to ‘*make individual releases of information under the FOI Act available to the widest possible public audience*’.^{4,5} Government departments themselves do this via the www.gov.uk web site⁶ and many other authorities make equivalent arrangements.

¹ Court and Tribunal Fees. The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings *and* Consultation on further fees proposals. August 2015. Cm 9124. The proposal to extend fees to appeals against the Information Commissioner’s decisions is contained on page 29

² There are limited exceptions to the ‘applicant blind’ principle, for example, in relation to potentially vexatious requests, where information may be withheld from a requester because of the history of that individual’s dealings with the authority on the issue, although it would be available to anyone else.

³ S. & Information Commissioner & The General Register Office, EA/2006/0030, paragraph 19

⁴ Department for Constitutional Affairs. Best Practice Guidance on Disclosure Logs, 2005. http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/foi/guidance/disclosure_logs.pdf

⁵ https://ico.org.uk/media/1246/definition_document_for_government_departments.pdf

⁶ https://ico.org.uk/media/1262/definition_document_local_authorities.pdf

⁶ For the Ministry of Justice’s disclosure logs, see: <https://www.gov.uk/government/collections/freedom-of-information-disclosure-log>

The FOI Act's function in promoting public accountability has been highlighted by the Supreme Court:

*"FOIA was enacted in order to promote an important public interest in access to information about public bodies. There are...thousands of public authorities, large and small, which are paid for out of public funds, and whose actions or omissions may have a profound effect on citizens and residents of the United Kingdom. There is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities. It adds to parliamentary scrutiny a further and more direct route to a measure of public accountability."*⁷

In another decision, the Supreme Court observed:

*"Information is the key to sound decision-making, to accountability and development; it underpins democracy and assists in combatting poverty, oppression, corruption, prejudice and inefficiency. Administrators, judges, arbitrators, and persons conducting inquiries and investigations depend upon it; likewise the press, NGOs and individuals concerned to report on issues of public interest"*⁸

This principle is most directly implemented through the public interest test which lies at the heart of the FOIA/EIR. For most exempt categories of information, information must be disclosed if the balance of public interest arguments favours disclosure.⁹ A purely *private* interest carries no weight under this critical provision.

This focus on *public* disclosure in the *public interest* distinguishes appeals under this legislation from those under other tribunal jurisdictions. The issues involved here go beyond the important question of access to justice by those seeking to enforce their rights. They involve the wider public interest which the legislation exists to promote.

The proposed fees will deter many requesters from bringing potentially successful appeals against decisions of the Information Commissioner. This will inevitably deny the public

⁷ Sugar v BBC [2012] UKSC 4, para 76

⁸ Kennedy v Charity Commission [2014] UKSC 20, para 1

⁹ See section 2 of the FOIA and regulation 12(1) of the EIR.

information that may be of considerable public interest. The deterrent effect will be particularly marked for unaffiliated requesters who are not acting on behalf of any organisation. But it will also apply to many small voluntary organisations or charities which may also be unable to appeal because of the costs. Often only the larger and better funded organisations will be able to make full use of their rights.

The introduction of fees for appeals to the Employment Tribunal has led to a fall in the number of cases brought to *one third* of its previous level.¹⁰ A substantial fall in the level of FOIA/EIR cases would also be likely if fees were introduced. The proposed £100 and £600 fees will not, however, deter public authorities from appealing against decisions. The result will be an inequality in arms, with public bodies being substantially more likely to challenge IC decisions requiring them to disclose information than requesters are to challenge decisions which uphold refusals.

The Court & Tribunal Service has provided a breakdown of the outcomes of appeals separately considering those brought by requesters and public authorities.¹¹ See appendix.

The figures show that appeals brought by requesters are fully or partly successful or result in a consent order¹² in 48 out of 281 requester appeals, or 17% of the total. The equivalent figure for appeals brought by public authorities is 12 out of 46 or 26% of the total. That is a relatively minor difference, given that public authorities which appeal are usually legally represented or advised whereas many requesters are not.

The figures also show that 30% of requester appeals (85 out of 281) are withdrawn, struck out, found not to be valid, or transferred to the Upper Tribunal, which means that a substantial proportion are dealt with without involving the FTT in the costs of a full determination.

¹⁰ A report by the House of Commons Library states: "In the year to June 2013, employment tribunals received on average just under 13,500 single cases (brought by one person) per quarter. Following the introduction of fees, the number of single cases averaged around 4,500 per quarter between October 2013 and June 2015 – a decrease of 67%. The average number of multiple cases (brought by two or more people) received per quarter fell from just under 1,500 to fewer than 500, a 69% decrease." House of Commons Briefing Paper No 7081, Employment Tribunal Fees, 15 September 2015.

¹¹ These figures cover the outcomes of appeals received between January 2014 and March 2015. The normally released statistics do not distinguish between appeals brought by requesters and those brought by public authorities and we are grateful to HMCTS for distinguishing between the two on this occasion.

¹² This involves the case being resolved by agreement between the parties. In the context of requester appeals it would normally involve the Commissioner (and the authority if it is a party) conceding that some or all of the requester's case was justified. In the context of public authority appeals, it would normally involve the Information Commissioner conceding that some or all of the authority's case was justified.

Examples

The potential impact can be judged from the following examples of *successful* appeals brought by *unaffiliated* individuals, not acting for any organisation. Any appeal costs would have to have been met by such requesters themselves.

1. Transfer of a Nottingham school

A requester applied for copies of contracts and other information about the transfer of a failing Nottingham school and its site from the local authority to another body. The council claimed to already have made public the little information it held although the transfer had taken place only 4 months earlier. The Information Commissioner accepted its position. The requester appealed to the tribunal which discovered that on receiving the request the council had privately acknowledged holding '6-7 lever arch files' of relevant material. The tribunal awarded costs against the council which it said 'misled' both the requester and the Information Commissioner. It was eventually forced to disclose some 1,000 pages of the material which it had previously claimed did not exist.¹³

2. Information supplied to the Ombudsman

The requester's mother died in hospital following an incorrect diagnosis, for which the NHS trust later admitted liability. The requester made an FOI request to the trust for the information which it had supplied to Health Service Ombudsman to whom the family had complained. The IC upheld the trust's argument that disclosure was prohibited by a statutory restriction on disclosure in the Health Service Commissioners Act 1993. That restriction had previously been understood to only limit the *Ombudsman's* ability to disclose - not to prevent *others* from revealing information which they had supplied to the Ombudsman. The requester appealed to the tribunal, which rejected the IC's interpretation and confirmed that the provision only applied to the Ombudsman.¹⁴ If this decision had not been challenged, it would have led public authorities to refuse to reveal any information supplied by them to the Health Service Ombudsman, the Parliamentary Ombudsman or the Local Government Ombudsman - all of whom are subject to a similar restriction. The

¹³ Dr Peter Bowbrick & Information Commissioner & Nottingham City Council, EA/2005/0006, 28 September 2006

¹⁴ Miguel Cubells & Information Commissioner & Wrightington, Wigan & Leigh NHS Foundation Trust, EA/2011/0183, 30 May 2012. The Campaign represented the requester in this case, but would not have been able to meet any tribunal costs.

result would have been a new and damaging layer of secrecy around all maladministration cases.

3. The adequacy of a murder investigation

The requester's sister was killed by her husband. Following her complaint about the police murder inquiry an independent review was carried out by a different police force, but this report was withheld from her. The Information Commissioner's Office (ICO) concluded that the report was her own personal data because it resulted from her complaint and was therefore exempt from the FOI Act. Parts were disclosed to her under the Data Protection Act. The requester appealed to the tribunal pointing out that while those parts of the report describing her own dealings with the police were her personal data the report's findings on conduct of the murder inquiry could not be. The Tribunal agreed, highlighting the fact that the IC's approach had been wrong, and ordered disclosure of large parts of the report.¹⁵

4. Conflict of interest by a GMC panellist

In 2004, a General Medical Council (GMC) panel heard complaints of misconduct against a consultant psychiatrist but it was alleged that one of the complaints was fraudulent. This allegedly did not come from the parent of a child he had treated but from a Scientology organisation called the Citizens Commission on Human Rights (CCHR) which is hostile to psychiatry. The GMC panel members involved had been asked if they had any links with Scientology and said that did not. It then emerged that one of the panellists had failed to disclose that he had previously not only worked with the CCHR but been named on its letterhead as a CCHR 'Commissioner'. An FOI request was later made to the GMC for information about the matter. The GMC, supported by the Information Commissioner, withheld the information on the grounds that disclosure would be an unfair disclosure of the panellist's personal data. The Tribunal rejected this argument. The panellist's failure to declare his conflict of interest raised the possibility of bias which could have jeopardised the psychiatrist's career and public confidence in the GMC. He could have no reasonable expectation that his privacy would be protected in the face of such serious misconduct. The GMC, which had made no public statement of the action it had

¹⁵ Joanna Bryce & Information Commissioner & Cambridgeshire Constabulary, EA/2009/0083, 8 June 2010.

taken following the case, was ordered to disclose the records which revealed that it had terminated the panellist's contract.¹⁶

5. Subsidence in the park

In 2010 signs of subsidence appeared in a park in Newbury, Berkshire, involving disturbance to the ground and the cracking of walls and paths. The nearby excavation of an underground garage by the builders Costain was thought to be a possible cause. The town council commissioned hydrogeological reports, partly based on data provided by Costain itself. But when a local resident applied for copies they were withheld on the grounds that they were legally privileged. The IC agreed, finding that their dominant purpose had been to support anticipated litigation against Costain and that they were therefore protected by an EIR exception for disclosures which would 'adversely affect the course of justice'. The requester appealed - and the tribunal ordered disclosure. It found that the reports had several distinct alternative purposes. One was to establish the problem's cause, which might have been the unusually low rainfall. Another was to advise on how to stabilise the land. The fact that they were partly based on data provided by Costain did not suggest that their main purpose was to sue that company. Even if it had been the main purpose, disclosure was justified by the public interest in informing the local community why their park had been severely damaged and what could be done to correct it. The reports were released.¹⁷

With the exception of Example 4, all these cases involved oral hearings and under the new proposals would attract a £600 fee. Even the lesser charge of £100, for a hearing on the papers, would create a substantial risk applicants would not proceed with such cases. Moreover, applicants may in practice have no choice, since where a case depends on a dispute about the facts, or a complex legal argument, the Tribunal itself may require an oral hearing even if no party asks for it.

The result of the proposed fees are likely to be a loss of information to the public as a whole, a reduction in the accountability of the authorities concerned and a slowing down of the development of FOI/EIR case law, which is still at a relatively early stage.

¹⁶ William Thackeray & Information Commissioner & General Medical Council, EA/2009/0063, 23 February 2010

¹⁷ EA/2014/0216, Mark Knight & Information Commissioner & Newbury Town Council, 4 August 2014.

Appendix

First-tier Tribunal Information Rights Appeal Outcomes Appeals Received January 2014 to March 2015

Cases by Outcome

Appeal Outcome	Totals	% of Total
Allowed	30	9.2%
Consent Order	10	3.1%
Dismissed	165	50.5%
Non Valid Appeal	14	4.3%
Part Allowed	20	6.1%
Struck Out	30	9.2%
Transferred to Upper Tribunal	2	0.6%
Withdrawn	56	17.1%
Total Appeals	327	

Cases by Appellant Type

Public Authority Appeals	Totals	% of PA Appeals	% of All Appeals
Allowed	3	6.5%	0.9%
Consent Order	3	6.5%	0.9%
Dismissed	17	37.0%	5.2%
Part Allowed	6	13.0%	1.8%
Withdrawn	17	37.0%	5.2%
Total Public Authority Appeals	46		14.1%
Information Requestor Appeals	Totals	% of IR Appeals	% of All Appeals
Allowed	27	9.6%	8.3%
Consent Order	7	2.5%	2.1%
Dismissed	148	52.7%	45.3%
Non Valid Appeal	14	5.0%	4.3%
Part Allowed	14	5.0%	4.3%
Struck Out	30	10.7%	9.2%
Transferred to Upper Tribunal	2	0.7%	0.6%
Withdrawn	39	13.9%	11.9%
Total Requestor Appeals	281		85.9%
Total Appeals	327		

Source: HM Courts and Tribunal Service, First-tier Tribunal, General Regulatory Chamber