

The Campaign for Freedom of Information

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FOI Implications of the Justice Committee's report on Courts and Tribunals Fees

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The Justice Committee's report on Courts and Tribunal Fees¹ has endorsed the proposal, made by the Independent Commission on Freedom of Information² that the right of appeal to the First-tier Tribunal (FTT) under the Freedom of Information Act should be abolished. We think this would significantly undermine the operation of the Act.

The Justice Committee does not appear to have examined the case for this change itself. It simply reported that it saw no reason to disagree with the Commission's view. It stated:

'28...The Commission did...express the view that there was an abundance of bodies effectively hearing appeals (the public authority subject to the original request, the Information Commissioner, and then the First-tier Tribunal) and said that "considerable resources and judicial time are being taken up by unmeritorious appeals". It recommended that legislation should be introduced to remove the right of appeal to the First-tier Tribunal against an Information Commissioner decision (a right of appeal to the Upper Tribunal would remain on a point of law). This recommendation is under consideration by the Government. **We see no reason to disagree with the Commission's view.'**

The Commission on FOI's report stated that 79% of appeals brought by requesters in 2014 were dismissed or withdrawn. This suggests that some 20% were wholly or partly successful.³ The Information Commissioner's 2015-16 annual report shows that just over 24% of all completed appeals (ie by requesters and authorities at all levels, including the Upper Tribunal) against its decisions were partly or wholly successful.⁴

A substantial proportion of appeals are therefore upheld. The proposed abolition of the right of appeal to the FTT would deprive most of those appeals of a remedy. Neither the Commission on FOI nor the Justice Committee discuss the implications of this.

The consequences can be gauged by looking at some of the Information Commissioner decisions which the FTT has overturned in the last year or so but which would have remained unchallenged under the proposal. The FTT has:

¹ Justice Committee, 'Court and Tribunals Fees', 2nd report of session 2016-17, HC 167 published 20 June 2016.

² www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf

³ Report of the Commission on FOI, page 43. This reported that 79% of appeals brought by requesters were dismissed or withdrawn.

⁴ This figure includes cases settled by a consent order, in which the Information Commissioner accepted that his initial decision had been wrong without requiring a full hearing.

- Ordered the Cabinet Office to release information about the adoption of the selection criteria for appointing members of the Chilcot Inquiry.⁵
- Told the Ministry of Defence that it was wrong to withhold information about its failure to warn soldiers that they would get a criminal record if convicted of minor disciplinary offences.⁶
- Ordered the Department for Education to reveal payments to new sponsors taking over failing academy schools.⁷
- Ordered the Cabinet Office to disclose documentation for the expenses, of up to £115,000 per annum each, claimed by four former prime ministers in connection with their public duties.⁸
- Ordered the Ministry of Justice to identify landlords convicted of Housing Act offences for letting dangerous or grossly substandard accommodation.⁹
- Required a local authority to reveal the income it was receiving from the sale of bus shelter advertising, which a survey by requester had suggested was not being maximised.¹⁰
- Ordered an NHS trust, which following a lengthy procurement process to outsource its pathology services decided to keep them in-house, to disclose its business case.¹¹
- Ordered a local authority to disclose minute of meetings at which a 25-year PFI contract for street lighting were discussed.¹²

Under the proposal these decisions, each of which reversed an Information Commissioner ruling against disclosure, could not be challenged, unless they involved an error of law. The justification, according to Commission on FOI's report and the Justice Committee, is that considerable time and resources are taken up with the consideration of 'unmeritorious' appeals. This is a mischaracterisation. The cases they are referring to are not in fact 'unmeritorious', they are unsuccessful – an important distinction. Unmeritorious appeals, ie those which have no reasonable chance of success, can be and are struck out without a full hearing. This occurred to some 10 per cent of all requester appeals in the period January 2014 to March 2015.¹³

⁵ EA/2015/0136, Christopher Lamb & Information Commissioner & Cabinet Office, 27.5.16. This decision is under appeal to the Upper Tribunal.

⁶ EA/2016/0004, Gerry Rowland & Information Commissioner, 6.6.16

⁷ EA/2015/0137, Janet Downs & Information Commissioner, 31.12.15

⁸ EA/2015/0194, Gabriel Webber & Information Commissioner, 22.2.16

⁹ EA/2014/0265, Tom Wall & Information Commissioner, 12.3.15

¹⁰ EA/2016/0008, John Eustace & Information Commissioner, 12.4.16

¹¹ EA/2015/0161, Richard Bourne & Information Commissioner, 7.12.15

¹² EA/2015/0062, Roy Benford & Information Commissioner, 8.1.16

¹³ Figures supplied by HM Court and Tribunals Service and reproduced in the Campaign for Freedom of Information's response to the Ministry of Justice's proposals to introduce fees for FOI appeals to the FTT. See:

The fact that some requester appeals are unsuccessful is not justification for removing the right of appeal from the 20% or so of appeals which are successful. To do so would allow poor decisions to stand and cause real damage to the public's right to know.
