

Claim No.  
Made on behalf of: Claimants  
Exhibits: MF1  
Date: 7 December 2017

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**  
**ADMINISTRATIVE COURT**

**Case No. [ \_\_\_\_\_ ]**

**BETWEEN:**

**(1) GOOD LAW PROJECT LIMITED**

**(2) MOLLY SCOTT CATO MEP**

**Claimants**

-and-

**(1) SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**

**(2) CHANCELLOR OF THE EXCHEQUER**

**Defendants**

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**WITNESS STATEMENT OF MAURICE FRANKEL**

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I, MAURICE FRANKEL of [REDACTED] will say as follows:

**Introduction**

1. I am the Director of the Campaign for Freedom of Information (*CFOI*). I make this witness statement in support of this application for judicial review of the Defendants' refusals to disclose two sets of documents, referred to as "the Sectoral Studies" and "the HM Treasury Report".
2. In particular, I make this statement to support the Claimants' contention that the Freedom of Information Act 2000 (*FOIA*) is not a suitable alternative route for the conclusive resolution of this dispute. This is because: (a) if these documents are to be of any use in terms of public debate, they need to be disclosed well before the UK leaves the EU in March 2019, and (b) that would be almost impossible via the FOIA

route. I explain the latter proposition in this statement. I have not otherwise had any involvement in this matter.

### **My work and that of the CFOI**

3. The CFOI is a not-for-profit limited company established in 1984 to try and secure a Freedom of Information Act for the UK. I have worked for CFOI since its launch in 1984 and have been its director since 1987.
4. The CFOI played a key part in persuading the government of the day to introduce the bill that became FOIA, in improving a draft FOI bill during pre-legislative scrutiny in both Houses of Parliament and in securing improvements to the bill during its parliamentary passage.
5. Between FOIA's passage in 2000 and its full implementation in 2005 I was a member of the Lord Chancellor's Advisory Group on the Implementation of FOIA. I was formerly a member of the Commonwealth Group of Experts whose Freedom of Information Principles were adopted by Commonwealth Law Ministers in 1999. I received an OBE for services to open government in 2004.
6. Since FOIA came fully into force in 2005 the CFOI's main activities have been to monitor and try to improve its operation, to seek to extend its provisions where appropriate, to assist requesters with advice and on occasions support at tribunal hearings and to provide training to requesters and a regular case law update for public authority FOI officers.
7. A key element of our work involves monitoring decisions of the Information Commissioner (*IC*), the First-Tier Tribunal and Upper Tribunal in terms of their content and timeliness. In 2009 we published a report analysing the timeliness of nearly 500 IC decision notices issued over an 18 month period, documenting the severe delays occurring at that time (**Exhibit MF1**, pages 1-17).

### **The FOIA process and statutory time limits**

8. FOIA entitles applicants to be informed whether a public authority holds requested information and, if so, to have that information communicated to them.<sup>1</sup> Requests can be refused where the cost of establishing whether the information is held and locating,

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<sup>1</sup> FOIA, Section 1(1).

retrieving and extracting it exceeds certain limits;<sup>2</sup> where the request is vexatious or repeated;<sup>3</sup> or where the requested information is exempt.<sup>4</sup> Some two-thirds of FOIA's exemptions are subject to a public interest test which requires exempt information to be disclosed where the public interest in disclosure equals or outweighs the public interest in maintaining the exemption.<sup>5</sup> These are known as 'qualified' exemptions (in contrast to the so-called 'absolute' exemptions which are not subject to the provision).

9. A public authority must respond to a request "promptly" and in any event within 20 working days.<sup>6</sup> Where it considers that a qualified exemption applies it is permitted to extend the response time by "such time as is reasonable in the circumstances".<sup>7</sup> Where it takes such an extension to consider the public interest it must inform the applicant of the date by which it expects to respond.<sup>8</sup> Guidance issued by the regulator of FOIA, the IC (**Exhibit MF1**, pages 18-21) states that a public interest extension should:

"...normally take no more than an additional 20 working days...meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional. Examples of such circumstances could include extreme pressures placed on the public authority by a major incident or exceptional levels of complexity involving a number of external parties."

10. The Cabinet Office publishes statistics on central government departments' compliance with FOIA's time limits. These show that in 2016, the 20 working day time limit was exceeded in 11% of requests (3,501 out of 30,664) (**Exhibit MF1**, pages 31-32). The length of these extensions is not given. No public interest extension was sought in these cases.
11. Where a public interest extension was taken, just over half the cases (773 out of 1,506) took more than the IC's recommended 20 working days.<sup>9</sup> For 23% of cases

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<sup>2</sup> FOIA, Section 12 and The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

<sup>3</sup> FOIA, Section 14.

<sup>4</sup> The exemptions are set out in Part II of FOIA.

<sup>5</sup> FOIA, Section 2(2).

<sup>6</sup> FOIA, Section 10(1).

<sup>7</sup> FOIA, Section 10(3).

<sup>8</sup> FOIA, Section 17(2).

<sup>9</sup> The relevant table gives a figure for the total which does not correspond to the sum of the individual sub-totals. The sum of the sub-totals has been used here.

where an extension was invoked, it was for between 21 and 40 working days. However, in 4% of cases, it was between 81 and 100 working days and in 8% of cases (118) extensions of more than 100 working days were taken.<sup>10</sup> The actual length of these extensions is not stated – some may have been substantially more than 100 days. All extensions would be in addition to the standard 20 working day period, so requesters in the last group would have waited more than 6 months for an initial decision.

12. I am of course not saying that every FOIA request to a government department is likely to result in such delays. I provide the factual evidence above, however, to illustrate the point – borne out by concrete governmental data – that the time limits under FOIA are regularly extended in practice. Whatever the statutory requirements, the practical experience of making a request to a government department can often be very different and entail significant delay.
13. A further potential source of delay occurs at the internal review stage. A Code of Practice issued by the Secretary of State under Section 45 of FOIA (**Exhibit MF1**, pages 61-76) encourages authorities to provide a complaints process to reconsider the initial handling of a request. The IC will normally not accept a complaint unless any such process has been exhausted.<sup>11</sup>
14. The IC recommends that internal review should normally take no longer than 20 working days, though says this may extend to 40 working days in exceptional circumstances (**Exhibit MF1**, pages 77-82). Fifty three per cent of internal reviews completed in 2016 (1,153 out of 2,184) took up to 20 working days, while a further 28% took up to 40 working days. At the other end of the scale, 2% (52 cases) took between 81 and 100 working days and 5% (106) took over 100 working days.<sup>12</sup> Again, the actual length of those delays is not known.
15. The available data thus illustrates that – even before the IC makes a decision – a requester can expect to encounter very substantial delays. At best, this stage of the process is likely to take at least two months, though difficult cases routinely take much longer.

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<sup>10</sup> These figures combine public interest extensions on requests received and completed in 2016 with those received in 2015 and completed in 2016 (see **Exhibit MF1**, pages 57-60).

<sup>11</sup> See FOIA, Section 50(2)(a).

<sup>12</sup> The figures combine internal reviews on requests received and completed in 2016 with those received in 2015 and completed in 2016 (see **Exhibit MF1**, pages 51-54).

16. I can illustrate by reference to a recent request I have made:

- On 27 September 2016, I asked the Ministry of Justice (*MOJ*) whether a named faith adviser to the prison service had either been employed by or had acted under a contract with the MOJ during a specified period.<sup>13</sup> This is not a contentious case and the exemption that has been invoked does not involve the Act's public interest test.
- My request was refused on 12 January 2017, 74 working days later.
- I requested an internal review of the response which was not provided until 95 working days after I had asked for it. The MOJ had thus taken some 8½ calendar months to finally refuse the request.
- After waiting 74 working days for the internal review, I complained to the IC asking if, in light of the delays, it would investigate the refusal without waiting for the internal review (as it sometimes does). I received no response.
- On 26 June 2017, after receiving the internal review, I complained again to the IC. On 15 August 2017 the IC informed me that my complaint had been allocated to a case officer.
- On 26 September 2017, the IC case officer informed me that the MOJ had still not responded to its enquiries.
- At the date of this statement, approximately 14 months after making the request and nearly 7 months after first complaining to the IC, the request remains unanswered and a decision notice is still awaited.

17. Such delays are not unusual. IC Decision Notices issued during 2017 show that:

- The Department for Communities and Local Government took 5 successive public interest extensions to consider a request about the

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<sup>13</sup> The request was intended to clarify whether information held by this individual was held on the authority's behalf. This is the effect of Section 3(2)(b) of FOIA.

cessation of funding for the Cornish language. It finally refused it after 114 working days.<sup>14</sup>

- The Department for Works and Pensions took 4 successive public interest extensions to consider a request for project assessment reviews of the Universal Credit Programme. It ultimately refused the request after 140 working days.<sup>15</sup>
- A request to the Home Office asked for costs of tickets for those escorting foreign nationals being removed from the UK. By the time of the IC's Decision Notice, 150 working days had elapsed without a Home Office decision.<sup>16</sup>
- The Ministry of Defence was asked for parts of a contract relating to combat ships. It only provided its decision on the public interest test after 161 working days.<sup>17</sup>

### **Complaining to the IC**

18. Once the internal review process is exhausted, a requester can complain to the IC under Section 50 FOIA. The process is outlined in the IC's document entitled "How we deal with complaints" (**Exhibit MF1**, pages 83-89).
19. The complaint is allocated to a caseworker at the IC, who writes to the public authority inviting it to explain and review its position. There are often a number of rounds of correspondence: for example, both the complainant and the public authority often make new points in their submissions to the IC, and the IC's caseworkers often allow each side to comment on relevant new points. Once that correspondence has concluded and the IC has deliberated, it issues a reasoned decision either upholding or dismissing the complaint.
20. Note, however, that annually only around a quarter of all complaints culminate in the issuing of a binding decision (**Exhibit MF1**, pages 90-94). A quarter are concluded by withdrawal, including through informal resolution, which may involve the public authority conceding and disclosing some or all of the requested information. The rest are closed because the complaints were made too early or were otherwise ineligible.

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<sup>14</sup> Decision Notice FS50646198, 26 April 2017.

<sup>15</sup> Decision Notice FS50640285, 30 August 2017.

<sup>16</sup> Decision Notice FS50694372, 13 November 2017.

<sup>17</sup> Decision Notice FS50658411, 2 May 2017.

21. The IC publishes statistics on the age profile of its complaints. These assist in understanding the typical length of time between the opening of a complaint and its conclusion. The most recent published data covers the quarter up to April 2017 (**Exhibit MF1**, pages 95-102). The table on page 2 of that document refers to “finished casework” from that quarter, a high proportion of which (44%) are closed in 0-30 days. From previous discussions with the IC, I understand that these are cases that have been closed without an investigation. These would include complaints that are closed for having been made prematurely because the internal review stage has not been completed. This applied to 33% of all complaints made during the quarter concerned (see the chart on page 2 of the data entitled “Outcome comparisons Q4”).
22. The data on page 5 (“FOI and EIR complaints – age profiles”) shows that, for that quarter, 29% of active cases were up to 30 days old; 37% were between 31 and 90 days old; 23% were between 91 and 180 days old, and the remaining 10% were older than 181 days.
23. For the purpose of this statement, the key indicator is the time taken to *close* a case and in particular a case that is not amenable to informal resolution and requires a decision notice. The “Outcome comparisons Q4” chart shows that in the relevant quarter only 29% of all complaints were dealt with in that formal way. The IC’s published data does not isolate and focus on cases that do require formal resolution. Therefore, while the IC’s data sheds some light on the question of timings, it does not necessarily focus on complex or contentious cases. The survey analysis set out later in my statement seeks to shed more light on cases of that kind, by analysing the timings involved with cases that were appealed to the FTT.

### **Appeals to the Tribunal**

24. Once the IC has issued its decision, either party – the requester or the public authority – has the right of appeal to the FTT. There is no need to obtain permission to appeal – the right of appeal is automatic. Appeals must be lodged within 28 days.
25. The typical process is that, once an appeal is lodged, the IC (who is always the First Respondent) has 28 days in which to submit her response to the appeal. This is provided for in rule 23 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

26. In many – though not all – cases, the public authority who refused the request will be joined as the Second Respondent. That is typically the case where central government is involved. In my view, that would certainly happen if FOIA proceedings were commenced in respect of the Sectoral Studies and/or the HM Treasury Report.
27. The Second Respondent (the public authority) is then granted a period of time in which to submit its response to the grounds of appeal. I understand this period to be between 21 and 28 days in general. These decisions are made by the FTT’s Registrar, who handles case management and makes directions.
28. The Registrar and the FTT’s team also make provision for oral hearings where these are requested. Any of the parties before the FTT has the right to ask for an oral hearing; if they ask, such a hearing is granted. I understand that, in general, a government department would tend to seek an oral hearing, at least for important cases. I am confident this would happen in this case, if it were to be pursued under FOIA before the FTT.
29. The Registrar makes arrangements to find a venue and dates that fit the parties, their witnesses and the three members of the FTT panel who are assigned to hear the case.
30. The FTT carries out a full merits review of the IC’s decision.<sup>18</sup> It typically hears witness evidence, including from civil servants. It has open and closed sessions, the latter for the consideration of the withheld information and any ancillary matters that the FTT decides should not be ventilated in public.
31. Based on my knowledge of FTT cases, I would estimate that – if the present case were to be pursued under FOIA before the FTT – the hearing would take 2 or 3 days.
32. I am not aware of published data on how long parties typically have to wait between the end of proceedings before the FTT and the promulgation of the FTT, but my impressionistic view is between 1 and 3 months. I have examined specific recent cases to try to provide a more concrete view on this point (see below).

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<sup>18</sup> “Despite the rather curious wording of section 58(1) of FOIA, the FTT’s role is not limited to the approach undertaken by the High Court on an application for judicial review. Rather, the FTT’s function is to undertake a full merits review of the IC’s decision”: *Craven v Information Commissioner and DECC*, [2012] UKUT 442 (AAC), [81].

33. Both the IC and FTT typically allow a public authority 35 calendar days to disclose information where this has been ordered, further deferring any disclosure that is ordered.

### **Further appeals**

34. The FTT's decision is then subject to a right of appeal to the Upper Tribunal on a point of law with further appeals to the Court of Appeal and Supreme Court. I do not know how long those procedures typically take, as I have not been involved in many cases that have progressed so far, and I am not aware of any public sources of data about timings.
35. I can, however, provide the example that culminated in the Court of Appeal's judgment in *BEIS v IC and Henney* [2017] EWCA Civ 844. The issue there was whether the requested report fell to be considered under FOIA or the Environmental Information Regulations 2004, though the precise nature of the point does not detract from its value as a case study in the length of time that may elapse between a request and its ultimate resolution following Court of Appeal proceedings. I was involved in that case: I provided the requester, Mr Henney, with informal advice before his FTT hearing; I represented him before the Upper Tribunal (*DECC v IC and Henney* [2015] UKUT 0671 (AAC)) and I was present as a spectator for the Court of Appeal hearing.
36. Mr Henney made his request to the government department on 9 November 2012. The IC's decision was issued on 31 March 2014 and the FTT's on 30 December 2014. The Upper Tribunal heard the appeal on 14 September 2015 and gave its decision on 7 December 2015. The Court of Appeal heard the further appeal on 17 and 18 May 2017 and its judgment was given on 29 June 2017. I understand that, while the outcome was that the substance of the matter was to be reconsidered by the FTT, the government department in fact disclosed sufficient information in the weeks after the Court of Appeal dismissed its appeal, and the matter was thus resolved, nearly 5 years after Mr Henney made his request.
37. That is a single case, but I have no reason to think those time scales are unrepresentative. In fact, I note two other FOIA cases considered by the Court of Appeal in the last 2 years took around 4 years to resolve from the date of request: *Department for Work and Pensions v Information Commissioner & Zola* [2016] EWCA Civ 758 (requests in January 2012; Court of Appeal judgment 27 July 2016) and *Department of Health v IC and Lewis* [2017] EWCA Civ 374 (request 8 June 2011; Court of Appeal judgment 24 May 2017).

38. Data for onward appeals to the Supreme Court is naturally more sparse, but to take one prominent example, I note that *Kennedy v Charity Commission* [2014] UKSC 20 involved a FOIA request made on 8 June 2007, which culminated in a Supreme Court judgment on 26 March 2014.

### **Survey of recent cases**

39. To further inform my statement, the CFOI has carried out a short survey of the delays occurring at different stages of cases dealt with by the FTT (see Appendix to this statement). We selected the last 31 published FTT decisions involving government departments. These cover decisions running from mid-February 2017 to 30 November 2017.<sup>19</sup> Twenty one involved hearings and ten were decided on the papers. We have identified the IC decision notices in these cases and wherever possible extracted the relevant dates from the two decisions. The full results are shown in the Appendix to this statement.
40. In summary, the survey shows that:

#### **From the making of the request to completion of the department's internal review**

This took an average of 79 working days (16 calendar weeks). Three of the requests took over 120 working days for the department to respond and complete the internal review, another took 180 days and another 251 working days (i.e., almost a full year).<sup>20</sup>

#### **From the requester's complaint to the IC to the IC's Decision Notice**

On average this took 156 working days (32 calendar weeks). Five complaints took the IC more than 200 working days (40 weeks), two others took more than 300 working days, with the longest of these taking 355 working days (i.e., one year and 5 months).

#### **From the making of the request to the IC's Decision Notice**

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<sup>19</sup> Two of the cases were dealt with under FOIA by the department concerned though the IC and FTT later held that they involved environmental information and should have been dealt with under a parallel access regime under the Environmental Information Regulations 2004. This operates alongside FOIA and adopts FOIA's enforcement provisions.

<sup>20</sup> There were 253 working days in 2016 and 252 in 2017.

This took an average of 265 working days (just over one year). Four of the cases took over 400 working days and another took 544 working days (i.e., over 2 years).

### **From the making of the request to the date of FTT decision**

The time from the original request to the FTT decision was an average of 467 working days (i.e., approximately 1 year and 10 months). Six cases took over 600 working days and another took over 700 working days (i.e., close to 2 years and 9 months).

### **Conclusion**

41. FOIA is an invaluable democratic regime, but its practical utility is often blunted. Substantial delays can occur throughout the process, making FOIA an unreliable and often unsuitable tool for those who require information urgently, as in the present case.
42. There are particular difficulties in obtaining information that has some relationship to ongoing government policy issues, which I understand to be one of the issues arising in the present case. The government invariably defends its claim for a ‘safe space’ for decision-making, even where the information itself is innocuous. The government-appointed Independent Commission on Freedom of Information, chaired by Lord Burns, was asked in July 2015 to consider whether sensitive policy making information was adequately protected under FOIA. Its March 2016 report (**Exhibit MF1**, pages 103-117) commented that:

“We have been concerned by the evidence we have received about the approach of public authorities (particularly central government) to some requests. Some cases concerning anodyne or factual information appear to have been resisted solely on the basis that to release the requested information would set a precedent for similar requests regardless of the content.”

43. For a policy that is both current and controversial, any decision by the IC to order disclosure is bound to be challenged by appeal to the FTT and perhaps beyond. The cases surveyed here indicate that the average time to completion of such an appeal was 1 year and 10 months for a resolution at FTT level, with possible further appeals

as discussed above, and with a 35-day window in which to disclose information in any event.

44. For all these reasons and based on my experience and knowledge of the FOIA system, my view is it would be extraordinarily unlikely for the Claimants' request for the Sectoral Studies and the HM Treasury Report to be conclusively resolved through the FOIA complaints and litigation processes before the deadline for the UK leaving the EU – and even that would only be to reach a FTT decision. Further appeals would no doubt be contemplated in this case, but it would in any event be too late to make any practical difference to the Brexit process.

**STATEMENT OF TRUTH:**

I believe that the facts stated in this witness statement are true.



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7 December 2017