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BRIEFING PAPER

Number 07400, 10 March 2016

Freedom of information: changing the law?

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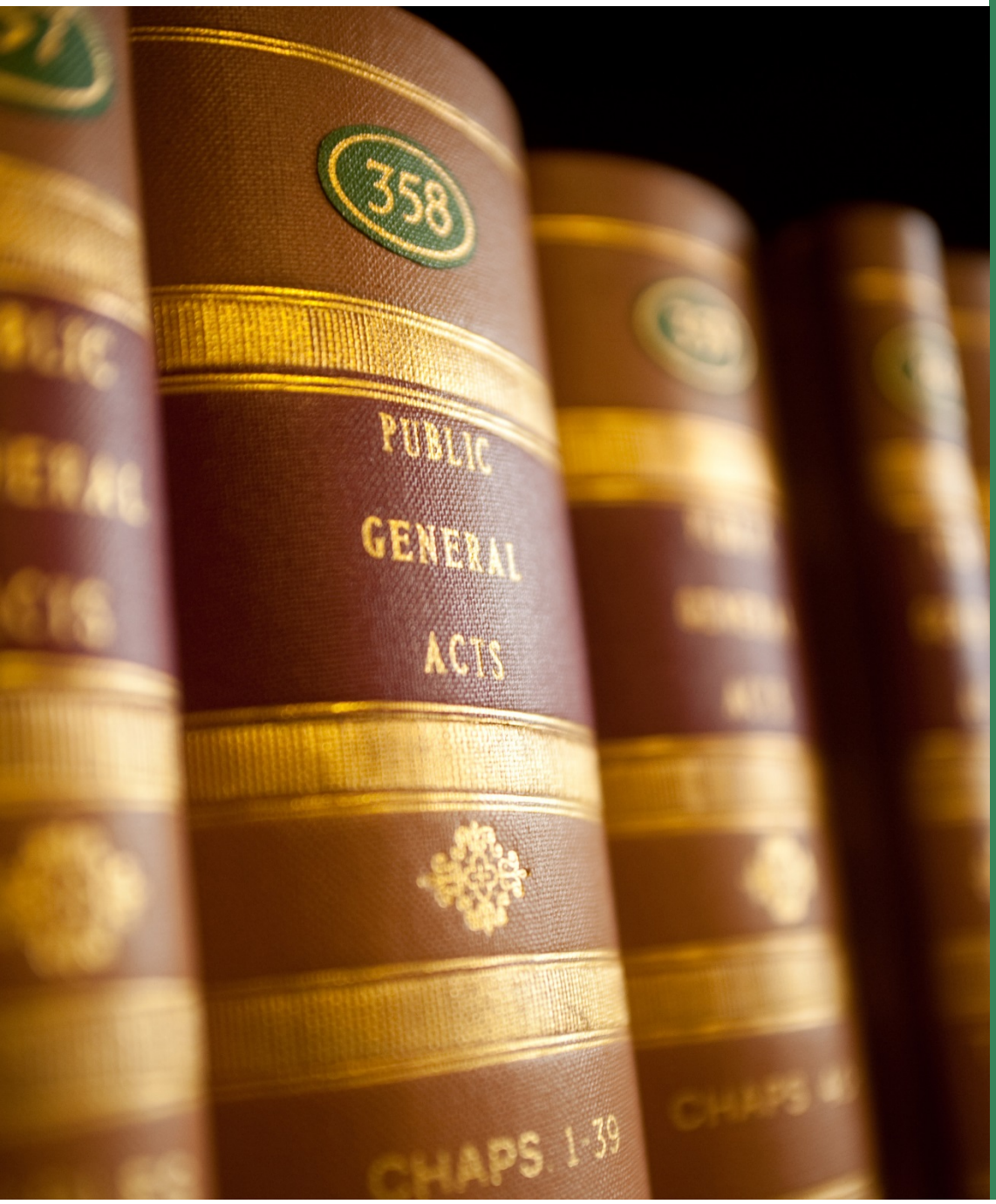

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Summary

The *Freedom of Information Act 2000*, which came into effect in January 2005, provides an enforceable right to access recorded information held by around 100,000 public sector organisations.

The Act was the subject of comprehensive post-legislative scrutiny by the Commons Justice Committee in 2012, which found that the Act had been "a significant enhancement of our democracy" and any additional burdens it created had been outweighed by the benefits. However, concerns have emerged:

- The use of the Ministerial veto has become uncertain following a Supreme Court judgment concerning correspondence between the Prince of Wales and Government Ministers.

- It is claimed that the obligation to respond to Freedom of Information (FOI) requests is placing disproportionate burdens on public authorities and diverting their funds from other purposes.

- Although Ministers insist that they support the Act, they believe that it is open to misuse and needs reform. There are suggestions that FOI requests may "gum up" the Whitehall machinery because officials are reluctant to write down sensitive matters such as policy options; also that the Act is being used as a "research tool to generate stories for the media".

Accordingly, the Government established the Independent Commission on Freedom of Information in July 2015 under the chairmanship of Lord Burns. A public call for evidence closed on 20 November. The Commission considered the current exemptions allowed for internal policy deliberations, collective Cabinet discussion and the Ministerial veto. It also canvassed opinion on the appropriate enforcement and appeal system and whether the public right to know justifies the administrative burden placed on public bodies by FOI.

The press and campaigning bodies reacted strongly to any suggestion that the Act might be "watered down", pointing to the numerous "public interest" stories that have emerged as a result of FOI requests. The Labour Party launched its own review of the Act.

The Commission published its report on 1 March 2016. It included 21 recommendations grouped broadly under: helping requestors, section 35 (formulation of Government policy etc), section 36 (prejudice to the conduct of public affairs), the Cabinet veto, the appeals process and burdens on public authorities. The Government responded on the same day with "preliminary views" on some of the recommendations and undertook to "carefully consider" the remainder.

There are currently no statutory fees for fulfilling initial requests. The possibility of introducing fees has also been raised. In a separate consultation, the Ministry of Justice floated a proposal to charge for appeals against FOI decisions taken to the First-tier Tribunal. Critics argue that fees at any level would deter requests and thus diminish the accountability of public bodies. The Government said that no decision would be taken on this matter until after the Independent Commission had reported.

In Scotland, the *Freedom of Information (Scotland) Act 2002*, an Act of the Scottish Parliament, covers Scotland-only public bodies. The Independent Commission had no remit to examine devolved legislation.

1. The Act

The Freedom of Information Act 2000, which came into effect in January 2005, provides an enforceable right to access recorded information held by around 100,000 public sector organisations.

The Act gives requesters a statutory right to find out if a public authority holds information and, within a framework of limits and safeguards for sensitive information, to be provided with access to it. The limits and safeguards within the Act include exemptions for certain types of information, derogations so that some information falls outside the scope of the Act, provisions to prevent requests which are too costly or which are vexatious, and a power for a Cabinet Minister, acting collectively with the rest of Cabinet, to veto the release of information.[1]

There is provision within the Act for oversight by an independent Information Commissioner, tribunals and courts.

The Act was the subject of comprehensive post-legislative scrutiny by the Commons Justice Committee in 2012, which found that the Act had been "a significant enhancement of our democracy" and concluded:

> We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits.[2]

In March 2015, the Supreme Court ruled, in a judgement that concerned the Prince of Wales's correspondence with Government Ministers, that the veto could no longer be used as the Government had previously understood. It seems to have been, in part, the uncertainty arising from this judgement that has prompted a review of the Act ten years after its introduction. There are also suggestions that the obligation to respond to Freedom of Information requests is placing disproportionate burdens on public authorities and diverting their funds from other purposes. Ministers insist that they support the Act but argue that it needs reform. According to press reports, there are fears that FOI requests may "gum up" the Whitehall machinery because officials are reluctant to write down sensitive matters such as policy options [3]

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1 Several Commons Library Briefing papers provide background on the Act and its implementation: *Freedom of information requests* (2950); *Freedom of information and the Royal Family* (5377); *FoI and Ministerial vetoes* (5007).

2 Justice Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*, 3 July 2012, Summary

3 "Freedom of Information Act: Labour to set up own review in attempt to head off Government move to dilute public's right to know", *Independent*, 19 November 2015. A BBC report suggested that Government Departments are adopting alternative strategies, for example: "The Department for Education installed an instant messenger system that is set up to destroy data immediately so conversations are never recorded and so can never be requested" (Chris Cook, "Is there trouble ahead for Freedom of Information?" *BBC News*, 13 May 2015).

2. The Commission

2.1 Establishment

The Independent Commission on Freedom of Information was announced in a Commons Written Statement on 20 July 2015.[4] The Commission's terms of reference were as follows:

> The Commission will review the Freedom of Information Act 2000 ('the Act') to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of the Act adequately recognises the need for a "safe space" for policy development and implementation and frank advice. The Commission may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information.

The Commission was chaired by Lord Burns, and comprised the Rt Hon Jack Straw, Lord Howard of Lympne, Lord Carlile of Berriew and Dame Patricia Hodgson.

In October the Commission issued a public call for evidence, with a closing date of 20 November.[5] The document posed six grouped questions which, it stated, would be the focus of the Commission's work:

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?[6]

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

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4 HCWS153

5 Independent Commission on Freedom of Information, *Call for evidence*, 9 October 2015

6 These are two of the sections designating exempt information. Section 35 covers "Formulation of government policy, etc." Section 36 is "Prejudice to effective conduct of public affairs".

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

The consultation document gave some background information on each of these points.

The Commission was originally expected to report to the Minister for the Cabinet Office by the end of 2015. However, the timetable proved too tight, in view of the fact that approximately 30,000 submissions of evidence had been received by the closing date. Furthermore, the Commission had also decided to invite some parties to provide oral evidence. This took place in two sessions on the 20 and 25 January 2016.[7] Public responses to last year's call for evidence are available on the website, as are transcripts of the oral evidence sessions.

2.2 Reaction

When the Commission was announced, it drew immediate criticism. Wayne David raised a Point of Order in the Commons:

> **Wayne David (Caerphilly) (Lab):** On a point of order, Mr Speaker. On Friday the Government published a written statement announcing a commission to look into the Freedom of Information Act. The impression has been given that it is a cross-party commission with the support of all parties. May I make it clear that Opposition Members have not been consulted about the work of the commission, nor do we have representation on the commission, nor do we want to see any watering down of the Freedom of Information Act, the worth of which has been demonstrated this afternoon?
>
> **Mr Speaker:** The hon. Member has made his point and that of his party with crystal clarity. It is on the record, and we are grateful to him.[8]

The World Wide Web Foundation criticised the Government for justifying its review of information freedom laws by citing the UK's position at the top of the Foundation's prestigious Open Data Barometer – an annual worldwide survey of open government.[9]

The campaigning organisation 38 Degrees launched a petition which has so far attracted over 192,000 signatures.

In September, 140 media bodies, campaign groups and others wrote to the Prime Minister expressing "serious concern" at the Government's

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7 Update on Commission website, 7 December 2015
8 HC Deb 20 July 2015 c1255
9 "Government review of FoI criticised as 'a step back' that could 'water down' the Act", *Independent*, 20 July 2015

approach to the *Freedom of Information Act*.[10] The letter – which called into question the independence of two members of the Commission, given their publicly stated views on FoI – is available on the website of the Campaign for Freedom of Information (CfFOI), together with other briefings from this organisation. The CfFOI interpreted the questions posed by the consultation in these terms:[11]

> imposing charges for requests
>
> making it easier to refuse requests on cost grounds
>
> making it more difficult to obtain public authorities' internal discussions, or excluding some from access altogether
>
> strengthening ministers' powers to veto disclosures
>
> changing the way the Act is enforced.

Another campaign, Hands Off FoI, was launched in October with support from the Society of Editors and *Press Gazette*.[12]

Chris Grayling, Leader of the House, aroused controversy during Business Questions on 29 October by suggesting that the Act was being "misused" by the media:

> …This Government are committed to the Act, but we want to ensure that it works well and fairly, and cannot be abused or misused. **It is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media, and that is not acceptable.** It is a legitimate and important tool for those who want to understand why and how Governments make decisions, and this Government do not intend to change that.[13] [emphasis added]

The *Guardian* responded by publishing a list of 103 "public interest stories" that would not have emerged without the Act.[14]

This potential burden on public authorities was one of the reasons for the independent review of FoI, A *Press Gazette* investigation found (appropriately enough, by making FoI requests to the ten British local authorities with the largest communications operations) that "few councils appear to keep a tally of the cost of answering FoIs, making it hard for them to make a case for the Act representing a 'burden'".[15] However, this finding should be read against the evidence in the Commission's call for evidence document, which quoted research by the UCL Constitution Unit estimating the financial burden on councils in 2010 and figures for an increasing number of requests made year-on-year to Kent County Council from 2005 to 2011.[16]

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10 Campaign for Freedom of Information, 140 press and campaign bodies urge PM not to weaken FOI Act, 22 September 2015

11 Campaign for Freedom of Information, *Stop FOI restrictions*

12 "Government accused of trying to water down Freedom of Information Act", *Guardian*, 19 October 2015

13 HC Deb 29 October 2015 c522

14 "Freedom of information: 103 stories that prove Chris Grayling wrong", *Guardian*, 30 October 2015. The list originally appeared on the FOI Directory website

15 "Press Gazette research casts doubt over claims FoI places unreasonable burden on councils", *Press Gazette*, 20 November 2015

16 Independent Commission on Freedom of Information, *Call for evidence*, 9 October 2015, p15

In its submission to the Commission on FoI, the Information Commissioner's Office (ICO) said that it considers the current checks and balances in Freedom of Information legislation to be "sufficient". The ICO argued that the FoI Act allows "awkward questions" to be posed to public bodies, a process which is "part of democracy". The regulator also praised the media's use of FoI, highlighting recent stories uncovered by the BBC, *Sun*, *Daily Mail*, *Times*, *Guardian* and others. On the question of how much protection should be given to "internal deliberations of public bodies", the ICO said that it felt the current exemptions under sections 35 and 36 of the Act to be sufficient.[17] Commentators (for example, the *Press Gazette*) have picked up on the ICO's evidence because

> journalists often have to battle with Information Commissioner Christopher Graham, who has the right to block the release of information. So his support for the status quo on FoI, as the impartial enforcer of the act, will be seen as a boost for the campaign to protect it from being weakened.[18]

2.3 The report

The Commission published its report on 1 March 2016. It is a wide-ranging document and includes 21 recommendations.[19] They are reproduced below (verbatim), with commentary as necessary:

Recommendation 1: That the Government legislates to amend section 10(3) to abolish the public interest test extension to the time limit, and replace it instead with a time limit extension for requests where the public authority reasonably believes that it will be impracticable to respond to the request on time because of the complexity or volume of the requested information, or the need to consult third parties who may be affected by the release of the requested information. This time limit extension will be limited to an additional 20 working days only.

> At present section 10 of the Act makes clear that a public authority has 20 working days to respond to a request made under the Act. This time limit, however, can be set aside where the public authority needs to consider the public interest balance in applying a qualified exemption. Where the time limit is set aside, a request need only be answered within a period which is "reasonable in the circumstances".

Recommendation 2: That the Government legislates to impose a statutory time limit for internal reviews of 20 working days.

> Under the Act, where a request is refused a requestor can ask a public authority to review its own decision. There is currently no fixed limit on the time taken for such a review.

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17 ICO, *Independent Commission on Freedom of Information: Call for Evidence Response of the Information Commissioner*, 16 November 2015

18 "Hands Off FoI: Information Commissioner urges Government not to introduce fees and praises role of the media", *Press Gazette*, 18 November 2015

19 *Independent Commission on Freedom of Information: report*, March 2016

Recommendation 3: That the Government legislates to make the offence at section 77 of the Act triable either-way.

> Section 77 of the Act makes it a summary offence to alter, deface, block, erase, destroy or conceal information after it has been requested under the Act with the intention of preventing its disclosure. The penalty is an unlimited fine. If it were an 'either-way' offence rather than a summary one, this would have the effect of removing the time limit for those seeking to bring a prosecution, and would also allow for a custodial sentence for particularly serious acts of destruction.

Recommendation 4: That the Government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish statistics on their compliance under the Act. The publication of these statistics should be co-ordinated by a central body, such as a Department or the Information Commissioner.

Recommendation 5: That the Government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish all requests and responses where they provide information to a requestor. This should be done as soon as the information is given out wherever practicable.

Recommendation 6: Public bodies should be required to publish in their annual statement of accounts a breakdown of the benefits in kind and expenses of senior employees by reference to clear categories.

Recommendation 7: The Government should give the Information Commissioner responsibility for monitoring and ensuring public authorities' compliance with their proactive publication obligations.

Recommendation 8: The Government should legislate to replace section 35(1)(a) with an exemption which will protect information which would disclose internal communications that relate to government policy.

> Section 35(1)(a) exempts from disclosure information relating to the formulation and development of Government policy.

Recommendation 9: The Government should legislate to expand section 35(1)(b) so that, as well as protecting inter-ministerial communications, it protects any information that relates to collective Cabinet decision-making, and repeal section 36(2)(a).

> Section 35(1)(b) exempts from disclosure information relating to ministerial communications.

Recommendation 10: The Government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35(1)(a), the public interest in maintaining the exemption is not lessened merely because a decision has been taken in the matter.

> Most exemptions under the Act require the public authority to consider the public interest balance. Where the public interest in

releasing material subject to an exemption outweighs the public interest in withholding it, then the material cannot be withheld under that exemption.

Recommendation 11: The Government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35, regard shall be had to the particular public interest in the maintenance of the convention of the collective responsibility of Ministers of the Crown, and the need for the free and frank exchange of views or advice for the purposes of deliberation.

Recommendation 12: The Government should legislate to amend section 36 to remove the requirement for the reasonable opinion of a qualified person.

In addition to the public interest test, several exemptions require a 'prejudice' test to be satisfied before information can be withheld under that exemption. Section 36 requires a qualified person to provide a 'reasonable opinion' that release would be likely to prejudice the effective conduct of public affairs. If section 36 is involved then section 35 cannot be invoked.

Recommendation 13: The Government should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act.

The veto powers are in section 53 of the Act. The Commission took the view that the language of section 53 reflected the will of Parliament that on reasonable grounds the executive should be able to override decisions made by the Information Commissioner, or, on appeal, by a tribunal or court. A majority of Supreme Court justices have taken a different view.

Recommendation 14: The Government should legislate to make clear that the power to veto is to be exercised where the accountable person takes a different view of the public interest in disclosure. This should include the ability of the accountable person to form their own opinions as to as to all the facts and circumstances of the case, including the nature and extent of any potential benefits, damage and risks arising out of the communication of the information, and of the requirements of the public interest.

Recommendation 15: The Government should legislate so that the executive veto is available only to overturn a decision of the Information Commissioner where the accountable person takes a different view of the public interest in disclosure. Where a veto is exercised, appeal rights would fall away and a challenge to the exercise of the veto would be by way of judicial review to the High Court. The Government should consider whether the amended veto should make clear that the fact that the Government could choose to appeal instead of issuing a veto will not be a relevant factor in determining the lawfulness of an exercise of the veto. Until legislation can be enacted, the Government should only exercise the veto to overturn a decision of the Information Commissioner.

Recommendation 16: The Government should legislate to allow the veto to also be exercised even where the Information Commissioner upholds a decision of a public authority. This would mean that the right of appeal would fall away and challenge would be instead by way of judicial review.

Recommendation 17: That the Government legislates to remove the right of appeal to the First-tier Tribunal against decisions of the Information Commissioner made in respect of the Act. Where someone remained dissatisfied with the Information Commissioner's decision, an appeal would still lie to the Upper Tribunal. The Upper Tribunal appeal is not intended to replicate the full-merits appeal that currently exists before the Information Commissioner and First-tier Tribunal, but is limited to a point of law.

> Currently, where the Information Commissioner upholds the decision of the public authority, the requestor can appeal to the First-tier (Information Rights) Tribunal. Where the Information Commissioner overturns the decision of the public authority, the public authority can appeal to the Tribunal. If an appeal is unsuccessful, then further appeals on points of law can be heard by the Upper Tribunal, the Court of Appeal, and ultimately the Supreme Court.

Recommendation 18: That the Government legislates to clarify section 11(1)(a) and (c) of the Act so that it is clear that requestors can request information, or a digest or summary of information, be provided in a hard copy printed form, an electronic form, or orally. Where a requestor specifies a specific electronic document format, that request should be granted if the public authority already holds the information in that format, or if it can readily convert it into that format. Where the information requested is a dataset, the requirements at section 11(1A) will apply. The legislation should make clear that the obligations on public authorities to provide information in a particular format extend no further than this.

> Section 11 allows a requestor to specify the form in which they would prefer requested information to be provided. Public authorities are required to give effect to a requestor's preference so far as reasonably practicable.

Recommendation 19: That the Government reviews section 45 of the Act to ensure that the range of issues on which guidance can be offered to public authorities under the Code is adequate. The Government should also review and update the Code to take account of the ten years of operation of the Act's information access scheme.

> The Code of Practice[20] under section 45 allows Ministers to set out the practice that they consider desirable for public

[20] Secretary of State for Constitutional Affairs, *Code of Practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000*, HC 33, December 2004

> authorities to follow in discharging their obligations under Part 1 of the Act.

Recommendation 20: That the Government provides guidance, in a revised Code of Practice issued under section 45, encouraging public authorities to use section 14(1) in appropriate cases.

> Section 14(1) of the Act allows a public authority to refuse to respond to a request if it is "vexatious". The word "vexatious" is not defined in the Act.

Recommendation 21: That the Government reviews whether the amount of funding provided to the Information Commissioner for delivering his functions under the Act is adequate, taking into account the recommendations in this report and the wider circumstances.

In addition to making recommendations, the Commission expressed views on several other topics that had come to its attention. The first was whether the Act should be extended to bodies not previously covered:

> Here we express our opinion that the Act should be extended to those who are providing public services under contract. We suggest this should be done by treating information about the performance of the contract as being held on behalf of the contracting public authority, although we think this should be limited to new contracts only, and only those contracts where the annual value is £5m or greater. We also express our opinion that there is no convincing evidence for the exclusion of universities and higher education institutions from the scope of the Act. (p12)

At present, the Act provides exemptions for requests which exceed the 'appropriate limit' (or 'cost limit'). The cost limit is specified in regulations and is set at £600 for central Government departments, and £450 for other public authorities. The cost limit was originally based on the limit set by the Treasury for refusing to answer a parliamentary question on grounds of "disproportionate cost", but unlike the parliamentary figure, it has not been uprated at intervals since. The Commission considered the option that the cost limit should be increased in line with the disproportionate costs threshold, and that the costs of redaction related to absolute exemptions should be included as a permitted activity. However, they were unable to arrive at any recommendation based on the evidence they received.

2.4 The Government response

On the day the Commission reported, the Government responded by way of Written Statements in both Houses.[21] The Government commended the report for presenting a "balanced set of measures". They also offered "preliminary views" on some of its recommendations.

Section 9 of the Act allows (by regulations) a fee to be set for answering requests. It was the original intention of the then Labour Government that a small charge would be set. In the event, no charges were

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[21] Open and transparent government: Written Statement by Matthew Hancock, HCWS566, 1 March 2016

introduced other than to cover "disbursement costs" (e.g. for copying or postage). The Commission concluded that it was not appropriate to impose a request fee (p46). The Government agreed.

On the Cabinet veto, the Government acknowledged the Commission's calls for a narrower and more limited veto provision:

> In line with the Commission's thinking, the Government will in future only deploy the veto after an Information Commissioner decision. On the basis that this approach proves effective, we will not bring forward legislation at this stage.

The Government agreed to review the operation of section 45 "to ensure that the range of issues on which guidance can be offered to public authorities under the Code of Practice is sufficient and up to date."

On the publication of statistics on the operation of the Act, the Government undertook to "issue guidance in the revised Section 45 Code of Practice to set a standard that public authorities with 100 full time equivalent employees or more should publish such information".

On 'vexatious' requests, the Government agreed with the recommendation for "improved guidance, via a revised Code of Practice, to allow public authorities to use section 14(1) in the rare cases where it is necessary and appropriate."

On the call for greater transparency on pay and perks of senior staff, the Government said:

> The default position should be that such information from all public bodies is published; that the public should not have to resort to making Freedom of Information requests to obtain it, and data protection rules should not be used as an excuse to hide the taxpayer-funded payments to such senior public sector executives. We will now consider what additional steps should be taken to address any gaps in published information, and in particular in relation to expenses and benefits in kind as recommended, including more broadly than at present.

There was a promise to "carefully consider" the Commission's other recommendations. Although the word "legislate" appears in 16 of the Commission's 21 recommendations, the Government is evidently not persuaded that acting upon the recommendations would necessarily require legislative change. For example, recommendation 4 (on the publication of statistics) is framed by the Commission as a call for legislation but the Government has responded that it will issue revised guidance to achieve the same end. A remark was attributed to Matthew Hancock, the Cabinet Office Minister, and reported in the press: "We will not make any legal changes to FoI". This has provided some comfort to campaigners who feared that the Government was planning statutory changes to limit the scope of FoI.[22]

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[22] "Review decides not to change Freedom of Information Act", *Guardian*, 1 March 2016

3. The Labour Party review

The Labour Party announced in November 2015 that it would set up its own review of the *Freedom of Information Act* in an attempt to head off what the party saw as a move by the Government to "dilute" the Act.[23] Labour's Review will seek to answer two main questions, neither of which – in the Party's view – have been asked by the Independent Commission:

1. How effective has the Act been in achieving its stated aims?
2. How can it be strengthened and extended in the interests of open, transparent and accountable government?

There was a call for evidence which ran from 8 December 2015 to 15 January 2016. The Party has also held several public evidence sessions, co-chaired by Deputy Leader Tom Watson and Shadow Minister Louise Haigh. Transcripts have not yet been published but there were updates on Twitter and some press coverage.[24] According to the review page on the Labour website, the publication date for their report is yet to be confirmed.

23 "Freedom of Information Act: Labour to set up own review in attempt to head off Government move to dilute public's right to know", *Independent*, 19 November 2015

24 E.g. "Government's FoI Commission 'a rigged jury,' says Lib Dem peer", *Guardian*, 20 January 2016

4. Charges

4.1 Flat fees

There is provision in the primary legislation for fees to be charged for initial requests made under the Act to public authorities (as they may be for data subject access requests). In the event, a later decision was made by Government not to introduce charging regulations, though the power remains on the statute book.

Under the current regime, public bodies can, where appropriate, charge disbursements for providing information to applicants. This might include photocopying and postage costs. In practice, few public bodies have used fees in supplying information. However, where the costs of responding are above £600 for central government, and above £450 for other public authorities, the public authority has discretion to refuse the request.[25]

While the Commission rejected any possible fee structure, there are precedents in other countries. Germany usually charges €50 (£37) to €100 per request, although this can be as high as €500. New Zealand levies $38 (£16) for each 30 minutes spent collating information after the first hour. In Ireland, when a €15 application fee was introduced, it resulted – reportedly – in the number of requests falling by 75 per cent.[26]

In a survey of civil servants, around half of those who replied said that they would support charging for FoI releases. Some respondents drew a distinction between the use of the Act by journalists and members of the wider public, and suggested that charges should be limited to the former.[27]

The ICO's submission to the FoI Commission was sceptical:

> The [Information] Commissioner is concerned that a flat fee would be a disproportionate measure because of its deterrent effect on a wide range of requests and requesters. It is worth noting that a flat fee of £10 (the same as for a subject access request under the Data Protection Act) would not enable public authorities to recover costs. It should also be recognised that charging a fee in itself creates an administrative burden, which is one reason why public authorities do not usually do it; the Constitution Unit found in 2010 that 62% of authorities they surveyed never quoted a fee for answering a request.

The Information Commissioner did, however, accept that "it could be reasonable to review and research" the "appropriate" limit in the fees regulations, saying that this "would be the most proportionate step to reduce the impact" of FoI on public authorities.[28] (The current limit in

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25 HC Library Briefing Paper 4169, *Fees for FoI requests*

26 "Public could have to pay £100 to make Freedom of Information Requests under right-to-know crackdown", *Independent*, 9 October 2015

27 "Freedom of Information: Civil servants would support charging for requests, CSW study finds", *Civil Service World*, 2 November 2015

28 ICO, *Independent Commission on Freedom of Information: Call for Evidence Response of the Information Commissioner*, 16 November 2015, paras 65, 68

the regulations of £600 for central government was based on the threshold for parliamentary questions.)

4.2 Fees for appeals

Another area that has attracted attention recently is the charging of fees for appeals. Essentially, if someone makes an FoI application and it is refused, or is not answered to their satisfaction, they have a right of appeal to the Information Commissioner. If the Commissioner finds in favour of the organisation holding the information, the individual has a further right of appeal to the First–tier Tribunal in the General Regulatory Chamber.[29] Currently, there are no charges for proceedings in this Chamber (except for appeals in relation to gambling licences). The Ministry of Justice conducted a public consultation (closing date: 15 September 2015) in which they floated a proposal to introduce fees for all proceedings in this Chamber. The document explains:

> 126… We have proposed one fee for an appeal decision on the papers and one fee for an oral hearing. Our proposal is to charge a fee of £100 to issue proceedings, which would entitle the claimant to a decision based on a review of the papers. The claimant may alternatively elect for an oral hearing, in which case a further fee of £500 would be payable.[30]

The public were invited to respond to these two questions:

> Question 14: Do you agree with the proposed fees for all proceedings in the General Regulatory Chamber: specifically £100 to start proceedings with a determination on the papers; and a further fee of £500 for a hearing? Please give reasons.
>
> Question 15: Are there any proceedings in the General Regulatory Chamber that should be exempt from fees? Please give reasons.

The overall context of the consultation was the need "to look again at the balance between what users pay towards the overall cost of the court and tribunal service as compared with the financial burden that falls on the taxpayer" (para 12).

The Campaign for Freedom of Information argued that introducing fees would dramatically reduce the number of FoI appeals and thus potentially reduce the accountability of public bodies.[31]

In its response to the consultation in December 2015, the Government announced that it would defer any decision on whether to introduce a fee for bringing an appeal against a decision of the Information Commissioner until the Independent Commission on Freedom of Information reported.[32]

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29 See section 3 of Commons Library Briefing Paper on *Freedom of information requests*

30 Ministry of Justice, *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, paras 124-7

31 CfFOI, *Fees for FOI appeals*, 30 July 2015

32 Written Statement HCWS438,17 December 2015

5. Scotland

Freedom of information is a devolved area. The *Freedom of Information Act 2000* covers UK-wide public authorities based in Scotland and those based outside Scotland which operate within the country, such as the BBC and the Ministry of Defence. However, Scotland also has its own freedom of information legislation which applies to Scotland-only public bodies, the *Freedom of Information (Scotland) Act 2002* (FOISA, an Act of the Scottish Parliament in force from 2005).[33] Under the 2002 Act, "Scottish public authority" means any body (or other person or office-holder) which is listed in schedule 1, designated by order under section 5(1), or which is a publicly-owned company as defined by section 6.

The legislation is not identical, but the differences between the 2000 and 2002 Acts are generally minor. The Scottish Act, which some have seen as more robust, is enforced and promoted by the Scottish Information Commissioner (SIC), whose website contains further information. One useful document on the SIC website sets out, in tabular form, the differences between the UK and Scottish Acts.[34]

The Independent Commission on Freedom of Information is reviewing the 2000 Act (the UK-wide legislation). Its remit does not extend to Acts of the Scottish Parliament. There is no parallel exercise taking place in Scotland and the Scottish Government did not make a submission to the Commission. Indeed, the direction of travel in Scotland appears rather different. Earlier this year, the Scottish Government ran a public consultation on whether the Scottish Act should be *extended* in scope to cover bodies that carry out functions of a public nature or which provide, under a contract with a Scottish public authority, a service which is a function of that authority. This could be done by making an order under section 5 of the *Freedom of Information (Scotland) Act 2002*.[35] Indeed, an order extending coverage of FOISA has recently been laid before the Scottish Parliament and, subject to Parliamentary process, will come into effect on 1 September 2016. The order extends FoI to a range of organisations – including private prison contractors.[36]

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33 Slightly amended by the *Freedom of Information (Scotland) (Amendment) Act 2013*
34 Scottish Information Commissioner, *FOISA and FOIA: comparative table*, 2015
35 Scottish Government, *Consultation on further extension of coverage of the Freedom of Information (Scotland) Act 2002 to more organisations*, June 2015
36 *Draft Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016*

BRIEFING PAPER
Number 07400, 10 March 2016

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