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BRIEFING PAPER

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Freedom of information requests

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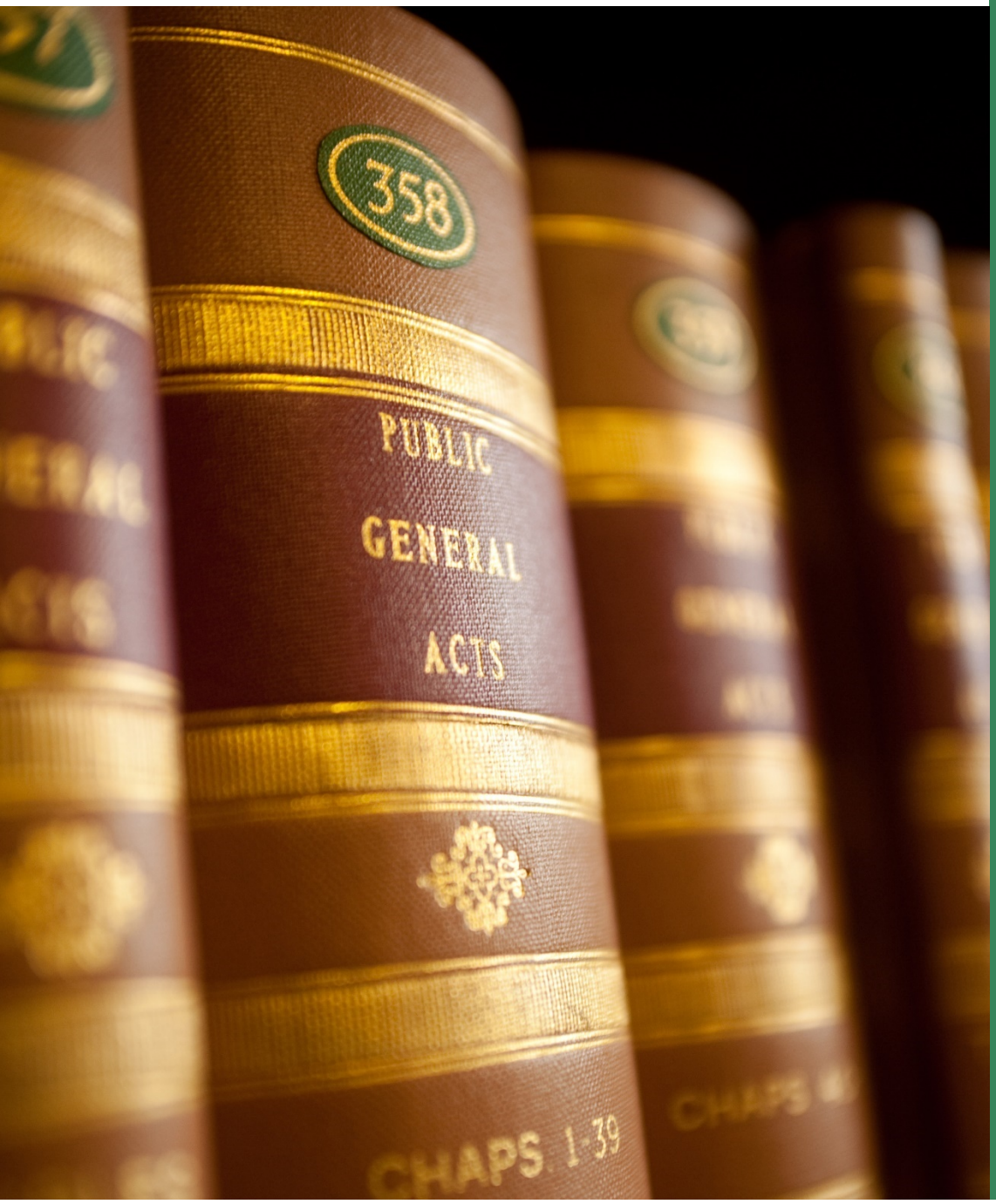

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Section 1 of the *Freedom of Information Act 2000* gives individuals the right to request information held by English, Welsh and Northern Irish "public authorities".

Anyone has the right to ask for information - people living abroad, non-UK citizens, journalists, political parties, lobby groups and commercial organisations.

Freedom of information (FOI) requests must be in writing (including by email), need not mention the Act, but must include the name and address (or email address) of the enquirer and the information sought. A request must be complied with, unless one or more of the exemptions in the Act are relevant. Most of the exemptions are subject to a public interest test.

Public authorities are required to comply with requests within 20 working days of receipt, although there are circumstances when this time limit can be extended. There are provisions for the payment of fees but, in practice, very few public authorities levy fees. Where the costs of responding are above £600 for central government, and above £450 for other public authorities, a request may be refused.

The Cabinet Office is responsible for freedom of information policy in England, Wales and Northern Ireland. It has published a Code of Practice (July 2018) for public authorities.

The Act is enforced by the Information Commissioner's Office (ICO). The ICO website includes information on how to make an FOI request. The ICO has published a guide (August 2017) for public authorities.

If a requester is unhappy with an FOI response, they can apply to the public authority for an internal review. If they are not satisfied, they can appeal to the ICO. The ICO can overrule a public authority's application of an exemption, issuing a decision notice, or may issue an enforcement notice to ensure compliance with the Act. Further appeals are available to the First-tier Tribunal (Information Rights).

There is a power for a Cabinet Minister or Law Officer to issue a conclusive certificate or ministerial veto against a decision or enforcement notice. The issue of a certificate must be supported by reasonable grounds and is open to judicial review.

Scotland

The 2000 Act covers UK-wide public authorities based in Scotland. However, Scotland has its own freedom of information legislation which applies to Scotland only public bodies – the *Freedom of Information (Scotland) Act 2002.* The legislation is not identical, but the differences are generally minor.[1] The Act is enforced by the Scottish Information Commissioner.

[1] Scottish Information Commissioner, *Comparative table – differences between the Freedom of Information (Scotland) Act 2002 and the Freedom of Information Act 2000*, December 2016

1. The Freedom of Information Act 2000

Section 1 of the *Freedom of Information Act 2000* gives individuals the right to request information held by English, Welsh and Northern Irish "public authorities".

What are public authorities?

Public authorities are, broadly speaking, public bodies which exercise public functions, such as central government departments, local government, the police, the health service, the education service and their related offices and agencies. Schedule 1 of the Act either names these public authorities specifically or describes them in general terms.

Regulations can be made under section 5 to bring new bodies within the scope of the Act if they carry out functions of a public nature.[2]

Extending the Act?

Information held by a private company "on behalf of" a public authority with which it has a contract is subject to the 2000 Act, but other information is not. It is possible for the contractual terms set with private providers to include requirements to protect the right to access information about service provision. Public authorities are obliged to answer requests about contracts with private providers, although exemptions exist for commercially sensitive material. This exemption is subject to a public interest test.

There have been calls for the Act to be extended to private sector companies that undertake public sector contracts.[3]

ICO report, February 2019

In February 2019, the Information Commissioner published a report calling for the 2000 Act to be reformed because of the changing nature of public service delivery.[4]

According to the Commissioner, the Act is "not fit for purpose" and "needs to keep pace with the changes in the modern public sector and public expectations":

> (…) Parliament clearly intended information rights to adapt to changes in public sector delivery - section 5 of FOIA includes a provision to bring contractors under its scope but it has never been used since the law came into force in 2005. There is a strong case for contractors to be more accountable when delivering public services. Similarly, powers to bring other organisations exercising functions of a public nature under the scope of FOIA

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2 In March 2015, the *Freedom of Information (Designation as Public Authorities) Order 2015* brought Network Rail within the scope of the Act

3 See, for example, HL13262, answered 5 February 2019; Andy Slaughter's *Freedom of Information (Extension) Bill 2017-19*, Louise Haigh's *Freedom of Information (Amendment) Bill 2017-19*, and a Westminster Hall debate on 6 March 2019

4 ICO, *Outsourcing Oversight? The case for reforming access to information law*, February 2019, pp5-6

> have only been used a few times since the legislation came into force 13 years ago. This should now be addressed urgently…[5]

The report recommends greater use of existing powers under section 5 of the Act to:

> 1. designate contractors regarding the public functions they undertake where this would be in the public interest, whether because of the scale, duration or public importance of the contracts.
>
> 2. designate a greater number of other organisations exercising functions of a public nature, and do so more frequently and efficiently.
>
> Designation orders under section 5 of FOIA would give the public the right to make requests directly to these organisations and require them to proactively disclose information in line with a publication scheme.[6]

The report recommends primary legislation to:

- amend section 3 of the Act to "give a clearer legislative steer about what information regarding a public sector contract is held for the purposes of the legislation".
- introduce a legal requirement to regularly report on the coverage of the Act.[7]

It also recommends that the Government should conduct a review of all proactive disclosure provisions regarding contracting, and which affect the public sector. This would include a review of the publication scheme provisions in the 2000 Act.[8]

Copies of the report have been sent to the Public Accounts Committee and the Public Administration and Constitutional Affairs Committee.[9]

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5 Ibid, p7
6 Ibid, p8
7 Ibid, pp8-9
8 Ibid, p9; Further detail on the recommendations is set out in chapter 3 of the report
9 Ibid, p9

2. How to make a request

Freedom of information (FOI) requests must be made in writing (this includes email). Requests must clearly state the name and address of the enquirer and the information sought. It is sufficient to provide an email as an address. It is not necessary to use a special form or even to make reference to the 2000 Act - any written request for information held by a public authority could therefore be categorised as an FOI request.

Anyone has the right to ask for information - people living abroad, non-UK citizens, journalists, political parties, lobby groups and commercial organisations. The Act applies to information produced by public bodies before the Act came into force in 2005.

Further information on how to make a request is available from the ICO website.

The ICO has published a guide (August 2017) on the Act for public authorities.

Exemptions

An FOI request must be complied with by a public authority unless one or more of the exemptions set out in Part II of the Act are relevant. Most of the exemptions are subject to a "public interest" test.[10]

Absolute exemptions

Absolute exemptions (i.e. not subject to a public interest test) are as follows:

- Section 21 information accessible by other means
- Section 23 information supplied by security bodies
- Section 32 court records
- Section 34 parliamentary privilege
- Section 36 in relation to conduct of public affairs in the House of Lords or House of Commons
- Section 37 communication with certain members of the Royal Household (following amendment in 2010, certain information relating to communications with the Sovereign and to the heir and second in line to the Throne is absolutely exempt from the Act, whereas information relating to other members of the Royal Family and the Royal Household is subject to the public interest test)
- Section 40 personal information
- Section 41 information provided in confidence
- Section 44 prohibited by another enactment

[10] Section 2 of the 2000 Act

Exemptions subject to the public interest test

Exemptions subject to a public interest test are as follows:

- Section 22 information intended for future publication
- Section 24 national security
- Section 26 defence
- Section 27 international relations
- Section 28 relations within the UK
- Section 29 the economy
- Section 30 investigations and proceedings by public authorities
- Section 31 law enforcement
- Section 33 audit functions
- Section 35 formulation of government policy
- Section 36 effective conduct of public affairs (not subject to the test in respect of the House of Commons and House of Lords)
- Section 37 communication with certain members of the Royal Household (following amendment in 2010, certain information relating to communications with the Sovereign and to the heir and second in line to the Throne is absolutely exempt from the Act, whereas information relating to other members of the Royal Family and the Royal Household is subject to the public interest test)
- Section 38 health and safety
- Section 39 environmental information
- Section 40(3) (a)(i) right to personal information where the data subject has a right to prevent processing
- Section 42 legal professional privilege
- Section 43 commercial interests

The "public interest" test

"Public interest" is not defined in the Act. However the ICO has published guidance (July 2016) on the public interest test. This includes the following:

> The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.
>
> However, these examples of the public interest do not in themselves automatically mean that information should be disclosed or withheld. For example, an informed and involved

> public helps to promote good decision making by public bodies, but those bodies may also need space and time in which to fully consider their policy options, to enable them to reach an impartial and appropriate decision, away from public interference. Revealing information about wrongdoing may help the course of justice, but investigations into wrongdoing may need confidentiality to be effective. This suggests that in each case, the public interest test involves identifying the appropriate public interests and assessing the extent to which they are served by disclosure or by maintaining an exemption.[11]

The guidance also notes: "The public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it".

According to the guidance, there is "an assumption in favour of disclosure" in the legislation:

> The effect of section 2(2)(b) [of the Act] is that when the authority has carried out the public interest test, it can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosing it. If the public interest is equal on both sides, then the information must be released. If the public interest in disclosure is greater than the public interest in maintaining the exemption, then the information must also be released. In this sense we can say that there is an assumption in favour of disclosure in FOIA.[12]

A number of cases involving public interest are summarised throughout the guidance.

Time limits for responses

Section 10 of the Act requires an authority to comply with a request within 20 working days of receipt of the application. However, there are circumstances when this time limit can be extended e.g. if a request needs to be clarified or a charge notice is issued. Moreover, where an authority has to consider the public interest test, the requirement is that they respond in such time as is "reasonable in the circumstances".

Fees

There are provisions for the payment of fees and disbursements for photocopying and for dealing with requests which are vexatious or of disproportionate cost. However very few public authorities levy fees. Under December 2004 regulations, central government departments which find that the cost of retrieving and collating the relevant information exceeds £600 (or three days work) may refuse a request. Other public bodies have a limit of £450. This does not include time taken to make a decision as to whether to release the information.[13]

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11 ICO, *The public interest test*, July 2016, paras 9 and 10
12 Ibid, para 7
13 The *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (SI 3244/2004)

Complaints

Advice on individual cases can be obtained from the ICO. A helpline is available on: 0303 123 1113.

If someone is unhappy with an FOI response from a public authority, they can apply for an internal review. If they are still not satisfied, they can appeal to the ICO. The ICO can overrule a public authority's application of an exemption, issuing a decision notice, or it can issue an enforcement notice to ensure compliance with the Act. Further appeals are available, including by public authorities, to the First-tier Tribunal (Information Rights).

3. Ministerial vetoes

Section 53 of the 2000 Act gives a Cabinet Minister or Law Officer the power to issue a conclusive certificate or ministerial veto against a decision or enforcement notice.[14] The issue of a certificate must be supported by reasonable grounds and is open to judicial review.[15]

For further information, see the Library Briefing Paper *Freedom of Information and Ministerial Vetoes* (CBP 5007, 19 March 2014).

4. Statistics and disclosure logs

The Cabinet Office is responsible for freedom of information policy in England, Wales and Northern Ireland. Statistics on the handling of FOI requests are available from the Gov.UK website.

Disclosure logs are available from the websites of public bodies. The logs are not mandatory, but the Government has encouraged their use. There is no set template for a disclosure log. Some list each request resulting in a release, and a summary of the information provided. Others give information released in the form of FAQs.

5. Freedom of information and Parliament

Freedom of information legislation does not apply to individual MPs - they are not public authorities for the purposes of the Act (although both Houses of Parliament are).

Correspondence from MPs held by a public authority may, however, be disclosable.[16] The Information Rights and Information Security (IRIS)

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14 There are also provisions for the devolved governments in Scotland, Wales and Northern Ireland to exert a veto

15 HL Deb 25 October 2000 c443

16 For full analysis, see Library Research Paper 07/18 on the *Freedom of Information (Amendment) Bill 2006-7* and Library Briefing Paper 4732, *MP allowances and FoI requests* (22 June 2009)

Service at the House can provide advice to Members and their staff on the application of freedom of information law.

In 2011, research published by the Constitution Unit at University College London found that only a small minority of MPs and peers use FOI, and that "requests are slower and less immediate than PQs" as a way of getting information from Government.[17] However, the research also noted that, unlike parliamentary questions, "FOI has an in-built appeal system" to the Information Commissioner and then to the Information Tribunal.

Free speech in Parliament, and the ability of the two Houses to regulate their affairs without the intervention of the Courts, is guaranteed by Article IX of the Bill of Rights, which provides that "proceedings in Parliament may not be impeached or questioned in any court or place out of Parliament". However, this also means that proceedings cannot be made subject to the operation of a statutory procedure, and a route of appeal, of the sort provided by FOI. So PQs, or a select committee's questions, are not technically FOI requests. But the existence of FOI means that a parallel, but separate request, can be made under the Act, and Members may wish to use public access rights under FOI to request information, either to ensure that any papers not released are covered by a specified exemption, or to obtain access to an independent system of appeal, or to ensure that the 20 day statutory deadline is used as a benchmark for a response.

17 Ben Worthy and Gabrielle Bourke, *The Sword and the Shield: The use of FOI by Parliamentarians and the Impact of FOI on Parliament*, UCL Constitution Unit, September 2011, p26

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