Freedom of Information: the first five years

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The *Freedom of Information Act* came into force in January 2005. This note reviews the operation of the Act over the first five years of implementation.

Background to the implementation of the Act is given in Library Research Paper 04/84 (*Freedom of Information implementation*) and a basic guide to its operation is set out in Library Standard Note 2950 (*Freedom of Information requests*).

Contents

1 Summary

The FOI Act has been widely used since its full implementation in January 2005. Over half a million requests were made in the first five years. There is now a considerable volume of case decisions from the Information Commissioner's Office, the Tribunal and courts.

The Act requires public authorities to respond to requests for information within 20 working days. There are no immediate penalties for non compliance and Ministry of Justice statistics show that only around 75% of requests to central government receive a substantive response within the legal time limit. The Information Commissioner has recently issued an enforcement notice requiring a public authority to deal immediately with all of its overdue requests. Failure to comply could be treated as a contempt of court.

Requesters must wait until an authority has completed an internal review before they can appeal to the Information Commissioner for a decision. There is no statutory time limit for internal reviews and Ministry of Justice statistics and ICO decision notices and practice recommendations show that there have been many cases where reviews have taken months or even years to complete.

Since the Information Commissioner's Office first started receiving complaints in 2005, there have been problems with long delays in issuing decisions. Most cases have taken over a year to resolve and some more than 3 years. The first Information Commissioner, Richard Thomas, attributed the backlog of cases in his office to inadequate funding.

The Ministerial veto has been used on two occasions by government to resist disclosure and prevent any further appeals.

The fees regulations introduced in 2005 are still in force. The government attempted to change the regulations in 2006, via secondary legislation, in order to enable authorities to refuse many more requests. The proposals for change attracted considerable criticism and were abandoned.

Publication schemes were a novel part of the UK's FOI Act. The original intention was that the Information Commissioner would reapprove individual schemes every few years but authorities are now encouraged to adopt a more standardised model scheme.

2 Use of the FOI Act

Before the implementation of the FOI Act, the Parliamentary Ombudsman had formal responsibility for appeals from the non-statutory Code of Practice on Access to Government Information. This applied to a much smaller number of public authorities, and it was used relatively infrequently. Annual reports on the implementation of the Code documented 5,969 Code requests in 2000, 4,668 in 2001 and 5,212 in 2002. The Ombudsman completed 208 investigations over the 11 years of the Code.[1]

Research commissioned by the Information Commissioner in 2004 suggested that, based on overseas experience, the number of requests in the UK was likely to be around 100,000 in the first year, rising to over 200,000 by the fifth year.[2] There is no requirement for public

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1 Parliamentary and Health Services Ombudsman, Access to Official Information, Monitoring of the Non-statutory Codes of Practice 1994-2005, 26 May 2005, HC 59

2 Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the FOI Act 2000 and the EIRs, March 2004, The Constitution Unit UCL

authorities to keep a count of the number of requests for information they receive. Since the Act applies to all written requests, it is in any event a matter of judgement which are 'business as usual' and which are additional requests made as a result of the FOI legislation. No single count has been kept of the total number of requests made under the FOI Act throughout the public sector, but the Information Commissioner estimated that between 100,000 and 130,000 requests were made under the Act during 2005[3] and that by the middle of 2009, there had been around half a million requests made under the Act.[4]

More specific data is available for some sectors. The Ministry of Justice publishes quarterly and annual reports with statistics on the number of requests made to central government departments.[5] The reports include information about the number of requests made to each department, the timeliness of response, the initial outcomes of the requests, the use made of each of the exemptions and the number of internal reviews requested and complaints made to the Information Commissioner. The total number of requests made to central government in each of the first five years was 38,108 in 2005; 33,688 in 2006; 32,978 in 2007; 34,950 in 2008 and 40,548 in 2009. Data for other authorities is more patchy. Local authorities indicated that they received around 70,000 requests in 2005, and the police service around 21,000 for the same year.[6] A Constitution Unit report estimated that local authorities in England received over 80,000 requests in 2007.[7]

Prior to the implementation of the Act, FOI campaigners predicted that the Information Commissioner's office would have difficulty in handling large numbers of complaints, given that the implementation was not phased in but was instead applied to all public authorities from the same date.[8] In 2004, the Information Commissioner commissioned research from the Constitution Unit at University College London, to estimate the likely volumes, sensitivity and complexity of his caseload when the Act came fully into force. This research predicted that his office was likely to receive between 2,000 and 4,000 cases during the first year and that this could rise to between 4,500 and 9,000 by the fifth year.[9] The actual number of cases received was 2,713 in 2005/06; 2,592 in 2006/07; 2,646 in 2007/08; 3,100 in 2008/09; and 3,734 in 2009/10.

In its first five years of operation, the Act has been used by a range of requesters to obtain varied information for many different purposes. The Campaign for Freedom of Information comments on individual cases on its website, and has published two papers giving summaries of hundreds of cases where the Act has been used to obtain information.[10] The Campaign's blog includes reviews of and comments on key cases.[11] The BBC blog *Open Secrets* is another source of comment on individual cases.[12]

The Constitution Unit at University College London is conducting a research project examining the extent to which Parliament has used FOI to hold the government to account. A paper setting out its preliminary findings notes that:

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3 Constitutional Affairs Committee, Freedom of Information – one year on, HC 991, para 5

4 ICO Annual Report 2008/09, pp 4-5, www.ico.gov.uk

5 http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm

6 Constitutional Affairs Committee, Freedom of Information – one year on, HC 991, para 5

7 FOIA 2000 and local government in 2007, September 2008, Constitution Unit UCL

8 Oral evidence to Public Administration Select Committee, 15 January 2004, HC 41-ii, Q 125

9 Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the FOI Act 2000 and the EIRs, March 2004, The Constitution Unit UCL

10 http://www.cfoi.org.uk , *500 Stories from the FOI Act's First Year* and *1,000 FOI Stories from 2006 and 2007.*

11 http://www.foia.blogspot.com

12 www.bbc.co.uk/blogs/opensecrets

> As the project is less than a year old, any conclusions must be provisional. We can say at this stage that it appears that a small group of MPs, and virtually no peers, are using FOI. It appears that most MPs, and almost all peers, prefer to use traditional mechanisms of accountability due to a mixture of habit, attitude and practical issues. These MPs are disproportionately members of the opposition using FOI in a variety of different ways from long term campaigns to nuisance making. It also appears FOI is used for different reasons and to obtain different types of information than parliamentary questions, though they may overlap. The use of FOI in PQs and debates appears to show that the majority of interactions concern questions about FOI, rather than using it. Nevertheless, there appears to be some use of FOI both in PQs and in debates.[13]

3 Compliance with time limits

3.1 Initial response to requests

Section 10 of the Act requires authorities to comply with requests for information within 20 working days (although an extension is permitted if it is necessary to consider the public interest test). The Constitutional Affairs Committee commented in 2006 that there had been many cases where public authorities were not meeting the 20 day response deadline and recommended that "the DCA [Department of Constitutional Affairs], together with the Information Commissioner must work to improve compliance with the deadline and raise standards so that authorities consistently provide a more timely response to requesters".[14]

The Ministry of Justice reported that in 2009 only 75% of requests to government departments received a substantive response within the 20 working-day limit. A further 6% of requests were subject to a public interest test extension and the remaining 19% were not processed within the time limits required by the Act. There was considerable variation in performance among different departments, ranging for example from HM Treasury which processed 94% of requests within 20 working-days to the Ministry of Defence which only processed 53% within 20 days.[15]

The Campaign for Freedom of Information has drawn attention to the lengthy extensions taken by public authorities to consider the public interest and to the lack of information provided by the Ministry of Justice about the extent of these delays within central government:

> Government departments took extensions of more than 40 working days – more than double the ICO's maximum level – in 267 cases in 2008, that is in 21.5% of all completed cases involving a public interest extension. Yet for this large group of the most severely delayed cases no indication is given of the length of the extensions. The failure to monitor the most serious delays helps to obscure the extent of the problem and undermine efforts to address it.[16]

3.2 Internal reviews

Section 50 of the Act indicates that the Commissioner should only investigate cases when the requester has exhausted the public authority's internal complaints procedure. The Act does not set a fixed limit for the duration of such reviews (in contrast to other regimes such

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13 http://www.ucl.ac.uk/constitution-unit/files/research/foi/projects/PSAConference2010_The%20sword_HowMPsAndPeersHaveUsedFOI.pdf

14 Constitutional Affairs Committee, Freedom of Information – one year on, HC 991, para 79

15 http://www.justice.gov.uk/publications/docs/foi-statistics-report-2009.pdf

16 Letter to UK Statistics Authority, 26 January 2010, www.cfoi.org.uk

as the Environmental Information Regulations (EIRs) and the FOI Scotland Act), although best practice guidance for internal reviews (internal complaints procedures) is provided in the Section 45 code of practice. The Information Commissioner's guidance states that "a reasonable time for completing an internal review is 20 working days from the date of the request for review". The Constitutional Affairs Committee in 2006 identified lengthy internal reviews as a cause of concern and recommended that "the target times and actual time taken for internal reviews by government departments be included in the DCA quarterly published statistics".[17] The Ministry of Justice implemented this recommendation; in its annual report on 2009 statistics, it reported that of 1,209 completed internal reviews, 43% took 20 working days or less, 42% took between 21 and 40 working days and 15% took longer than 60 working days.[18] The Campaign for Freedom of Information argues that the Ministry of Justice statistics are still unsatisfactory because no information is provided about the extent of the longest delays. The Campaign points out that one internal review by the National Offender Management Service is known to have taken 29 months, and that "the inadequate monitoring protects the worst cases from scrutiny and pressure to improve".[19]

There are no immediate penalties for an authority which does not comply with the guidance on time limits, but the Information Commissioner may issue a Practice Recommendation when it appears that a public authority's practice does not conform with the Code of Practice. For example in August 2009 the ICO issued a Practice Recommendation ordering the Ministry of Defence to improve its handling of internal reviews, stating that:

> The ICO has a issued a practice recommendation to the MoD for not implementing the standard target days for completing internal reviews in its processes and for failing, on many occasions, to complete internal reviews within the recommended timescales. In one case a requester waited over 190 working days for a response from the MoD.
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> Prior to serving this recommendation, the ICO made numerous attempts to offer advice and guidance to the department, in the hope that the matter could be resolved without the need for further intervention. ICO guidance states that a reasonable time for completing an internal review is 20 working days and in no case should it exceed 40 working days.[20]

The other public authorities which have received a Practice Recommendation because of slow internal reviews are Cardiff County Council, UK Borders Agency, Greater Manchester Police, Department for Communities and Local Government and the National Offender Management Service.[21]

4 Refusals to provide information

4.1 Use of the exemptions

Under the Act, any information requested must be disclosed unless one or more of the exemptions apply. The Act sets out seventeen exemptions which are subject to a public interest test and eight absolute exemptions. There is now a considerable volume of case decisions available on the Information Commissioner's website, and the database is searchable by exemption and/or by public authority.[22] An overview by Anya Proops of

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17 Constitutional Affairs Committee, Freedom of Information – one year on, HC 991, para 85
18 http://www.justice.gov.uk/publications/docs/foi-statistics-report-2009.pdf
19 www.cfoi.org.uk, Freedom of information statistics, Letter to UK Statistics Authority, 29 January 2010
20 ICO Press Release, 13 August 2009, www.ico.gov.uk
21 Enforcement policy, www.ico.gov.uk
22 Decision notices, www.ico.gov.uk

11KBW Chambers, which sets out some recent key decisions and the use of exemptions, is available online.[23]

4.2 Interaction with the Data Protection Act 1998

The Freedom of Information Act 2000 has a complex interaction with the Data Protection Act 1998. There is a tension between the two in that the primary purpose of FOI is to make provision for the disclosure of information held by public authorities whereas the primary function of the DPA is to make provision for the regulation of processing information about individuals, which includes making restrictions on the circumstances in which it is legal to disclose information about individuals. Requests for personal information about the requester are automatically subject to an absolute exemption in FOI because they are dealt with under the DPA rather than the FOIA. The processing of requests for personal information about other individuals is more complex in that, broadly speaking, they are dealt with under FOI but according to the principles set out in DPA, and they are subject to a public interest test.

According to the Information Commissioner's Office, FOI cases with a data protection element (for example public authorities wanting to redact names of individuals attending meetings) form one of the most onerous parts of the office's FOI caseload, both in terms of volume of cases and in terms of complexity.[24] The Information Commissioner's Office publishes detailed guidance on determining what is personal data in order to help authorities determine what information is likely to fall within the scope of the personal information exemption.[25] The authority must then assess whether "the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles". Where to draw the line between personal privacy and public transparency is an issue which is still being determined by the Tribunal and courts. Issues which have been the subject of debate have included names, role and salary band of officials; MP's expenses; and statistical information (which could be combined with other information and then used to identify individuals)[26].

4.3 Ministerial vetoes

During the passage of the FOI Act, there was debate about the need for a ministerial veto to override the decisions of the Information Commissioner, and the circumstances in which this veto could apply. Since the implementation of the Act, the veto has been used on two occasions. The then Lord Chancellor, Jack Straw, issued the first ministerial veto on 23 February 2009 in relation to a FOI request for cabinet minutes relating to the war in Iraq. This veto overruled a decision of the Information Tribunal ordering disclosure. Further details on this case, and further background information about the veto are provided in Standard Note 11.03.09 (*FoI and Ministerial Vetoes)*.

The Campaign for Freedom of Information called the decision to use the veto "an extremely retrograde step" and said that the government should have abided by the Information Tribunal's decision or appealed against it, but not overruled it. It expressed concern that having been used once, "the veto might now be used in other cases involving the examination of policy at lower levels in government".[27] It also pointed out that in 2008 the

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23 Freedom of Information – Recent Developments, May 2010, http://www.11kbw.com/articles/docs/FOIAAnyaProops.pdf

24 Phone conversation between staff and the Deputy Information Commissioner, 9 June 2010

25 Data Protection Technical Guidance: determining what is personal data, www.ico.gov.uk

26 Eg EA/2006/0060, EA/2008/0074 and EA/2009/0047

27 Press release, 24 February 2009, www.cfoi.org.uk

Australian government had announced the abolition of conclusive certificates under the Australian FOI Act.[28]

However, to date the veto has only been used on one other occasion (in December 2009), in relation to a request for the minutes of the 1998 meetings of the cabinet subcommittee on devolution in Scotland, Wales and the English regions. This veto overruled a decision of the Information Commissioner. The government had appealed to the Tribunal, and the hearing was due to start at the end of January 2010, but the government changed course and instead issued a veto.

The then Information Commissioner, Richard Thomas laid a report before Parliament setting out his comments on the first occasion on which the veto was used. The report included Counsel's opinion on the prospects of successfully challenging the veto. This opinion concluded that a claim for judicial review was unlikely to have any reasonable prospects of success:

> The result is that the Secretary of State can effectively overturn the decision of the Commissioner and the Tribunal. This is a serious incursion on the decision-making mechanism set up by FOIA, but the possibility of an outcome of this kind is inherent in the existence of the section 53(2) power. There is a strong argument that it is undesirable for the Act to include a power of executive veto, but this is of course a matter for Parliament and not for the courts. There may also be questions as to whether the exercise of the section 53(2) power in the present case was desirable in policy terms, or politically expedient: these are not questions for the courts either. The only issue is whether there are reasonable prospects of establishing that the Secretary of State acted unlawfully in issuing the certificate; for the reasons explained above, I consider that the answer is no.[29]

Following the second use of the veto, the current Information Commissioner, Christopher Graham, laid a report before Parliament and confirmed that he intended to do so on each occasion that the veto was used:

> In light of previous commitments made by the Commissioner's predecessor, and the interest shown by past Select Committees in the use of the ministerial veto, the Commissioner intends to lay a report before Parliament under section 49(2) of the Act on each occasion that the veto is exercised. This document fulfils that commitment.
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> Laying this report before Parliament is an indication of the Commissioner's concern to ensure that the exercise of the veto does not go unnoticed by Parliament and, it is hoped, will serve to underline the Commissioner's view that the exercise of the ministerial veto in any future case should be genuinely exceptional. The Commissioner is also mindful that less may be known about any future cases and it is therefore important to continue with the precedent already set.[30]

4.4 Speaker's certificates

The Act also includes special certificate provisions for the House of Commons (and the House of Lords). Under Section 34, a certificate signed by the Speaker of the House of Commons is conclusive evidence that exemption from disclosure is required to avoid an

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[28] Australian Law Reform Commissioner, Press release 22 July 2008

[29] Ministerial veto on disclosure of Cabinet minutes concerning military action against Iraq: Information Commissioner's Report to Parliament, HC 622, Annex 1, para 23

[30] HC 218, Ministerial veto on disclosure of the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions

infringement of the privileges of the House. A certificate signed by the Clerk of the Parliaments provides a similar exemption for the House of Lords. The Speaker may also issue a certificate under Section 36 if he judges it necessary to avoid prejudice to the effective conduct of public affairs.

Since the implementation of the Act, the House has issued 12 certificates under Section 34 and four under Section 36. The Section 34 exemption has most commonly been used in relation to requests for Select Committee papers. The Section 36 exemption has been applied to different types of information, including one request for a copy of a briefing given to a Member by the House of Commons Library.[31]

The Information Commissioner's website documents three cases where the House of Commons had issued a Speaker's certificate and the requester had then applied to the Commissioner for a decision.[32] In two of the cases, the House refused to disclose information on the grounds of Parliamentary privilege. One of these related to information held by the Treasury Committee and the other to information regarding the Register of Members' Interests. In the third case, the House withheld the names of Members' staff on the grounds that the release of this information would be likely to prejudice the effective conduct of public affairs. The Commissioner concluded in all three cases that the House had complied with its obligations and correctly applied the exemptions, and that he had therefore no remit to investigate further.

5 The Information Commissioner

The Information Commissioner's Office is a non-departmental public body sponsored by the Ministry of Justice. Although the Commissioner operates independently in the exercise of his statutory functions, some issues, such as funding and the level of notification fees, require the approval of the Secretary of State. The Information Commissioner is appointed by HM The Queen, on advice from the Prime Minister and in turn the Secretary of State for Justice, following a selection process by his Department. The appointment is for a five year (renewable) term and has independent status, reporting directly to Parliament, with a range of responsibilities under the *Freedom of Information Act 2000*, the *Data Protection Act 1998* and related laws. The functions of the Information Commissioner's Office include promoting good practice, ruling on complaints and taking regulatory action.

The role of Information Commissioner was created in January 2001 following the passing of the *Freedom of Information Act 2000* when the Commissioner's role absorbed that of the Data Protection Registrar. The first Information Commissioner, Richard Thomas finished his second term of office in 2009 and Christopher Graham took over in June 2009. He was previously Director General of the Advertising Standards Authority. The Justice Committee held a pre-appointment hearing with Mr Graham in January 2009, and endorsed his suitability for appointment as Information Commissioner.[33]

5.1 Handling of complaints

Any person who is not satisfied that a public authority has dealt with his request in accordance with the Act, has a right to make a complaint to the Commissioner and ask for a

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31 Information provided by the House of Commons FOI Officer, 7 June 2010

32 Decision notices, www.ico.gov.uk

33 Justice Committee, The work of the Information Commissioner: appointment of a new Commissioner, Third Report of Session 2008-09, HC 146

decision. The Commissioner publishes his decision notices regarding these complaints, except for those which are resolved informally.

The question of whether the Information Commissioner has adequate resources to fulfil his FoI duties, and in particular to deal with the volume of complaints and issue decision notices in a timely way, has been an issue since his office first started receiving complaints in 2005. In June 2006, the Constitutional Affairs Committee commented that:

> The impression given by our witnesses was that the complaints resolution process was unsatisfactory during 2005, but we were pleased to note the efforts being made by the ICO to learn from the first year's experience of a challenging workload in order to investigate complaints more efficiently. We are surprised that the need for additional resources was not identified earlier in 2005, before the backlog became a problem, and we are not convinced that adequate resources have been allocated to resolve the problem, or that they were allocated early enough.[34]

However, despite measures taken by the Commissioner to make processes more efficient, the problem of long delays continued. The Campaign for Freedom of Information published a report in July 2009 which examined the delays in investigating FoI complaints by the Information Commissioner's Office. It analysed 493 formal decision notices published in the 18 months from 1 October 2007 to 31 March 2009, and concluded that on average it took 19.7 months from the date on which a complaint was made to the ICO to the date of its decision notice. Other conclusions were that:

- 46% of cases took between 1 and 2 years from complaint to decision notice;
- 25% of cases took between 2 and 3 years to a decision;
- 5% of cases (23 complaints) took more than 3 years;
- The longest case took 3 years and 10 and a half months; and
- 24% of decision notices were issued within 12 months of the complaint being made.[35]

In a case relating to information requested from the Student Loans Company, the Information Tribunal criticised the Information Commissioner's Office for lengthy delays in investigating the requester's complaint and in publishing its decision notice. In this case the requester made a complaint on 18 July 2006 and the decision notice was published over two years later on 3 November 2008. The Tribunal set out why it believed that such delays seriously undermined the operation of the Act:

> For many requests which are made under the Act, the timeliness of the release of information is important. Where public interests are served by the disclosure of information, they are usually better served by prompt release than by a disclosure which is held up for months or years. The Act is written on this basis: subject to certain exceptions, information is required to be disclosed by the public authority within 20 working days after the request. It seems to us that delays of the magnitude which occurred here seriously undermine the operation of the Act. The right to obtain information that ought to be made public loses much of its usefulness if it cannot be enforced within a reasonable timescale. While it may be that a requester could compel the Commissioner to act promptly by means of an application to the High Court for judicial review, most requesters are unlikely to possess the determination or the funds to make this a practical option. If public authorities come to expect that a reference to the Commissioner may take several years to be dealt with, they may be tempted to withhold information that ought to be disclosed, in the hope that the requester or the

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[34] Constitutional Affairs Committee, Freedom of Information – one year on, HC 991, para 62

[35] Delays in Investigating Freedom of Information Complaints, 3 July 2009, www.cfoi.org.uk

> public will have lost interest in the topic by the time it is finally prised out of them, or that any embarrassment that might have been caused by prompt disclosure will be diminished because of the passage of time. Such a situation would be wholly unacceptable.[36]

In his final Annual Report as Information Commissioner, Richard Thomas commented that:

> Delays have been the most serious problem with freedom of information – within public authorities, within the ICO and at the tribunal stage. We have improved our performance substantially and are meeting our targets, but the delays for most cases which require full investigation remain frustrating and disappointing. A recent article argued that the ICO is the only public sector organisation that needs and deserves more money.[37]

In January 2009, Richard Thomas told the Justice Committee that FoI was "done on a quite a shoestring".[38] The Committee recommended that the Ministry of Justice take the appropriate steps to ensure that there are sufficient resources available to the Information Commissioner to enable the backlog of freedom of information cases to be resolved within a reasonable timescale".[39]

The Campaign for Freedom of Information has suggested that the delays are "sufficiently serious and widespread to undermine the FOI Act's effectiveness and public confidence in it" because:

> (1) By the time information is received, it may be too late to be of any use to the requester. A delay of 2 to 3 years or more in reaching a decision (as happens in over a quarter of cases) means that the information - even if ultimately disclosed - may be too old to be relevant or no longer of interest to the requester.
>
> (2) Requesters who have to wait for such extended periods may be so frustrated by the experience that they become reluctant to use the Act again or to complain to the Commissioner about refusals.
>
> (3) The delays mean authorities which have made mistakes in their handling of requests may carry on doing so for long periods before the Commissioner's decision puts them right. In the meantime, many other requests may also be wrongly refused.
>
> (4) Even where the Commissioner ultimately upholds the authority's approach, the lack of a prompt decision increases the chance of further challenges from other requesters, leading to time-consuming internal reviews and more complaints to the ICO.
>
> (5) If authorities calculate that they can safely withhold information for several years before the Commissioner compels disclosure, a minority may do so knowing they have no good reason, just to 'buy time'.[40]

There is some evidence that the ICO has made progress in reducing the size of its backlog. The 2009/10 Annual Report noted that there had been a significant increase in the number of cases closed in 2009/10 (4,196) compared to 2008/09 (3,019). Over the same period, the

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36 EA/2008/0092, FS50126264, 17 July 2009

37 ICO , Annual Report Summary 2008/09, p 11

38 Justice Committee, The work of the Information Commissioner: appointment of a new Commissioner, HC 146, para 35

39 Ibid, para 36

40 Delays in Investigating Freedom of Information Complaints, 3 July 2009, p 6, www.cfoi.org.uk

number of new cases received increased from 3,100 to 3,734 so the overall effect of the increased output was that at 1 April 2010, the ICO had 1,035 open cases, 439 fewer than at the start of the previous year.[41] The report also noted that at 1 April 2010 the office had 117 cases which were over one year old and 11 over two years old, compared to 418 and 118 respectively at 1 April 2009.[42]

5.2 Powers of enforcement

Practice recommendations

Where the Commissioner considers that the practice of a public authority does not conform with that proposed in the Codes of Practice, he may give that authority a practice recommendation, specifying the steps which the authority must take to conform. The ICO website states that:

> Practice Recommendations will address matters of poor practice, not breaches of the FOIA or Environmental Regulations (EIR). They are non-enforceable and should be viewed as a way to carry out good practice. However, following a Practice Recommendation will help a public authority to satisfy its legal obligations under FOI. We are more likely to issue a Practice Recommendation in response to repeated poor practice, although we may issue one for a single incident of very poor practice.[43]

The ICO website provides details of eight practice recommendations which have been issued since the implementation of the Act (six to central government and one each to a County Council and a police authority). The ICO has primarily used this power to address consistent poor practice with regard to slow internal reviews, but also for repeated public interest extensions and poor records management. Practice recommendations can only be used for measures covered in the Code of Practice and so cannot be used for persistent poor compliance with the initial 20 day time limit.

Information notices

The Commissioner has the power to serve an authority with an information notice requiring it to provide him with specific information within a set time period. Failure to comply can be dealt with as a contempt of court. The ICO has used information notices in specific cases where it needs to see information in order to reach its decisions, and also to set an enforceable time limit for the authority to provide that information. Since January 2005, the ICO has issued 109 information notices to a wide range of authorities and has only had to raise the prospect of contempt proceedings in one of those cases.[44] It does not routinely publish details of information notices but may do in certain circumstances, as outlined in its policy on communicating enforcement activities.[45]

Enforcement notices

The Commissioner has the power to issue an enforcement notice requiring the authority to take specified steps so that it complies with the Act. Non compliance with the measures in an enforcement notice can be dealt with as a contempt of court. The Commissioner has used this power on only two occasions since the implementation of the Act. In the first case in May 2006, the Information Commissioner issued an enforcement notice concerning information on the legality of military intervention in Iraq. The notice required the Legal Secretariat to the

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41 Information Commissioner's Annual report 2009/10, pp27-28
42 Ibid, p 31
43 ICO FOI Practice Recommendations, Policy Statement, www.ico.gov.uk
44 Phone conversation between staff and the Deputy Information Commissioner, 9 June 2010
45 ICO communications and enforcement activities policy, www.ico.gov.uk

Law Office to publish a disclosure statement incorporating the parts of the information requested which were not covered by exemptions. This disclosure statement was published at the same time as the enforcement notice and the Information Commissioner confirmed that it met the requirements of the FOI Act.

A second enforcement notice was published in June 2010. In this case, enforcement action was taken against the Independent Police Complaints Commission (IPCC) because it had repeatedly failed to respond to requests within the 20 day time limit. The ICO confirmed that the IPPC had 69 outstanding requests for information, the oldest of which had been received 11 months earlier. The enforcement notice required the IPPC to respond to all of these overdue requests by a fixed date (30 September 2010). In the ICO press release, the Deputy Commissioner Graham Smith commented that:

> I am concerned that the IPCC has denied people access to information by repeatedly failing to respond to requests in line with the Act. The FOIA gives individuals important rights to access information held by public authorities and despite the current strain on resources all public authorities must remember their responsibilities under the Act. The Enforcement Notice serves as a strong signal to all public authorities that failure to respond is unacceptable. I am pleased that the IPCC reported the difficulties it was facing to us and hope that it will treat this notice with the urgency it requires by putting in place the necessary steps to answer all FOI requests in compliance with the Act.

Failure to comply with this Enforcement Notice could result in the Commissioner referring the matter to the High Court where it may be dealt with as a contempt of court.[46]

Time limit for prosecution of offences under section 77 of the FOI Act

Section 77 of the Act makes it an offence for any person to deliberately destroy, alter or conceal a record after it has been requested with the intention of preventing its disclosure. The offence can only be tried in a magistrate's court, and under section 127(1) of the Magistrates Court Act 1980, proceedings for all such offences must be brought within 6 months of the offences occurring.

In the 2009 'climategate' case, the University of East Anglia was alleged to have deleted emails after they had been the subject of an FOI request. The ICO Annual Report 2009/10 notes that:

> In December 2009 leaked emails revealed possible attempts by staff at the University of East Anglia to circumvent freedom of information legislation and suggested potential offences under the Freedom of Information Act and Environmental Information Regulations. It is a criminal offence to conceal, erase or destroy information once a request to see it has been made.
>
> We did not pursue an investigation into the University of East Anglia under Section 77 of the Freedom of Information Act, which covers the concealing, erasing or destroying of information once a request for it has been made. We have been clear throughout that the legislation requires action within six months of an offence taking place and, as the case came to light outside this time limit, we were not able to take forward a criminal investigation. The Information Commissioner has renewed his call for this anomaly to be addressed.[47]

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[46] ICO press release 16 June 2010, www.ico.gov.uk

[47] Information Commissioner's Annual Report 2009/10, p 42

The Campaign for Freedom of Information has suggested that it is unlikely that offences could ever be detected in time for a prosecution to be brought, given the delays involved in cases reaching and being considered by the Information Commissioner's Office. The Campaign had drafted a proposed amendment to Section 77 which would have allowed a prosecution to be brought within 6 months of the evidence of the offence coming to the Commissioner's knowledge, rather than within 6 months of the offence being committed. The amendment was supported by the Information Commissioner's Office and tabled to the Coroners and Justice Bill by Lord Dubs but was rejected by the government.[48]

5.3 Independence

In 2006, the Constitutional Affairs Committee recommended that consideration should be given to making the Information Commissioner directly responsible to Parliament:

> We are not convinced that the relationship between the DCA and the ICO is working as effectively as it might. We are concerned that resource restrictions and staff salary constraints could limit the Commissioner's performance as an independent regulator and recommend that other reporting arrangements be considered if the recovery plan does not achieve its stated objectives.
>
> We see considerable merit in the Information Commissioner becoming directly responsible to, and funded by, Parliament, and recommend that such a change be considered when an opportunity arises to amend the legislation.[49]

The Justice Committee returned to this issue in February 2009, saying that:

> In our previous form as the Constitutional Affairs Committee we recommended that the Information Commissioner should be directly responsible to, and funded by, Parliament. The Government's position has been that, in its view, the status quo provided for independent decision-making by the Commissioner while permitting the proper scrutiny of public resources.
>
> Mr Thomas, the current Commissioner, told us that direct funding from Parliament was "in principle … the right approach" citing the position of the Scottish Commissioner who is funded by, and accountable to, the Scottish Parliament. Mr Thomas emphasised the constructive relationship between his office and the Ministry of Justice (MoJ) but pointed to the potential for "perception issues" arising from the fact that his funding came from the MoJ's Information Directorate, which also housed the team of officials providing advice to all government departments on freedom of information cases and issues. He described this as "a slightly uncomfortable situation". Mr Graham was cautious. While recognising that this Committee had made "the running" with this recommendation, he confined himself, at this early stage, to saying that the proposition seemed "logical" and that he "would not resist it".[50]

In his first annual report, Christopher Graham made the case for a change in governance structure. Stating that it was time to formalise the governance so that it was "suitable for an independent public official whose accountability is fully to Parliament rather than primarily via a Department of State."[51]

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48 Press Release 29 January 2010, www.cfoi.org.uk

49 Constitutional Affairs Comittee, HC 991, paras 107-108

50 Justice Committee, HC 146, paras 29-30

51 Information Commissioner Annual Report 2010 July 2010 http://www.ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/annual_report_2010.pdf

6 Appeals

The Information Tribunal (previously called the Data Protection Tribunal) was set up to hear information appeals relating to Information Commissioner decisions under the Freedom of Information Act, the Data Protection Act, the Environmental Information Regulations and the Privacy and Electronic Communications Regulations. From 17 January 2010 it became part of the First-tier Tribunal in the General Regulatory Chamber and is now referred to as the First-tier Tribunal (Information Rights). The Principal Judge is Professor John Angel. There are eleven other judges and 34 non legal members of the Tribunal. Decisions are published on the Tribunal's website.[52] The Campaign for Freedom of Information runs seminars from time to time, reviewing recent significant decisions of the ICO and the Tribunal.

First tier tribunal decisions can be appealed to the Upper Tribunal's Administration Appeals Chamber. Some cases can be referred directly from the Information Commissioner to the Upper Tribunal where it is decided, in accordance with Tribunal Procedure Rules, that the Upper Tribunal is better suited to hear that particular case. The High Court previously heard appeals from the Information Tribunal. Cases now go straight from the Upper Tribunal to the Court of Appeal. The Court of Appeal may refer a case to the Supreme Court.

In January 2010, the Supreme Court referred to the European Court of Justice, an issue concerning the interpretation of the public interest test in the Environmental Information Regulations 2004 (EIRs). It asked the Court of Justice to decide whether a public authority should weigh all the interests in favour of disclosure against all the public interests in refusing disclosure in addition to performing the separate public interest test in relation to each exception. The original request had asked Ofcom to provide the precise location of mobile phone base stations in the UK. The Information Commissioner ordered disclosure and this decision was upheld by the Information Tribunal and the Administrative Court, but the Court of Appeal found in favour of Ofcom. Although the case is particular to requests made under the EIRs, it could have implications for the future interpretation of the FOI public interest test.[53]

7 Fees

Any charges made by public authorities for providing information must be in accordance with the FOI fees regulations. The current regulations were published in December 2004. Under this regime, FOI requests are normally answered free of charge, other than administrative costs such as photocopying. Government departments can refuse to answer a request if it would cost more than £600 to find the information and other authorities can refuse if that costs exceeds £450. Section 14 provides measures for authorities to refuse vexatious or repeated requests, and this is supported by guidance from the Information Commissioner.

In October 2006, the government announced proposals to amend the FOI fees regulations to make it easier for authorities to refuse requests on the grounds of cost. A consultation document with new draft regulations was published in December 2006 and a few months later, a further consultation on whether the regime should be changed at all was published. The proposals attracted significant media criticism. Under the proposed regime, public authorities would have been able to take account of the time taken to consider whether to release the information, and to refuse disclosure if this consideration time was over the limit. The Constitutional Affairs Committee conducted a brief inquiry and concluded that it saw no

[52] www.informationtribunal.gov.uk

[53] Freedom of Information, Volume 6, Issue 4, March/April 2010

need to change the fees regulations.[54] Following the consultations, the government decided not to implement to proposed changes, and the fees regulations as implemented in December 2004 remain in force.

8 Publication Schemes

The FOI Act requires each public authority to produce a publication scheme listing the classes of documents which they will make available. This provision was implemented in a phased approach for different sectors of public authorities, with the Information Commissioner approving initial publication schemes over a period of time between 2002 and 2004. Model publication schemes were designed by the Commissioner's office where large numbers of public authorities held similar types of information, and authorities could choose to adopt a model scheme instead of preparing an individual one. The schemes were originally approved for a period of four years, with the intention that the Information Commissioner's Office would reapprove individual schemes after this time. However, the ICO received very few complaints about publication schemes,[55] and following a review, the Commissioner announced a new policy to be effective from January 2009:

> We concluded from the review that both public authorities and user groups prefer the ICO to concentrate efforts on enabling public authorities to develop and clarify the content and improve the maintenance of existing schemes rather than introducing a re-approval process. This matched our own view that in our role as regulator and approver of publication schemes, we would prefer to enable their effective use by guiding, supporting and enabling public authorities by setting good practice guidelines rather than bureaucratic enforcement.[56]

The Information Commissioner's Office issued the following letter to authorities:

> The approval of all current schemes expires on 31 December 2008. The ICO is refreshing its approach to proactive disclosure of information. Our aim is to encourage maximum disclosure but also to reduce the burden on public authorities. The ICO has therefore approved (under section 20 of the Act) a model scheme which is suitable for every public authority to adopt with effect from 1 January 2009. The Model Scheme has been developed in conjunction with representatives from a wide range of public bodies whose assistance we have much appreciated.[57]

Although the key priority for the ICO is to reduce its backlog of complaints, it has also allocated resources to monitoring the extent to which authorities have adopted (and put into practice) the new model scheme which came into effect on 1 January 2009.[58] In December 2009, the ICO published a report setting out the issues relating to central government's adoption and operation of the model publication scheme.[59] The report noted that eight departments had not adopted the model scheme and were in breach of the FOI Act. Across all of the monitored authorities, the greatest area of non-compliance with the model scheme was in relation to the proactive release of financial information.

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54 Constitutional Affairs Committee, Freedom of Information: Government's Proposals for Reform, HC 415
55 ICO Policy on Publication Schemes, June 2006, www.ico.gov.uk
56 Publication schemes, www.ico.gov.uk
57 Ibid
58 Ibid
59 Ibid

8.1 Disclosure logs

There is no requirement under the Act proactively to publish details of the information released in response to requests (or the information itself), and the model publication scheme does not require organisations to do this. Some authorities do include disclosure logs in their publication schemes, but the House of Commons does not. The ICO view is that disclosure logs are good practice rather than mandatory: the effort involved in publishing some information could be disproportionate to the benefits and the authority should make a judgement about whether information released is likely to be of wider interest.[60]

9 The Future

9.1 Constitutional Reform and Governance Act 2010

In October 2007, the Prime Minister announced a review to be chaired by Paul Dacre, managing editor of Associated News, of the 30 year rule governing the release of records in the National Archives. In February 2010, the government announced that old government records would be publicly available in the National Archives after 20 years, instead of 30 years, and that a new exemption for the Royal Family would be created.

Various changes were made to the FOI Act by the *Constitutional Reform and Governance Act 2010.* The section 37 exemption relating to the communications with members of the Royal Family was extended, and the period at which a record becomes a historical record was, in most cases, reduced from 30 years to 20 years. A proposal to exempt Cabinet papers from FOI was not included in the scope of the Act. These changes have not yet been brought into force.

9.2 Extending the Act to other authorities

In 2007, the Prime Minister announced a consultation on extending the scope of the FOI Act to private bodies with public functions and contractors providing some services on behalf of public authorities. The Ministry of Justice published a response to the consultation in July 2009.[61] This stated that the Government would consult academy schools, ACPO, the Financial Ombudsman Service and UCAS, with a view to their designation under an initial order, and that it would reflect on the experience of these newly designated bodies before assessing the case for a further extension of the Act.

There has been continuing debate about extending FOI to private sector providers, as more public services are outsourced. The Information Commissioner, Christopher Graham has been quoted as saying that the proposed extension was insufficient, and that other bodies such as “the big transport undertakings, the utilities, housing and social services” should also be considered.[62] The Scottish Government is also in the process of considering whether the FOI (Scotland) Act should be extended to additional bodies. In December 2009 it published a discussion paper setting out the factors for and against extending coverage to different sectors.[63]

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60 Phone conversation between staff and the Deputy Information Commissioner, 9 June 2010

61 www.moj.gov.uk , Freedom of Information Act 2000: Designation of additional public authorities, Response to Consultation, 16 July 2009

62 www.publicservant.co.uk, April 2010, “Getting tougher to unlock information”

63 Coverage of the FOI (Scotland) Act 2002, Summary Report and Conclusions, December 2009

9.3 Future reform

The Conservative manifesto did not include any specific commitments about amending the FOI Act. The Liberal Democrat manifesto included a Freedom Bill which is available at http://freedom.libdems.org.uk/the-freedom-bill/full-text-of-the-freedom-bill/. Part 5 of the Bill proposed three specific amendments to the Act, including the repeal of the Ministerial veto. The coalition's programme for government included a commitment to implement a programme of civil liberty measures, including commitments to introduce a Freedom Bill and to extend the scope of the Freedom of Information Act to provide greater transparency.[64] On 31 May 2009, the Prime Minister launched a plan to open up Government data to the public. In a letter sent to all Government departments, he set out plans to publish more data and set deadlines to public bodies for the publication of information on topics including crime, hospital infections and Government spending.[65]

A review of information law in the new Parliament by Timothy Pitt-Payne QC is available online.[66] The BBC's Martin Rosenbaum described the coalition programme as "surprisingly lacking in further detail, given the campaign promises made by both Conservative and Lib Dem parties".[67] In particular, he highlighted the absence of any commitment to extend the Act to other authorities.

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64 http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf , Chapter 3 Civil Liberties

65 http://www.number10.gov.uk/news/statements-and-articles/2010/05/letter-to-government-departments-on-opening-up-data-51204

66 http://www.11kbw.com/barristers/detail.php?bid=21

67 http://www.bbc.co.uk/blogs/opensecrets/2010/05-coalition_plans_on_foi.html