The Odysseus Trust

RESPONSE TO THE INDEPENDENT COMMISSION ON FREEDOM OF INFORATION

Call for Evidence

19 November 2015

Introduction

1. The Odysseus Trust[1] is a non-profit company limited by guarantee which seeks to promote good governance and the effective protection of human rights. The Trust is directed by Lord Lester of Herne Hill QC, who is assisted by his senior researcher Caroline Baker and Parliamentary Legal Officers, Clare Duffy and Zoe McCallum.

2. This document responds to the Call for Evidence made by the Independent Commission on Freedom of Information on the Freedom of Information Act 2000 ("the Act").

Deliberative space

3. We agree that a "safe space" is required for the frank discussion necessary for good government and comprehensive policy formulation; policy decisions cannot be conducted in a goldfish bowl. But there is a difference between a safe space and "a desire for secrecy across a broad area of public sector activity."[2] Absolute exemptions are too broad and protect unnecessary secrecy in government. They are contrary to the public interest in transparency, openness and accountability. There are already strong and sufficient safeguards in the Act through the qualified exemptions provided in sections 35 and 36 and the application of the public interest test on a case-by-case basis.

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[1] For more information on the work of the Trust, please visit www.odysseustrust.org

[2] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p.4, §10

4. In their 2012 report *Post-legislative Scrutiny of the Freedom of Information Act 2000*, the House of Commons Justice Select Committee investigated the subject of policy formulation, safe spaces and the chilling effect. The Committee took evidence from former Ministers and civil servants including the Rt. Hon. Jack Straw MP, Rt. Hon. Francis Maude MP and Lord O'Donnell. They all thought that the freedom of information regime had resulted in a marked chilling effect. According to their evidence the "chilling effect" had resulted in less information being recorded in writing, more oral briefings and meetings taking place in more informal settings where they could not be recorded (e.g. by mobile phone).

5. On the other hand the Constitution Unit's research indicated only a marginal effect. They also pointed out that a shift to informal meetings and fewer records is influenced by a range of drivers other than the Act including: "time and resource pressure; technology, news media and electronic communication; increasing numbers of civil servants from private sector backgrounds; leaks; the longstanding front-page test [caution about expressing something on paper which would be embarrassing to read in a newspaper, which pre-dated FOI]; more informal workspace; and other accountability and access mechanisms, such as select committee inquiries or judge-led inquiries."[3]

6. The Justice Select Committee's inquiry was unable to conclude with any certainty that an adverse chilling effect has resulted from the Act. The Committee concluded that the evidence did not support any major reduction in the openness created by the Act.[4]

7. We endorse the Justice Select Committee's view that the increased openness introduced by the Act is of value. Absolute exemptions would lead to a return to a culture of unnecessary secrecy in government. We support the maintenance of the qualified exemptions in sections 35 and 36 and the continued application of the public interest test which takes into account timing, the need for deliberative spaces, and the facts and circumstances of individual cases.

[3] Justice Select Committee's report, *Post-legislative scrutiny of the Freedom of Information Act 2000,*First Report of Session 2012-2013, 26 July 2012, HC 96-I, p.71, §188

[4] Justice Select Committee's report, *Post-legislative scrutiny of the Freedom of Information Act 2000,*First Report of Session 2012-2013, 26 July 2012, HC 96-I, p.75, §200-201

8. The value of the public interest test is that it requires the Government or other public authority to weigh the public interest in maintaining the exemption against the public interest in disclosure. According to the Information Commissioner's Office Guidance, public interest is defined as public good, not what is of interest to the public, and not the private interests of the requestor.[5]

9. The Commissioner's and the Tribunal's approach to the public interest test is that policy discussions will not normally be disclosed if they were requested *before* the policy decision was announced. We agree with the Information Tribunal that:

> "Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."[6]

10. If a request is made *after* the policy announcement, the Commissioner or Tribunal will consider whether the public interest in preventing that "chilling effect" outweighs the public interest in disclosure. Where discussions are very frank, this will weigh heavily against disclosure. If they are anodyne or old, disclosure is more likely. But all the circumstances are taken into account.

11. The Information Commissioner is alert to the need for a deliberative space when applying the public interest test. In 2015 he upheld complaints against public authorities applying a section 35 exemption in only 1.7% cases and a section 36 exemption in only 4.3% of cases. We share his concern that a "very small number of high profile cases may be having a disproportionate effect on perceptions of FOIA within government, particularly at a senior level."[7] We believe that such a

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[5] Information Commissioner's Office, *Guidance to the public interest test: Freedom of Information Act*, version 2, p.2

[6] *The Department for Education and Skills v Information Commissioner and the Evening Standard,* Information Tribunal Appeal No: EA/2006/0006

[7] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 6, §15-16

small number of cases does not warrant replacing the application of the public interest test with absolute exemptions for sections 35 and 36.

12. The Act currently strikes the correct balance between protecting the deliberative space and public transparency. Decisions should continue to be made by applying the public interest test on a case-by-case basis.

Cabinet papers

13. The Act recognises the public interest in maintaining the convention of Ministerial collective responsibility through the protection afforded by sections 35 and 36. In particular, section 35 exempts Ministerial communications, and section 36 exempts information which would prejudice Ministerial collective responsibility if disclosed. Both of these exemptions are qualified and subject to the public interest test. Sections 35 and 36 are mutually exclusive, although they can be claimed in the alternative. Any decision to withhold Cabinet material under sections 35 and 36 is subject to appeal to the Information Commissioner, Information Tribunal and courts.

14. The Information Commissioner rightly recognises that there is a strong public interest in protecting the convention of collective Cabinet responsibility. Unlike the public interest in protecting the safe space for policy deliberation, he considers that the public interest in protecting the convention continues after a decision is made:

> "Whether or not the issue is still 'live' will not reduce the public interest in maintaining collective responsibility (although it will affect the weight of related safe space arguments). This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken."[8]

15. The qualified exemptions in sections 35 and 36 are all subject to the public interest test on a case-by-case basis. The Information Commissioner adopts a nuanced approach and makes decisions both in favour and against disclosure. In a report on the minutes about devolution he maintained exemptions where the content would have identified Ministers or dealt with more sensitive areas of policy, but

[8] Information Commissioner's Office, *Guidance to Government Policy (Section 35): Freedom of Information Act*, version 2.0, §212

considered that disclosure of the remainder of the minutes "would not be likely to harm the convention of collective Cabinet responsibility given the passage of time."[9] The Commissioner also considered the public interest in informing debate on devolution, and the public interest in transparency in decision-making.

16. There is insufficient evidence to support the claim that the Act has had a chilling effect on policymakers and interdepartmental discussions. Instead, the evidence indicates that current qualified exemptions contained in sections 35 and 36 provide sufficient protection for information relating to the process of collective Cabinet discussion. In 2012-2015 the Information Commissioner found that public authorities had applied section 35 and 36 exemptions correctly in 87% of cases which engaged collective responsibility arguments.[10]

17. We believe that the requirement to weigh the public interest in maintaining the exemption against the public interest in disclosure ensures transparency and openness in decision-making without harming the convention of collective Cabinet responsibility. We agree with the Information Commissioner that the small number of cases where the public interest overrides the principle of collective Cabinet responsibility (such as the 2003 Cabinet minutes on the Iraq War) are "exceptional and demonstrate the importance of the public interest test."[11]

18. We welcome the 2010 amendment to the Public Records Act 1958 decreasing the period after which records of historical interest are transferred to The National Archives from 30 years to 20 years. This means that the section 35 and 36 exemptions cannot be claimed after 20 years. However, many documents could, and should, be made available in a shorter time period. This could be achieved by applying the public interest test to documents younger than 20 years old. Such documents would be disclosed only when concerns about safe spaces and the convention of Ministerial collective responsibility either no

[9] House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000,*First Report of Session 2012-2013, 26 July 2012, HC 96-I, §172
[10] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 11, §28
[11] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p.12, §30

longer remain valid or are outweighed by the strong public interest in disclosure.

Risk Assessments

19. The Call for Evidence states that risk assessments are another example of the tension between the public's right to know, and the need for public bodies to have an internal deliberative space. Two of the seven Cabinet vetoes have been in respect of risk assessments (the NHS reforms risk register and the HS2 project assessment review). Risk registers can be shared between Ministers, and between officials during the development of policy.

20. Section 35 of the Act provides an exemption for information which relates to formulation or development of government policy. This section has previously been used to withhold risk assessments associated with a policy or programme. We oppose absolute exemptions for risk assessments. The section 35 qualified exemption appears to be working well.

21. In the case of the badger cull disclosure the Upper Tribunal ordered DEFRA to disclose "anodyne" risk registers about the badger cull. The Upper Tribunal accepted that if the material had been disclosed at the time of policy development, then it would have undermined the ability of the project board concerned to think in private. But by the time of the request's refusal, two years later, the Government had announced a limited cull and the arguments against disclosure no longer carried weight. The potential risks were now well known and the suggested counter measures revealed "nothing surprising or informative."[12] We see no reason why "anodyne" information such as this should not be disclosed.

22. In the case of the disclosure of the NHS reforms risk register the Commissioner did not accept that disclosure of the register would affect the "frankness and candour" of future risk registers and did not accept that there was evidence of a chilling effect. Nor did he accept that disclosure of this register would set a precedent for the general

[12] Department for Environment Food and Rural Affairs v. The Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC).

disclosure of future risk registers. He stated that there would be circumstances in which it would be proper to withhold risk registers.[13]

23. Risk assessments should remain subject to the qualified exemption and public interest test provided for under section 35 of the Act. There is no evidence that current provisions have led to an adverse "chilling effect" or that the disclosure of risk registers has jeopardised government projects. Any reform to remove risk registers from the scope of the Act or to exempt absolutely such information from requests would be unjustified.

The Cabinet Veto

24. The Ministerial veto provided for in section 53 of the Act is used sparingly – it has only been exercised a total of seven times since 2005.[14] It cannot be used in relation to environmental information, as a veto would be incompatible with the UK's international obligations under EU law and the Aarhus Convention. When considering the existence and strength of the executive veto, the impact of any significant divergence between the two regimes should be carefully borne in mind.

25. Following the recent Supreme Court judgment in *Evans* the circumstances in which the executive veto can be exercised are very limited. However, we disagree with the Call for Evidence that the Black Spider judgment "raised serious questions about the constitutional implications of the veto, the rule of law, and the will of Parliament." On the facts of the case the veto was used unlawfully against the Upper Tribunal decision, rather than against the Information Commissioner's decision.

26. This is the correct position. As Lord Neuberger held in *Evans* there is a basic principle that a decision of a court is binding between two parties and cannot be ignored or set aside by anyone, including the executive –

[13] Information Commissioner, *Freedom of Information Act 2000: Ministerial veto on disclosure of the Department of Health's Transition Risk Register*, Report to Parliament, HC 77, Session 2012-13, § 7.5-7.9

[14] Twice in relation Cabinet papers about the Iraq War; twice in relation to Cabinet papers concerning devolution; in relation to a Department of Health risk register; in relation to HRH Prince of Wales' correspondence; and in relation to HS2 risk assessments.

save in rare cases where there has been a material change of circumstances since a decision was taken.[15] It is of constitutional importance that the decisions of an executive must be judicially reviewable.[16]

27. There is a tension between the section 53 veto and section 57 appeal of a decision of an Information Commissioner. This tension was not resolved in the *Evans* case and in our opinion is not resolvable without undermining the rule of law, *unless* there were further restrictions or conditions introduced on the executive's ability to issue a section 53 certificate (notwithstanding the differences between a decision of the Commissioner and that of a court of record).

28. As a matter of principle it would be preferable to remove the executive veto over the release of information. Instead, all information requests should be subjected to a public interest test on a case-by-case basis. Sufficient protection is offered to the executive through a multiple-stage appeal process.

29. The scrutiny of the Commissioner and the Tribunal offers further protection and respects the safe space for policy making. Government statistics state that of the 263 appeals completed at the time of the Government's 2014 monitoring the public authorities' initial handling of the request was fully upheld in 81% of cases and partially upheld in a further 7% of cases. Therefore in only 12% of cases (31 in total) was the requestor's application upheld.[17] This demonstrates the seriousness with which the Information Commissioner considers the need to balance a "safe space" for policy making against the public interest.

30. The Upper Tribunal considers requests on judicial review principles. The process of judicial review contains numerous safeguards for the Government in the Civil Procedure Rules Part 54 – such as the three month application time limit, disclosure duties, permissions hearing, the residual and discretionary character of the remedies, and (in the event of a ruling against the Government) the right to appeal. Judicial review is limited to the legality of the Information Commissioner's decision, rather than with the merits of the request or reconsideration

[15] *R (Evans) and Anor v Attorney General* [2015] UKSC 21, §52
[16] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147
[17] *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4,* Ministry of Justice Statistics Bulletin, 23 April 2015, pp.18-19

of the public interest test. Of the 34 cases brought by requestors in 2014-2015 88% were either refused permission to appeal, were dismissed or withdrawn.[18] In cases where the applicant's claim is upheld, it remains open to the Government to appeal an Upper Tribunal decision to the Court of Appeal or Supreme Court.

31. Removing the veto would not result in a chilling effect on policy formulation. Currently it is one of two statutory safeguards to the "safe space" alongside exemptions to the right of access to classes of information in certain circumstances. The exemptions safeguard would remain, although ideally all exemptions should be qualified by a public interest test. We acknowledge that this provides less clarity for policy makers than an absolute class based exemption. However, a public interest test is in keeping with the object and spirit of the Act – "to encourage more open and accountable government" and to "empower people, giving everybody the right of access to the information that they want to see."[19]

32. In principle we oppose a Ministerial veto, but we agree with the Information Commissioner that:

> "[T]he possibility of a veto of the Commissioner's decisions, in exceptional cases, is a more proportionate response to the concerns [about the impact of the Act on deliberative space and collective responsibility], compared to converting sections 35 and 36 into absolute exemptions. This would not exclude the possibility of any use of the veto being judicially reviewed."[20]

33. If a veto is retained then there needs to be greater clarity about the circumstances in which it may be exercised. It should only be used against an Information Commissioner's decision in the rarest of circumstances. Guidelines ought to be published to prevent its overuse and abuse by "appropriate persons" authorised to issue certificates.

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[18] Independent Commission on Freedom of Information, *Call for Evidence* 9 October 2015, p.24

[19] *Your Right to Know – Your views on the White Paper,* 28 February 1998

[20] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 15, 45

Enforcement and Appeals

Enforcement

34. There are often substantial delays by public authorities in answering requests and, in particular, conducting internal reviews. In 2014 37% of internal reviews took over 20 working days, with 5% taking between 60 days and 100 days, and 2% more than 100 days.[21]

35. The lack of a statutory time limit for internal reviews elongates the process for both requestors and public authorities. The Code of Practice issued under section 45 of the Act merely states that internal review procedures should "encourage a prompt determination of the complaint."[22] This should be improved by introducing a statutory time limit for internal reviews, as occurs under the Environmental Information Regulations and the Scottish Freedom of Information Act. The Freedom of Information Act (Scotland) 2002 stipulates that an internal review should be completed within 20 working days following receipt of the request for review.[23] This would be an appropriate limit in the rest of the UK, and would match the limit for answering requests.

Appeals

36. The appeals process should remain the way it is. The Call for Evidence cites two drawbacks to the current system:

    i. that a multi-layer appeal system is expensive for both public bodies and requestors, and that it can be a lengthy, drawn-out process in some cases.

    ii. that the appeals process focuses on the Information Commissioner's decision rather than the public authority's decision to withhold, and that as a result the original requestor sometimes ceases to play an active part in the proceedings.

[21] *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4,* Ministry of Justice Statistics Bulletin, 23 April 2015, p.17
[22] 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, Issued under section 45 of the Act, HC 33, 25 November 2004, p.11, §39.
[23] Freedom of Information Act (Scotland) 2002, section 21(1).

37. We reject both these arguments as grounds for reducing the appeals protections currently in place:-

    i. Appeals give rise to a lengthy, drawn-out process, but it is important to retain a sense of proportion. Government statistics show that in 2014 there were 395 appeals to the Information Commissioner's Office representing just 0.8% of all requests received.[24] Moreover, the Commissioner's decision was upheld in 77% of decisions which reached a First Tier Tribunal.[25] As the Call for Evidence states only 39 cases in 2014-2014 were decided by the Upper Tribunal, and further appeals to the Court of Appeal and Supreme Court are rare. The vast majority of cases are not embroiled in a drawn-out process.

    ii. The appeals system plays an appropriate role in relation to the rest of the legal framework. To claim otherwise would be to attempt to undermine the role and importance of judicial review. To go further by removing the right to judicial review would be an affront to the rule of law. This would in turn undermine the principle of legality that "means that Parliament must squarely confront what it is doing and accept the political cost."[26]

38. The suggestion made by the Call for Evidence that the appeals process should be restructured is not borne out by the comparative evidence nor by the statistics presented. The current system plays an appropriate role in relation to an established system of judicial review. To dilute the strength of the system currently in place would be a threat to the rule of law.

Burdens and Fees

Burden

39. The Act gives good value for money given the relatively low costs of handling freedom of information requests combined with the benefits

[24] *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4,* Ministry of Justice Statistics Bulletin, 23 April 2015, p.5
[25] Independent Commission on Freedom of Information, *Call for Evidence,* 9 October 2015, p.16
[26] *R v Secretary of State for Home Department, Ex p Simms* [2000] 2 AC 115, 131 E-F, *per* Lord Hoffmann.

it confers both in increasing the democratic accountability of government and in operating as a deterrent to wasteful public spending.

40. The Call for Evidence suggests that the Act imposes an excessive cost burden on public authorities. But, the statistics cited are selective. In particular the methodology of the Frontier Economics 2006 report has been criticised by the Constitution Unit for overstating the number of requests received and inflating the average costs incurred as a result of requests.[27]

41. The Act should be viewed in the context of broader communications budgets. Central Government departments spend less than £6m per year responding to freedom of information requests. Press Gazette research finds this expenditure represents around 0.001% of the £577.4bn central Government is due to spend in the 2015 fiscal year, and is less than 2% of the estimated £289m the Government Communication Service said it would spend on external communications activities in 2014/15.[28] An illustrative example of the relative value offered by the Act is the Department of Work and Pensions "workie" advertising campaign to promote the Government's workplace pensions reforms. That campaign reportedly cost £8.54million to develop - outstripping the freedom of information budget across all central government departments for the same period.[29]

42. The Call for Evidence highlights the cost of the Act, but gives no indication of the savings resulting from freedom of information requests. To calculate the costs associated with the implementation of the Act is to examine only one side of the equation. Freedom of information requests can be a considerable deterrent against wasteful spending. The lack of attention given to the cost-saving impact of the

[27] Anna Colquhoun, *The Cost of Freedom of Information,* Constitution Unit, University College London, December 2010, www.ucl.ac.uk/constitution-unit/research/foi/countries/cost-of-foi.pdf; Martin Rosenbaum, BBC Blog, ww.bbc.co.uk/blog/opensecrets/2006/10

[28] William Turvill, *Cost to Central Government of complying with FOI 50 times less than external comms budget*, Press Gazette 13 October 2015.

[29] www.independent.co.uk/news/uk/politics/iain-duncan-smith-spends-85m-on-hairy-monster-cartoon-to-promote-workplace-pensions-a6702686.html

Act was highlighted in the Justice Select Committee's report on post-legislative scrutiny of the Act.[30]

43. The Act contains controls to ensure the burden on public authorities is not excessive. Section 14 of the Act excuses public authorities from the duty to comply with a "vexatious" or repetitious request was included in the Act to prevent any disproportionate burden. The Information Commissioner argues it is surprising "that more public authorities don't use these provisions more often, but instead complain about having to deal with requests which could validly be described as vexatious."[31] This provision should be retained.

44. If local authorities are feeling burdened with freedom of information requests then greater use of these provisions should be made. If there is a lack of knowledge about section 14, then local authorities require greater training in order to use the Act effectively. The Information Commissioner has indicated that he would be open to strengthening the guidance on section 14 by putting it on a statutory basis in a special code of practice issued under section 45.[32] We support this sensible suggestion.

45. Another control to reduce any excessive burden on public authorities is the cost limit contained in section 9. Under the current Regulations[33] if a request exceeds "the appropriate limit" of £600 for a national government and £450 for local authorities, then a public authority may:-

    i. refuse to supply the information altogether; or
    ii. supply the information provided the requestor agrees to pay the full cost, i.e. £600/450 plus the surplus.

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[30] House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000*,First Report of Session 2012-2013, 26 July 2012, HC 96-I, pp. 23-24, §51-53.

[31] Christopher Graham, *Working Effectively: lessons from 10 years of the Freedom of Information Act,* 1 October 2015. See also: Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 18-20, §58-62

[32] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 20, §62

[33] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

46. The cost control is objectionable. It grants public authorities the discretion not to consider a claim at all if it exceeds the cost level, which frustrates the objective and purpose of the Act. The cost involved in obtaining information should not bar the claim in and of itself. If a claim is expensive then, at most, a requestor should have to make a reasonable contribution towards the costs.

47. If the cost control is retained, then it should not be expanded. Currently, in determining the appropriate limit, public authorities may include the costs of (i) determining whether the authority holds the information, (ii) locating the information, (iii) retrieving the information and (iv) extracting it. These limits guard against public authorities dragging their feet when processing freedom of information claims by excluding, for example, the time taken to consider the public interest test or to redact information.

48. The list of actions for determining the appropriate limit should not be expanded; any expansion would go against the spirit of openness and accountability underpinning the Act. Expansion could also, as the Information Commissioner argues, create a "perverse incentive" for public authorities to retain inefficient practices for handling freedom of information requests, so that "the requester pay[s] for the public authority's shortcomings."[34]

49. When considering whether the cost of the Act poses a disproportionate burden on public authorities it also needs to be queried how costs arise. The Justice Select Committee's report suggested that a reduction in the cost can be achieved if public authorities handle freedom of information requests in a streamlined, efficient and well-thought through manner.[35] The routine proactive publication of information online by public authorities could potentially reduce the number of requests received and their associative costs.

Fees

50. The Call for Evidence suggests that fees would alleviate the burden felt by public authorities. We strongly oppose the introduction of

[34] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 20, §65
[35] House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000,*First Report of Session 2012-2013, 26 July 2012, HC 96-I, pp. 37-38

application fees for making freedom of information requests. There are several objections to such a move:

i. First, the introduction of fees could invoke a two-tier system whereby persons invoking their statutory rights would encounter a payment requirement, whereas persons requesting information in ignorance of their rights would not.

ii. Secondly, fees would likely deter people from using the Act. This would particularly affect those on limited incomes and individuals making multiple requests, such as journalists and NGOs. It would also prejudice against a requestor in a dispute with a public authority requiring multiple requests to a variety of agencies.

iii. Any attempt to 'target' fees to certain classes of requestors, such as journalists or commercial companies, would violate the principle of requestor anonymity and be expensive to implement.

51. Fees will inevitably deter and inhibit the exercise of the public right of access to information and of freedom of expression. The Irish example provides an illustration of the deterrent effect of fees. When the Irish Freedom of Information Act was introduced in 1997 it did not include a fee for filing requests. That Act was amended in 2003 to introduce a charge of €15 per application, except for requests for personal information. Charges of €20.95 were also imposed for "search and retrieval" and copying, but *not* for reviewing the requested records to determine whether they might be exempt. This led to a significant drop in applications from 18,443 requests in 2003 to 10,704 in 2007. [36] In 2014 the application fee was removed.

52. The 2009 decision not to introduce charging regulations under the Act was the correct one. Fees should not be introduced for an application for information. We agree with the Information Commissioner when he states that the imposition of application fees would be "a tax on the

[36] *Freedom of Information The First Decade*, Office of the Information Commissioner, May 2008, p.15

exercise of a democratic right – before it was clear what information could or could not be released."[37]

53. It is notable that few public authorities choose to impose the fees which can be currently charged when the costs of handling a request exceeds the section 9 cost limit. Of the 46,806 requests received in 2014 only 624 (1.3%) were subject to a fee being levied by the authority involved, of which 621 were levied by the National Archives.[38] The National Archives charged under a separate fees regime in section 19; therefore it appears that a maximum of 3 requests during 2014 used section 9.

54. However, if search fees are introduced and the section 9 provisions are used more often, then public authorities should charge search fees *only* to the first requestor who seeks particular materials. The fees should be waived for any subsequent requestors and where possible the information should be published online.

55. Fees should not be applied selectively to classes of requestors such as journalists or commercial entities. Suggestions that requestors be identified (and certain requestors charged) overlook the primary aim of the Act: to create a statutory right of access to information. To achieve that aim the focus is whether information ought to be disclosed in the public interest, rather than whether the person requesting the information is of sound character and motivation.

56. The former Lord Chancellor, the Rt. Hon. Chris Grayling MP, considers that the Act has been "misused by those who use it effectively as a research tool to generate stories for the media."[39] This statement undervalues the importance of journalists in upholding freedom of information and expression. The media are the eyes and ears of the public and use the Act for the public interest by holding public authorities to account. We strongly oppose any attempt to make it more difficult or expensive for journalists to use the Act.

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[37] Christopher Graham, *Working Effectively: lessons from 10 years of the Freedom of Information Act,* 1 October 2015, https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/

[38] *Freedom of Information Statistics: Implementation in Central Government 2014 Annual and Q4,* Ministry of Justice Statistics Bulletin, 23 April 2015, p.9

[39] www.independent.co.uk/news/media/press/freedom-of-information-laws-misused-by-journalists-says-chris-grayling-a6713866.html

57. In addition, a requirement that individual requestors are identified would be difficult to implement and enforce. The Justice Select Committee noted that such a requirement "could be easily circumvented by requestors using the name of a friend, family member or other person. Attempts to police such a system, either by public authorities or the Information Commissioner, would be expensive and likely to have limited effect."[40]

58. Introducing fees differentiating between types of request or requestor would be costly to implement and would create an administrative burden on public authorities. It could result in discriminatory differences of treatment. The Information Commissioner notes that such subjective charging mechanisms are likely to increase the number of internal reviews for public authorities and procedural complaints to the Commissioner.[41] We believe that fees should be strongly resisted for reasons of both principle and practicality.

Conclusions

59. We recognise the importance of the need for public authorities to have an internal deliberative safe space, the importance of collective Cabinet responsibility and that risk registers should involve candid assessment of risks. But absolute exemptions are unnecessary as there are already sufficient safeguards in the Act through the qualified exemptions provided in sections 35 and 36 and the application of the public interest test on a case-by-case basis.

60. The existence of the Cabinet veto is objectionable in principle, especially given the existence of a multi-stage appeal process available to the Government. However, if the veto is retained, then it should only be used against an Information Commissioner's decision in the rarest of circumstances and guidelines ought to be published to clarify and regulate its use.

61. A statutory time limit should be introduced for internal reviews by public authorities. A 20 day limit would be appropriate and align with the limit for answering freedom of information requests.

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[40] House of Commons Justice Select Committee, *Post-legislative scrutiny of the Freedom of Information Act 2000,* First Report of Session 2012-2013, 26 July 2012, HC 96-I, p. 35, §80-82

[41] Information Commissioner's Office, *Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner,* 16 November 2015, p. 20, §64-65

62. The appeals system currently in place plays an appropriate role in relation to the rest of the legal framework and does not require reform.

63. Public authorities are sufficiently protected in the Act from being excessively burdened by freedom of information requests. The cost incurred by authorities should be tackled through training, the introduction of efficient streamlined procedures, and the routine proactive publication of information online.

64. We strongly oppose the introduction of further fees, especially application fees. Fees would run contrary to the spirit of the Act, stifle free speech and erode government transparency. The identity of the person submitting a freedom of information request should remain anonymous.

65. Overall, we believe that the Act represents good value for money and increases the democratic accountability of government. Reform should only be made to strengthen the Act in line with the Justice Select Committee's 2012 Report.