



The Odysseus Trust

RESPONSE TO THE CONSTITUTIONAL AFFAIRS COMMITTEE

House of Commons

Call for Evidence

‘Freedom of Information Follow Up’

16 February 2007

1. The Odysseus Trust¹ 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, together with his Parliamentary Legal Officers, Kate Beattie and Bonita Meyersfeld.
2. This document responds to the call by the Constitutional Affairs Committee for evidence regarding the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 (“the proposed regulations”).

¹ For more information about the work of the Trust, please visit www.odysseustrust.org.

A. Executive Summary

3. Public access to government and other official information is a civil right. The right of public access must not be restricted arbitrarily or unnecessarily. Because individuals in a democracy have a right to transparent, open and good government, the enjoyment of the right of public access should not be conditional upon the ability to pay a fee, and any charges must be reasonable and objectively justifiable.
4. There are serious deficiencies with both the current regulations and the proposed regulations. The deficiencies relate to the way in which fees are calculated, aggregated and charged, and the absence of effective safeguards against abuse.
5. The proposed regulations go far beyond remedying the concerns raised by the Department of Constitutional Affairs (“DCA”) and create fundamental problems. Public officials would be endowed with excessively wide powers to reject applications for access to information, about the workings of government and other public bodies irrespective of the substance of the applications and the public interest to which they may relate. This would frustrate the object and purpose of the Freedom of Information Act 2000 (“the Act”).

B. Background

6. In January 2005 the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 came into force. These contained the following key provisions:-

- a. Public authorities may refuse to comply with a request for information if the request would exceed “the appropriate limit” which, in the case of central Government and Parliament is £600 and £450 for the wider public sector.
- b. 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.
- c. The standard rate for a public official’s time is £25 per hour.
- d. When estimating whether a request will exceed the cost threshold, public authorities may aggregate the costs of two or more requests received from the same person or from persons who appear to be acting in concert or in pursuance of a campaign, provided the requests relate to the same or similar information and are received within a period of 60 working days.

7. The DCA commissioned an independent economic review of the 2004 regulations, which was published in October 2006. The review concluded that:

- a. a small percentage of requests place a disproportionate burden on the resources of public authorities, particularly in respect of officials’ time; and
- b. a small number of regular users of the Act account for a substantial proportion of the overall costs of delivering freedom of information.² The DCA, however, does not specify

² Department of Constitutional Affairs, Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 Consultation Paper, paragraph 3, page 3.

the nature of the burdensome requests. It could well be that the information that the DCA finds is costly to review and disclose is in fact information of public interest.

8. In response to the review, the DCA drafted new regulations, incorporating the review's recommendations. The DCA has requested comments concerning these regulations.

C. Problems

9. We have four main objections to the proposed regulations:
 - a. They would preserve the public authority's discretion to refuse information requests outright solely on the ground of burdensomeness.
 - b. Fees would be imposed irrespective of the public interest in the information.
 - c. Broad discretionary powers would be delegated with wide scope for abuse and inadequate safeguards.
 - d. By imposing hefty fees, legitimate as well as vexatious claims would be affected. Requesters making genuine claims might not be able to meet the costs and, therefore, might well be deterred from pursuing them.

Problem One: The new regulations do not address a fundamental flaw in the current scheme that allows public bodies to refuse any information request if responding to the request would take too much time.

10. Currently, if a request exceeds the cost limit, the authority may:-

- a. Refuse to supply the information altogether; or
 - b. Supply the information provided the requestor agrees to pay the full cost i.e. £600/£450 plus the surplus.
11. It frustrates the object and purpose of the Act to grant public authorities the discretion not to consider a claim at all if it exceeds the cost level. The cost involved in obtaining information should not bar the claim in and of itself. If a claim is expensive, at the most the requestor should have to make a reasonable contribution towards the costs, certainly where commercial interests are involved.
12. Furthermore, the refusal to consider requests on the grounds of cost is bound to result in an increase of appeals to the Information Tribunal in terms of Part V of the Act. Such challenges would place significant burdens on the Information Commissioner's Office and the Information Tribunal. In this regard, rather than saving time and money, the proposed regulations have the potential to drain further public resources.

Problem Two: The proposed regulations would worsen the current scheme by allowing information requests to be aggregated.

13. The proposed regulation would allow non-similar requests to be aggregated if doing so would be "reasonable in all the circumstances."
14. According to the DCA, reasonableness would be assessed on a case by case basis, taking into account factors such as the disruption to the work of the public authority and if the request is made by a person who, in the past, has made many requests or has been "uncooperative or disruptive".

15. A denial based on “reasonableness” is discretionary, and one that creates a risk of abuse of discretion. This is especially so in light of the subjective nature of the factors that an authority may consider, namely conduct which “has been uncooperative or disruptive.”³ Claims for information should not be rejected either because they are costly or because the claimant makes frequent requests for information.

Problem Three: The proposed regulations would weaken the current scheme by allowing public authorities to include in their cost calculation the time taken to decide whether or not to release the information.

16. Under the current regulations, an authority may include in its charges the time it will take to check whether it holds the information, find the information, extract it, edit if necessary and submit it. It may not include the time spent in deciding whether the information has to be disclosed under the Act. Often this is the most time-consuming part of handling the request.

17. The proposed regulations would allow authorities to include in their calculation of costs the time for consideration and consultation (in addition to the current cost factors described above).

Problem Four: The proposed regulations would chill the use of the Act. People who make frequent requests and requests which are politically sensitive will be most seriously affected.

³ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 Consultation Paper 28/06, 14/12/2006, page 14.

18. Politically sensitive requests involve substantial consideration and consultation.⁴ Under the proposed regulations, a request made for a plainly legitimate purpose might be rejected on the basis that it would be too burdensome for the relevant minister or public official to consider. Almost any politically sensitive request could be refused, thereby distancing ministers, civil servants and Parliament from the reach of the Act.

19. As the eyes and ears of the public, news and media bodies are responsible for the transmission of a variety of information. The Act is integral to the service such bodies provide. As the Fleet Street Lawyers' Society has indicated, the aggregation of requests would block a substantial proportion of all media requests.⁵ For example, a newspaper would be limited in the number of requests its individual reporters could make, with the result that once a request has been made, no further requests to that authority on any subject could be made during a three month period by any other journalist from the same organisation. That is a severe and unnecessary restriction upon freedom of information and expression.

D. Recommendations

20. The only reasons why a request should not be considered are if the request is vexatious or it falls within one of the exemption categories. Section 14 of the Act allows a public authority to refuse to comply with a request for information if the request is vexatious. In addition, the

⁴ See the Campaign for Freedom of Information letter to Baroness Ashton of Upholland, 24 November 2006.

⁵ See Fleet Street Lawyers' Society letter to Baroness Ashton of Upholland, 13 December 2006.

Information Commissioner has provided guidance on how its office deals with vexatious applications.⁶

21. The problems raised by the Government do not need to be tackled by the crude mechanism of imposing increased fees that inevitably will deter and inhibit the exercise of the public right of access to information and of freedom of expression. For this and the reasons stated above, we submit that the proposed regulations should be revised.
22. The DCA should draft new regulations to address the problems it identified as well as the problems noted above. In developing appropriate solutions we recommend that the DCA should have regard to good law and practice in other countries committed to open government and freedom of information.
23. We draw particular attention to the law and practice in the United States, where news media, educational requesters and public interest organisations are treated more liberally than other requesters because of the importance of freedom of information and expression. Such requesters are assumed to seek information of public interest and therefore they are charged only for duplication, and may not be charged at all for search and review costs. Commercial requesters, in contrast, may be charged fees for copying, searching for and reviewing documents (at an hourly rate, based on the level of the government official who does the searching and/or reviewing of the documents for

⁶ "The Commissioner's general approach will be sympathetic towards authorities where a request, which may be the latest in a series of requests, would impose a significant burden and: clearly does not have any serious purpose or value; is designed to cause disruption or annoyance; has the effect of harassing the public authority; or can otherwise be fairly characterised as obsessive or manifestly unreasonable." *Information Commissioner, Freedom of Information Act Awareness Guidance No 22, Vexatious and Repeated Requests.*

release, as expressed in each public authority's published fee schedule).⁷ All other requesters are charged search fees and duplication only, and they generally receive the first two hours of search time for free, with the result that there is no charge for most simple requests. A requestor would not have to identify itself but if it does it will qualify for the reduced fees. We commend such a system.

24. Review costs should include only the direct costs incurred during the initial examination of a request for the purposes of determining whether the documents are in the possession of the public authority and whether the information must be disclosed.

25. In addition, public authorities ordinarily should charge search fees only to the first requester who seeks particular materials; these fees should be waived for any subsequent requesters, because the search has already been conducted. To the extent possible, information of public interest released to one requester should be posted on the public authority's website. This would reduce demands from different users for similar information.

26. In Ireland, the Freedom of Information Act 1997 originally did not include a fee for filing requests. When the Act was amended in 2003, a charge of €15 per application was added, except for requests for access to personal information. The Information Commissioner's study on the impact of the 2003 changes shows that the introduction of up-front application fees led to a significant drop in applications.⁸ Charges may

⁷ For an example of the fee schedule and guidelines for a federal agency, see the State Department web site at <http://foia.state.gov/fees.asp>.

⁸ Information Commissioner's Report, <http://www.oic.gov.ie/en/Publications/SpecialReports/InvestigationsCompliance/File,571,en.pdf>.

also be levied for “search and retrieval” and copying. Charges may *not* be imposed for reviewing the requested records to determine whether they might be exempt. The search and retrieval charge is currently set at €20.95. No charge may be levied for search and retrieval of records containing personal information unless the request relates to “a significant number of records”.⁹

27. The Irish record illustrates the danger of imposing fees for filing requests. However, while we do not suggest filing fees in the UK, a flat filing fee of €15, coupled with a maximum search and retrieval fee of €20.95 is clearly far less onerous than the current and proposed scheme in the UK.

28. Ideally, there should be no fee for an application for information. Rather fees should be charged only for the “provision” of information.

29. The Freedom of Information Acts of Ireland, New Zealand, Trinidad and Tobago and Australia all require public authorities to assist the applicant prior to refusing a request on the ground of its unreasonableness.¹⁰ The Australian Act specifies a number of conditions which must be met, including written notice and identification of an officer of the public authority or member of staff with whom the requester may consult in order to remove this ground for refusal. Moreover, there is a specific provision that refusal on the ground of unreasonableness is directly appealable.

This report also contains a useful comparative table of charges across a range of English-speaking jurisdictions.

⁹ Information supplied by Professor Maeve McDonagh, Law Faculty, University College Cork.

¹⁰ “A head shall not refuse ... to grant a request under section 7 [for unreasonableness] unless he or she has assisted, or offered to assist, the requester concerned in an endeavor so to amend the request that it no longer falls within that paragraph.” Freedom of Information Act 1997, as amended 2003, sec. 10(2), Ireland; Official Information Act 1982, sec. 18, New Zealand; Freedom of Information Act 1999, sec. 21(1), Trinidad and Tobago; Freedom of Information Act 1982, sec. 24, Australia.

30. The relevant provisions of the United States Freedom of Information Act read as follows:

“Section 552. Public information; agency rules, opinions, orders, records, and proceedings

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced...

(ii) Such agency regulations shall provide that –

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section –

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250...”

E. Conclusion

31. For the above reasons, we submit that the draft regulations proposed by the DCA should be reconsidered and new regulations should be developed that protect the right of the public to access information.