Guide to answering the Call for Evidence on FOI

The following is a guide to the questions in the Call for Evidence on Freedom of Information, which is considering exempting certain types of information from FOI, strengthening the ministerial veto, reducing opportunities to appeal refusals and the introduction of charges for making requests. The aim of the briefing is to set out the questions, the issues they raise and the arguments in defence of FOI.

Questions 1-3 are concerned with the claim that the Freedom of Information Act threatens the "safe space" that officials and ministers need to formulate policy. It is alleged by ministers and civil servants that the fear of being published under the FOIA is having a "chilling effect" on the provision of courageous and candid advice. The Call for Evidence looks at this in relation to internal deliberations (Q1), Cabinet minutes and materials (Q2), and risk registers. These types of information are exempt under s35 and s36 of the FOIA, but the exemptions are not absolute. They are subject to a public interest test. The Commission will consider strengthening that exemption, for example, by making it absolute.

- These types of information can form the basis for the strongest FOI-based stories. Whereas most FOI stories consist of data sets, FOI releases of s35 and 36 material provides context, analysis, explanation and assessment of policy and performance. Sometimes it can cause embarrassment, typically by revealing when a minister has ignored advice but often it will just provide the public with greater understanding of the policies that affect their lives.
- You should include in your responses stories based on this sort of material from your own publication. Here are some examples: Independent: "Chancellor ignored advice from Treasury to launch Help to Buy scheme" Thursday 5th February 2015; Times: "Treasury has sought to meddle with OBR forecasts", September 14th 2015; Yorkshire Post: "Council 'borders on corruption'", 20th December 2014

Internal deliberations and policy discussions

- The ICO and information tribunal are consistently very respectful of the need to protect a "safe space" for internal policy deliberations. Both have made it clear that it is extremely unlikely that they would consider it in the public interest to release any of this kind of information while policy is being formulated, unless it revealed wrongdoing on the part of ministers.
- In a speech in October this year, the Information Commissioner, Christopher Graham, emphasised the respect that his office and the Tribunal have for the "safe space" for deliberations and indicated that "*in our evidence to the FOI commission, we will be submitting figures showing the balance of withhold versus disclose calls in*

relation to sections 35 and 36 in central government Decision Notices – updated since Post Legislative Scrutiny – showing the significant percentage of such DNs that sanction withholding."

- They rightly consider however that the safe space does not continue forever. Once a policy has been formulated, decided upon and announced, it is usually held that the safe space starts to diminish, as the public is entitled to understand the rationale for the policies that affect their lives and not just rely on ministers' speeches and press releases.

Chilling effect?

- Objective assessments have yet to find substantiation for the "chilling effect" claims. The Justice Select Committee looked at this in its post-legislative scrutiny of the FOIA in 2012 said it could not conclude that it existed: "***We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act."*** [at para 200, Committee's bolding]
- The Constitutional Affairs Unit at UCL, which produced a two-year study of FOIA in 2009 and testified to the Committee in 2012, was dismissive of the idea. Professor Robert Hazell, CBE: "*We looked very hard for evidence of the chilling effect in all the interviews that we conducted, in a big two-year research project looking at the impact of FOI on Whitehall and in a related project commissioned by the Information Commissioner. We interviewed, in total, about 100 Ministers and middle and senior-ranking officials. What they told us, in sum, was that, yes, there has been a deterioration in the quality of record keeping in Whitehall, but that, no, on the whole FOI has not been the cause of that.*" [in answer to Q62]
- The Information Commissioner is too, saying in his 1 October speech that "*[D]espite the weight of the evidence, senior Whitehall figures criticise the operation of FOIA and warn of its icy blast. In response, I observe that if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy.*"
- Finally, local publishers and editors need to be aware that any introduction of an absolute exemption on the internal deliberations of central government departments might presage the introduction of an absolute exemption on those of councils and other public authorities.

Cabinet minutes

- Parliament did not exempt these from FOIA, but subjected them to a public interest test.
- The ICO and tribunal set the threshold much higher than for other types of deliberation and the "safe space" continues for far longer than the announcement of the policy. Unless the subject matter is truly momentous or the events have clearly receded into history, the ICO/tribunal will not sanction disclosure.
- In his speech, the Information Commissioner said: "*To be clear, Parliament has made these exemptions subject always to the public interest test. Sometimes issues are of*

significant public interest and the balance tips in favour of disclosure. Such cases have included requests for information held about the Hillsborough disaster, the takeover of Rowntrees, and, famously, the minutes of Cabinet meetings immediately prior to the declaration of war with Iraq in 2003. Different factors were at play in each of those cases, but they were not matters of the routine business of government and each had far-reaching significance."

- Even where there is a strong public interest in what was discussed, the tribunal has found against disclosing, where the ministers involved are still politically active. For example, in the information tribunal backed the ICO in not disclosing the minutes of Cabinet discussions in 2006 regarding the admission to the EU of Bulgaria and Romania. Its grounds were that " i) *The Minutes include content attributable to individual Ministers, either by name or by the nature of the subject matter recorded. A high number of those involved remain in front line politics and may well return to Government in the near future. ii) The Minutes provide some insight into how individual views held by Ministers contributed to the formation of the collective Cabinet decision.*" The tribunal added that even though the information was five years old by the time of the request, it remained eastern European immigration remained a "*highly contentious issue of government policy*."
- Government-level concern about the protection given to Cabinet materials by decisions by the tribunal and Commissioner to release Cabinet minutes from the period leading up to the 2003 Iraq war and also the minutes of ministerial discussions on devolution from 1997.
- However, it cannot be said that the appeals process failed to protect this information, as it was not given the chance. On these occasions, ministers cut the appeals process short by wielding the executive veto.

Risk registers:

- There is nothing in the FOIA to suggest that Parliament wanted an absolute exemption for risk registers and risk assessments. As with other information that may fall within the s35 exemption, withholding them from the public was meant to be subject to a public interest test.
- The public interest in the contents of a risk register is likely to be particularly strong. They are not a feature of routine policy-making, but accompany particularly ambitious projects involving billions of pounds of public money (HS2) or the overhaul of a public service upon which millions of people depend (NHS). (see: "Suppressed HS2 report reveals serious cost concerns", Guardian, 26th June 2015)
- The ICO and the Tribunal always weigh against this the need to protect a safe space for policy formulation, but in doing so the timing of the request is considered crucial. If it post-dates the announcement of the policy in question and if it concerns implementation rather formulation, the safe space diminishes. Again, it is not reasonable for a government to insist that the safe space stretches on forever. It has

to start receding at some point and the most logical, credible point after the policy has been formulated and public announced.

- Both the Commissioner and the Tribunal can be relied on only to release this information after the policy-formulation phase is complete (see for example, the tribunal judgment in the NHS risk register case; the ICO decision in HS2 risk register and tribunal ruling in the DEFRA risk register for the badger cull.)
- The evidence simply does not support the claim that risk registers are being released in a way that derails or disrupts the policy-formulation process. The may cause some embarrassment or inconvenience once a decision has been made, but that is not the purpose of the "safe space", which is there to protect policy formulation not reputations.

Question 4 concerns the ministerial veto under s53 of the FOIA. The scope of this has been significantly diminished following the ruling by the Supreme Court in March this year that narrowed the circumstances in which a minister could ignore an FOI tribunal or court to where there are new facts or has been an error in law. The Commissioner can still be vetoed but the Supreme Court made it clear that the minister should use the appeal process instead. The Call for Evidence expresses concern that highly sensitive information will no longer be protected.

The major example for – the one that led to the Supreme Court ruling – is Guardian: "After 10 years the secret of a persistent and demanding prince is finally revealed"; 13th May 2015

- It is very troubling that a veto that was, according to Ministry of Justice guidance, supposed to be "exceptional" has been exercised seven times since 2009.
- On four occasions, it is possible to connect the veto to an attempt to protect Cabinet collective responsibility – which the ministerial guidance indicated was its primary purpose.
- In recent years, however, it has been used twice to block risk assessments of politically contentious policies and once to shield lobbying correspondence from public view. In other words, it has been used as a protection against mere embarrassment for those in authority.
- Ministers have also shown themselves prone to wielding the veto before exhausting the extensive appeals process under the FOIA regime, in effect substituting themselves for the courts. In the case of the HS2 risk register, the veto was wielded after a decision notice from the Information Commissioner, instead of referring the matter on to the Information Tribunal.
- The suggestion in the call for evidence that the Supreme Court decision in March somehow undermines the will of Parliament is particularly misguided. As the Campaign for Freedom of Information has pointed out "*Parliament never intended the veto to be used against the Tribunal or courts – that possibility was not mentioned at all let alone debated during the Bill's passage. The veto was seen as available only in relation to the Information Commissioner's decisions.*"

- The ruling was a welcome restatement of the long-standing constitutional principle that ministers are subject to the rule of law. Just like everyone else they are bound by the decision of a court and cannot ignore its ruling just because they disagree with it.
- It is also a well established principle of statutory interpretation by the courts that they will treat with scepticism attempts to oust its authority or shield decisions from scrutiny.
- These principles should not have taken ministers by surprise. They have been established for centuries. As Lord Templeman put it in M v Home Office [1994] 1 AC 377 "the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [is] a proposition which would reverse the result of the Civil War" [at 395]

Question 4 suggests that there are too many stages to the appeals process and that this can result in an expensive protracted process that is against the interests of both public authorities and requesters themselves. The process involves the right to request an internal review; complaint to the Information Commissioner; appeal to the first tier Information tribunal; appeal on a point of law to the Upper Tribunal

- Please include examples from your coverage of where an appeal to a tribunal has resulted in release of information that served the public interest – either because the tribunal ruled in favour of release or because the prospect of having to defend its decision prompted the authority to give up. For example: "Tate's BP sponsorship was £150,000 to £330,000 a year, figures show", Guardian, 26th January 2015. Notable occasions where the prospect of having to go before the tribunal has triggered the public authority to back down and disclose: "Police forced to disclose more details of ghoulish and heartless spy tactic," Guardian 7th January 2015; "What a rip-off: Taxpayers spend £500m to send Government's official's kids to top public schools", Mirror 10th November 2012

Guarantee of fair, high-quality decisions

- A state committed to openness should regard secrecy as a last resort and such decisions subject to challenge.
- While the vast majority of requests will be straightforward and disposed of by the original FOI officer, there will be some that require very fine and complex assessments of competing interests, such as those discussed above. Several tiers of appeal, of escalating expertise are necessary to ensure that the right balance is being struck.

Small, diminishing volumes

- The proportion of requests to government departments that make even to the first stage of external review is small and shrinking. According to the Ministry of Justice

FOI statistical bulletin for 2014 some 46,806 FOI requests were received by central government departments – a 9.5 per cent decrease on the previous year. Of these 2,417 – 5.3% - were subject to a request for internal review – an 8% decrease on the previous year. The number that were then referred on to the Information Commissioner for review stood at 395 - or 0.8% of the total, compared to 408 in 2013.

Significant success rates in appeals

- The statistics show that the decision-making at public authorities, the ICO and even information tribunal is far from flawless. This makes it difficult to justify cutting back the appeals process.
- The MOJ/ICO figures in the annexes to the call for evidence show that a sizeable proportion (38%) of appeals to the ICO of public authorities succeed wholly or in part, including nearly a fifth of those from central government departments.
- Nearly a quarter -23%- of appeals of ICO decisions to the Information Tribunal are successful wholly or in part.
- Thirteen per cent of appeals to the Upper Tribunal on a point of law succeed wholly or in part.
- What is striking is that In the Upper Tribunal 12% of appeals *brought by requesters* succeeded wholly or in part while in the Information Tribunal 21% of appeals by requesters were upheld partly or completely. This is remarkably high considering many of these requesters, unlike public authorities, will not have professional legal representation.
- These figures suggest that if the appeals process was curtailed, there is a real danger that errors of fact and law will go undetected and that information that should be shared with the public will wrongly remain shrouded in secrecy.

Question six is concerned with the "burden" on public authorities of complying with FOIA. The Independent Commission will be considering the introduction of charging for requests and bringing more requests in scope of the cost exemptions that already exist.

FOI exposes waste

- These proposals will be very popular with public authorities. It is essential that newspapers highlight stories where they have exposed the waste of taxpayers' money by authorities themselves. FOI is the most effective tool out there for bring to light waste and financial incompetence that would otherwise be buried by authorities. Examples: "Private jets to deport asylum seekers: After stretch limo farce, now taxpayers are hit with a £15m bill to send migrants home on half-empty planes", Mail, 15th October 2015; "Millions spent on Help for Heroes centre with empty beds" Times, 29th September, 2015; "Manchester City Council spends £190,000 on 500 iPads for staff over last three years", Manchester Evening News, 22nd April 2014

- The power of Freedom of Information to expose waste and drive up governance standards was underlined by the Public Accounts Committee of the House of Commons in 2014. Its report called or the *extension* of FOI to private sector contractors carrying out public services as part of the solution to the scandals of overcharging and incompetence surrounding G4S, ATOS, Serco and Capita.

Charges are a backwards step

- Charging for FOI requests would also be a backward step for democracy. It would be tantamount to a tax on a democratic right and it would be levied before the requester even knew if the information was available and could be disclosed.
- Investigative journalism would be profoundly impaired. Requests to multiple authorities in order to survey the performance of public services across the region or a nation have become a vital tool of investigative journalism.
- If charges were introduced only journalists at the most deep-pocketed news outlets would be able to investigate authorities in this comprehensive way. If there was a £20 fee per request, a journalist wanting to find out how many and which police forces in England and Wales were keeping suspects on bail for a year or more without pressing charges, FOI requests to all 43 police forces would cost £860. If they wanted to look at the numbers of young people who had gone missing while in local authority care in England – a very pressing concern following the child grooming scandals - a journalist would have to submit requests to 152 local authority children's services departments, costing £3,040 in total. And that is almost certainly an underestimate. When similar investigations have been done in the past, local authorities have often refused to reveal this information, which would require the journalist requests internal reviews that would push costs up even higher. This would be prohibitively expensive for most publishers and journalists and needless to say, members of the public.
- It would be very helpful if you could highlight stories based on sending FOI requests to multiple authorities to get a snapshot of performance across the board (for example, "Families at mercy of rogue landlords", Times, 20th October 2015) as these will become very expensive if these changes come in.
- Emphasise as well that when a €15 application fee was introduced under Ireland's FOI Act in 2003, the volume of requests collapsed by 75 per cent. The Irish Government had to climb down and abolished the application fees in 2014.

Catching out requesters

- Any move towards making it easier to run up against existing cost limits should be resisted. These are likely to take the form of including "thinking" time in the calculation of the cost of request or the revival of past suggestions that multiple requests from the same requester should be amalgamated.

- As part of their job, journalists (and parliamentary researchers for that matter) will often submit a number of requests to the same authority but covering different aspects of its work or making follow-up requests in the course of a deepening investigation. If these can be bundled up into one, media organisations, journalists and other researchers could find these requests cost-barred and they and their companies barred from making further requests for the rest of the quarter.

Existing powers

- Before embarking further down the path of considering charges, the FOI Commission should consider whether public authorities are using the powers they already have to refuse excessively expensive requests and recoup costs. The Information Commissioner has indicated that they are not: "*Public authorities are, rightly, empowered to say "enough is enough" and refuse a vexatious request. The ICO has a good clear track record of supporting public authorities when they have relied reasonably on these provisions to refuse to deal with a request. What's surprising is 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 – lacking in serious purpose, excessively burdensome, or designed to disrupt or annoy*."
- He also added that when they are entitled to charge fees for photocopying and postage, they do not: "*it is interesting that public authorities invariably choose not to raise a fee for the supply of information even when they entitled to do so.*" Until authorities use the powers they have, they should not be allowed to impose charges on the public.

Perspective

- The Independent Commission should also keep in perspective the figures that they are presented with by public authorities as the cost of FOI. Basing its calculations on Ministry of Justice data on FOI spend in central government, Press Gazette estimated the cost of all departments complying with FOI at £5.6m a year. It added that this represents less than 2% of the estimated £289m the Government Communication Service said it would spend on external communications activities in 2014/15, as set out in its Communications Plan 2014-15. The Gazette quoted Maurice Frankel of the Campaign for Freedom of Information as saying that this represents "very good value for money considering the level of scrutiny and accountability [FOI] generates."

In concluding, please add a note of regret that the Independent Commission is only looking at ways of restricting the Act and making it harder to use, rather than ways of improving it and expanding official transparency. In particular, it is a great shame that it is not exploring the recommendation of the Public Accounts Committee to extent FOI to the £4bn of government spending that is in the hands of private contractors. The contractors

themselves (G4S, Serco, Atos and Capita) even agreed. This is something that NMA has consistently campaigned for.

As the information commissioner said in his speech "*my contention, based on the facts, is that the Act is working effectively. The interesting questions are about how to keep FOIA effective for the future – not how to limit its effect today.*"