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FOI Commission Evidence

All Freedom of Information laws are dynamic and uncertain. Over time they are changed by use, legal rulings and political decisions. The effect of any FOI law is both administrative, in terms of changing how the law works, but also political, in terms of having consequences for government. The complexity of the laws mean any reforms can have unpredictable effects.

Q1. Internal Deliberations

1.1 In terms of numbers, most FOI requests seek factual information and few that go either to local or central government concern ‘decision-making’ processes.\(^1\) Those that do are likely to attract disproportionate attention and shape views. Looking at the section 35 and 36 exemptions, there remains, and may always be, uncertainty.\(^2\) However, the Commissioner and Tribunal have sought to protect ‘safe space’, dependent on the time period and sensitivity of the information. As the Information Commissioner recently pointed out, a ‘significant percentage’ of decisions favours withholding.\(^3\)

1.2 Judging the working of exemptions is problematic but two pieces of evidence indicate relatively stable functioning. First, looking at the frequency of exemption use since 2005, section 35 and 36 have been used at a steady rate and, after an early burst of concern, have not risen or obviously ‘spiked’. In 2015 they were the 10\(^{th}\) and 11\(^{th}\) most used exemption, in 2014 were 8\(^{th}\) and 11\(^{th}\) with similar levels before going back to 2007.\(^4\)

1.3 Second, the constrained use of the veto may also be an indicator of exemption stability. The Justice Committee recommended s.53 use to ‘protect’ space

\[\text{...we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space.}\]

1.4 In terms of the Public Interest Tests built in to section 35 and 36, as Professor Peter Hennessy pointed out in 2012, the two PITs are a symbol of the openness of the UK FOI regime:


\[^{2}\text{Justice Committee (2012) \(\text{http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120327.htm}\) q267,}\]

\[^{3}\text{ICO speech Oct 2015 \(\text{http://blogs.lse.ac.uk/mediapolicyproject/2015/10/01/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/}\)}\]


\[^{5}\text{Justice (2012) \(\text{http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9609.htm\#a46}\) para 201}\]
The question is, can you so delineate the safe area that the uncertainty goes and everybody knows where they stand? It is very difficult because there has to be a public interest defence in all this—there has got to be—but, also, there has to be a safe house.  

1.5 Given the uncertainty of evidence around any ‘chilling’, these parts of the Act should, by default, remain as they are. The alternative would be to reach for an over restrictive change that could leave out any possibility of access.

*Chilling Effect*

1.6 The discussion of safe space links to that of a chilling effect. This has been a persistent story around FOI since at least the 1980s, when it was used as an argument against the FOI policy being developed in Australia. Research highlighted some nervousness and shifts in behaviour at local government level in Scotland and a MORI survey for the MOJ indicated ‘that some people were recording less information and that internal communications had become less detailed and informative than before FOIA’. However, other research across local government in England pointed to a few cases but no general trend. A 2009 study of central government policy making discovered some negative views and concerns but no ‘change in the substance of government policy making or decisions’. Our own studies across central and local government between 2008 and 2011 were able to discover only a few clear examples, which were minor and isolated. There was no systematic or large

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6 Justice Committee (2012) http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120327.htm q255
8 Justice Committee (2012) http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9609.htm#a46 para 180-200
scale changes to either minutes or free and frank discussion as a result of FOI.\textsuperscript{12} Some officials were more concerned over the consequences of not having a record should there be a judicial review.

1.9 Our own studies and others found FOI also had a positive effect, professionalising records as a ‘disciplining’ rather than a ‘chilling’ effect.\textsuperscript{13} The MORI survey also identified

...evidence to suggest that FOIA has had benefits for public authorities in encouraging more professional communications, more focused record-keeping and adherence to best practice in decision-making.\textsuperscript{14}

Our 2010 study concluded FOI has had no impact on the anonymity or advice of officials. It also found that the Phillips Review of 2000 into BSE revealed identities at a lower level than any FOI request.

\textit{Elsewhere}

1.10 Similarly, evidence from elsewhere points to an occasional ‘chilling’ but one that is not systematic. One study in New Zealand found some changes in politically sensitive cases and there was evidence in Canada.\textsuperscript{15}

1.11 However, an early study of Australia, Canada and New Zealand discovered no change to ministerial advice or any ‘post-it-note’ culture while noting it was a persistent myth. In the largest study of transparency laws yet undertaken in the world there was ‘little evidence’ for any alterations to files or records across all levels of government in India.\textsuperscript{16}

1.12 There were also signs of a positive, professionalizing effect. The ALRC in Australia found FOI had helped ‘discipline’ communications and ‘focused decision-makers minds’ and in New Zealand 15 years of the Official Information Act had ‘improved the quality’ of policy advice.\textsuperscript{17} Even when asked directly, those within public bodies appear uncertain. A survey of Irish local government found 30 per cent of local officials claimed a chilling effect and just fewer than 50 per cent denied it.\textsuperscript{18}

Is there an effect?

1.13 There are two problems with offering any firm conclusions. The first is the measurement problem of proving or disproving that a ‘chilling’ is taking place. Anecdote is plentiful but finding hard evidence for such an effect is by its nature very difficult, as it requires proving a ‘negative’ and asking interviewees to admit unprofessional conduct.

1.14 Second, more importantly, the claim of a direct link between FOI and a ‘chilling’ ignores the many other powerful forces acting upon record quality and decision-making. The effects of FOI are frequently conflated, for example, with leaks. Gus O’Donnell spoke of how for some records ‘we tended to put it in rather plain prosaic language because there could be leaks’.19 Our studies found emails and electronic communications have had a huge effect on the nature of record keeping, far greater than FOI. Many interviewees were keen to point out the impact of the broader politics of what is recorded, relating to decision-making styles and natural political caution. As the Justice committee pointed out, the Butler report of 2004 raised concerns over informal meetings and sofa government before FOI became operational.

1.15 Consequently, the balance of evidence is that a chilling happens occasionally at the margins but it is not widespread. The difficulty is that the story of a chilling itself may influence behaviour change and becomes self-reinforcing and, as the Information Commissioner called it, a ‘self-confirming myth’.20

Q2. Collective Discussion

2.1 Few FOI requests are made for Cabinet documents and very few are released. FOI appears to have had no effect, with one detailed study concluding that, while influencing abstract discussion, it had no impact on how records were kept.21 Gus O’Donnell also observed that at ‘a formal meeting like a committee meeting or a Cabinet meeting...we did not reduce the coverage of...minutes. They were accurate’.22

2.2 Generally, our 2010 study found that Cabinet discussion was far more likely to be opened up by leaks than any FOI. As Gus O’Donnell pointed out, Cabinet confidentiality

....is affected by all sorts of things: first, the amount of leaking that goes on from different Cabinet members; and, secondly, the propensity of a number of the Cabinet members to write their memoirs rather quickly and include things they probably should not.23

A further difficulty is that the principle of Cabinet confidentiality and unanimity is not a ‘rigid dogma’ but a flexible instrument, famously summed up James Callaghan’s phrase: ‘You know the difference between leaking and briefing. Leaking is what you do and briefing is what I do’.24

19 See Gus O’Donnell’s evidence to the Justice Committee
http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120327.htm q260
22 See Gus O’Donnell’s evidence to the Justice Committee
http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120327.htm 260
23 See Gus O’Donnell’s evidence to the Justice Committee
http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/120327.htm q266
2.3 Given the lack of evidence of any decisive change in Cabinet operations, and the move by the appeal systems to mirror the 20 year rule, the protections should remain as they are.

Question 3: Risks

3.1 Given the lack of evidence, it is unclear what effect release has upon risk assessments. It is likely there would be similar uncertainty as there is around proving the ‘chilling’ more generally.

Question 4: Veto

4.1 The veto was the lynchpin of the FOI revisions during the laws development. Looking across the last decade, the UK veto has been rarely used, especially when compared with other FOI regimes. This may be as a result of the successful functioning of exemptions elsewhere lower down the system. Jack Straw argued to the Justice Committee that there would be a political reluctance to use what is the ‘ultimate’ power. The veto has a clear ‘backlash potential’ as it naturally draws attention to the particular topic, generating headlines and making the government appear secretive.

Comparative Veto use in the First Four years of FOI systems

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Veto use in first four years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>48</td>
</tr>
<tr>
<td>New Zealand</td>
<td>14</td>
</tr>
<tr>
<td>Ireland</td>
<td>2</td>
</tr>
<tr>
<td>UK</td>
<td>0</td>
</tr>
</tbody>
</table>

4.3 Vetoes are common, in various forms, across different systems. New Zealand effectively removed its veto power in 1987 and Australia similarly abolished their equivalent in 2009. While former PM Geoffrey Palmer felt the veto change in New Zealand had no effect the consequences of the changes in Australia are still being examined.

4.4 Before the Supreme Court ruling the veto worked in a sparing way. Any future veto power should be kept as close as possible to the precise, limited and ‘exceptional’ model that existed previously.

Q5. The Appeal System

5.1 The UK appeal system had suffered a series of problems common across FOI regimes, especially over delays. However, it appears to have developed into a robust and powerful part of the FOI process. International research has shown how all the varied approaches bring costs and benefits and, given the lack of any obvious better model, the UK appeal system should be kept in its present form.

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Q6. Burden

6.1 Measuring the ‘cost’ of FOI is problematic as it involves balancing administrative resources against democratic benefits. Moreover, the exact cost of FOI is very unclear and any figure, high or low, can be challenged.

Attempts to Measure the Cost of FOI in the UK 2004-2011

<table>
<thead>
<tr>
<th>Study</th>
<th>Estimated cost per request</th>
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</thead>
<tbody>
<tr>
<td>A pre-Act estimate</td>
<td>£350</td>
</tr>
<tr>
<td>Frontier Economics</td>
<td>£293</td>
</tr>
<tr>
<td>Cornwall council</td>
<td>£150</td>
</tr>
<tr>
<td>Bexley council</td>
<td>£36 with most requests costing around £19.</td>
</tr>
<tr>
<td>Scottish government</td>
<td>£193</td>
</tr>
<tr>
<td>MOJ estimate</td>
<td>£164</td>
</tr>
</tbody>
</table>

6.2 FOI requests are also a moving target as, on the one hand they become more elaborate but, on the other, public authorities deal more efficiently with them - annual surveys by UCL between 2005 and 2010 found a sharp drop in time taken for organisations to process requests, falling by more than 50% in 5 years. Other studies sought to calculate any costs savings emerging from FOI requests through, for example, resources saved from cancellation of policy. There is also the issue of context and, famously, the claims of costs triggered indirectly by US litigation launched by FOI were found to be the equivalent of the amount spent by the US military each year on marching bands.

Fees

6.3 The UK Freedom of Information Act is currently, more or less, free to use. Most FOI regimes, from India to the US, have a standard application fee that is charged for most (but not all) requests. However, almost all these charges have been part of the system from the start. Although some regional or state level openness regimes have introduced a fee, only one country, Ireland, went from having no charge to charging in 2003 and then abolishing fees again in 2014.

6.4 The difficulty with fees for governments are both practical and symbolic. One clear practical effect in Ireland after 2003 was, according to the Irish Information Commissioner, a steep fall in [non-personal] requests of 75% in a single year.

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30 See the summary of the UCL’s local government surveys 2005-2010 https://www.ucl.ac.uk/constitution-unit/research/foi/and-local-government/foi-localgovt-6-year-summary.pdf


particularly sharp decline. A decade later in 2013, a year before fees were abolished, requests remained at only half of their pre-fee level and represented a ‘tangible barrier’ to ordinary requesters.\(^{33}\)

6.5 It’s not clear whether a government can claw back any costs. Governments make the case that FOI costs money so the fee goes towards offsetting the resources used but in Ireland, Nat O’Connor concluded that the fees recouped only 1.6 % of the estimated cost.\(^{34}\)

6.6 There are also questions about implementation. In a number of Australian states public bodies simply didn’t bother to charge if a request was small, as it was cheaper simply to send it out.\(^{35}\) Evidence from the UK at local government level, which is the focus of 70-80% of all FOI requests, is that charges for FOI in any form are very rare and it is likely that any ‘fee’ would not be charged. Our research discovered that few local authorities strictly abide with cost limits and most simply process anything reasonable so changes to cost limits may face a similar non-operability problem.\(^{36}\) Equally, some requesters may seek to find ways around innovative ways around a fee or even, a seen across the world, crowd-fund requests.\(^{37}\)

6.7 Politically, as one academic put it, transparency is a ‘contested political issue that masquerades as an administrative tool’.\(^{38}\) The introduction of up-front fees would be politically difficult and, as occurred in Ireland, would be seen as a ‘signal’ of a government’s negative attitude towards openness. In Ireland fees rapidly became a contentious, party political issue and were reversed when the opposition parties came into power.

6.8 Given the evidence, fees are too blunt an instrument. It would be recommended to keep FOI free, given the practical and political difficulties and, most importantly, the unintended effects on large groups of requesters of limiting public access.

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