

Memorandum to the Justice Select Committee Post-Legislative Assessment of the Freedom of Information Act 2000

Submission of Paul Gibbons, creator of the FOI Man Blog and FOI practitioner

Executive Summary

1. The Freedom of Information Act (FOI) works very effectively. In my opinion it appropriately balances the right to know with the need to ensure that public bodies can deliver public services effectively.

2. The Act has clearly, though to varying degrees, met its objectives of improving openness and transparency, increasing accountability, improving decision-making and supporting public engagement in decision-making.

3. The biggest obstacles to the effectiveness of FOI are a lack of cultural change within the public sector, epitomised by public statements from senior figures attacking the legislation, and irresponsible use of the Act by a small minority of requesters. Both should be more effectively countered in future.

4. I have made some recommendations which the Committee may wish to consider as part of its post-legislative assessment of the Act:

Recommendation 1: There must be more leadership shown in Whitehall promoting the benefits of FOI and challenging negative perceptions.

Recommendation 2: users of the legislation should be encouraged to follow best practice, perhaps set out in a formal or informal Code of Practice (a "highway code" for FOI requesters).

Recommendation 3: there should be a transparency impact assessment (similar to a privacy impact assessment in Data Protection) of proposed amendments to FOI to ensure that existing levels of access to public information are at least maintained.

Recommendation 4: the Act should be amended so as to ensure that the Information Commissioner can prosecute offenders under s.77 of the Act up to three years after the offence occurred.

Recommendation 5: reporting statistics on FOI compliance should be made mandatory for all public authorities, and consideration given to a requirement to quote FOI in requests to ensure consistency in management and reporting.

Recommendation 6: public authorities should be encouraged to proactively disclose as much information as possible, and to publish responses to requests via a Disclosure Log, but the requirement to maintain a central Publication Scheme should be dropped.

Recommendation 7: section 14 of the Act, covering 'vexatious' requests, should be reviewed and possibly clarified. This might be linked to the idea of a Code of Practice for requesters.

Recommendation 8: maintain existing cost restrictions on FOI requests.

Recommendation 9: amendments to FOI must be considered in the context of the Government's wider transparency agenda and must be consistent with the aims of that agenda.

1. Introduction

- 1.1. I have been working as a practitioner, responsible for implementing the legislation and answering requests made under its provisions, for several years. Between February 2001 and November 2003 I served as Parliamentary Records Manager, helping both Houses to prepare for the Act coming into force. Since then I have worked for the Greater London Authority (for 6 years), an NHS Trust and the School of Oriental and African Studies (SOAS).
- 1.2. In September 2010, I created the weblog and site <http://FOIMan.com>. The aim of the site is to give those interested in FOI an inside perspective on the legislation and related issues.
- 1.3. My evidence reflects my experience as both a practitioner of FOI in a range of public authorities and of my engagement with users of the legislation through social media. I am submitting this evidence in my own capacity – it is not intended as an official submission of any other body.

2. Does the Freedom of Information Act work effectively and is it operating in the way that it was intended to?

- 2.1. In my opinion, the FOI Act works very effectively. The long title of the Act is “An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them...”,¹ there is little doubt that vast quantities of information have been disclosed since the general right of access came into force on 1 January 2005.
- 2.2. One way to assess whether the Act works effectively is to look at the way it was intended to work. As the Ministry of Justice has pointed out,² the Act had four main aims:
 - to improve openness and transparency of public bodies;
 - to make public bodies more accountable;
 - to improve decision-making;
 - to allow the public to engage in decision-making.
- 2.3. Research suggests that the Act has succeeded in making public authorities more open and transparent.³

¹ *Freedom of Information Act 2000*, c.36

² *Memorandum to the Justice Select Committee – Post-Legislative Assessment of the Freedom of Information Act 2000*, Ministry of Justice, December 2011, pp. 5-7

³ *ibid.* p.85; B. Worthy, J. Amos et al, *Town Hall Transparency? The impact of the Freedom of Information Act 2000 on local government in England*, UCL Constitution Unit, 2011, p.13

- 2.4. It is also clear that public bodies are now more accountable.⁴ One important point for the Committee to consider is the importance of the general right of access under FOI in holding public bodies to account. Public authorities decide what to disclose pro-actively. The general right of access allows members of the public to choose what must be disclosed, with limited restrictions.
- 2.5. Studies have struggled to find evidence that decision-making has been improved by FOI.⁵ This is, by its very nature, difficult to prove. My own view is that it is inevitable that the nature of decision-making will have changed to a degree, if only because officials and politicians are aware that there is more potential for outside scrutiny. To give an example, politicians and senior officials must surely consider more carefully what expenses they will claim now that they know their claims may well be made public, and have seen the reaction to the disclosure of MPs' expenses claims in 2009. Similarly, it must focus the minds of officials making decisions involving major expenditure.
- 2.6. Some have suggested that FOI has had a 'chilling effect' on decision-making and record keeping.⁶ The Information Tribunal has been sceptical of this view.⁷ It has argued that effective record keeping is a management issue and should be reinforced through management guidance.⁸ There is also evidence from other jurisdictions that have been subject to a form of FOI for longer than the UK that the 'chilling effect' may not be as significant as some suggest.⁹ There are two main reasons proposed for this. Firstly, there is an element of self-preservation involved – officials want to record decisions in order to be able to defend their actions at a later stage. Secondly, the chances of any particular document being disclosed out of all the documents created by public authorities are slim, so employees still do not necessarily expect a particular document to be disclosed.¹⁰ In my own experience, there is little evidence that colleagues have stopped putting things in writing as a result of FOI.

⁴ *Memorandum*, Ministry of Justice, 2011, p.85

⁵ *ibid.*, pp.59-61, also commissioned research at p.86; Worthy, Amos et al, *Town Hall Transparency*, 2011, p.16

⁶ See for example the comments made by the former Cabinet Secretary, Sir Gus O'Donnell at <http://www.bbc.co.uk/news/uk-politics-16229867> or his predecessors in the House of Lords debate on Freedom of Information on 17 January 2012 at *Hansard HL*, 17 January 2012, Col. 532

⁷ See for example *Department for Education and Skills v Information Commissioner and The Evening Standard*, Information Tribunal decision EA/2006/0006, 19 February 2007, para. 72

⁸ *Baker v Information Commissioner and the Department for Communities and Local Government*, Information Tribunal decision EA/2006/0043, 1 June 2007, para. 18

⁹ Eagles, Taggart and Liddell, *Freedom of Information in New Zealand*, OUP, 1992, p.373

¹⁰ *ibid.*

- 2.7. As a professional records manager, my experience is that whilst there have been some improvements in recording decision-making processes, for example through clearer demarcation of 'closed' items discussed in committee meetings, overall records management has not dramatically improved as a result of FOI. As before, there are 'islands' of good practice focussed on core organisational functions, but there is a mixed picture in other areas. Largely this is because outside central government there has been relatively little investment in records management,¹¹ or in ensuring that systems, for example accounting systems, can be readily interrogated. This means that retrieving information to answer FOI requests can take longer than it would do if systems were better designed. It also means that there is a higher likelihood of requests being turned down on grounds of cost than there would be if record keeping had been improved.
- 2.8. There is evidence that FOI has allowed the public to better engage with decision-making. The Ministry has acknowledged this.¹² One recent example was the campaign by disability campaigners against the Welfare Reform Bill currently before Parliament. The campaign used responses to the Department's consultation on the Bill, obtained through an FOI request, to produce a report which was then widely circulated through social media and other mechanisms.¹³ Recent research into FOI in local government suggests that such use of FOI by NGOs is common.¹⁴ The National Council for Voluntary Organisations (NCVO) has produced guidance for such organisations to encourage their use of FOI.¹⁵ The guide contains a number of case studies demonstrating how such groups have used FOI effectively.¹⁶
- 2.9. There is clear evidence that FOI has met its objectives. Any proposal to reform FOI must be careful not to place the progress that has been made to date under threat.
- 2.10. One significant limit on the Act's effectiveness in my opinion is the lack of cultural change within the public sector. It is public knowledge that many public employees and politicians are cynical of the benefits of FOI and critical of its cost.

¹¹ E. Shepherd, A. Stevenson, A. Flinn, "Records management in English local government: the effect of freedom of information", *Records Management Journal*, Vol. 21 Iss: 2, 2011, pp.122 - 134

¹² *Memorandum*, Ministry of Justice, 2011, p.59, para. 211

¹³ <http://diaryofabenefitscrounger.blogspot.com/2012/01/i-support-spartacus-report.html>

¹⁴ Worthy, Amos et al, *Town Hall Transparency*, 2011, p. 19

¹⁵ P. Hadley, *Voicing your right to know: A guide to using Freedom of Information in campaigning*, National Council for Voluntary Organisations, October 2010 <http://www.ncvo-vol.org.uk/yourrighttoknow>

¹⁶ *ibid.*, pp.18-34

2.11. There is a lack of leadership in the public sector championing FOI. I will quote below a series of public statements on FOI from influential figures. If this is the attitude of senior officials, it is not surprising if these views pervade the public sector:

2.11.1. Former Prime Minister Tony Blair wrote in his memoirs: “Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it.”¹⁷

2.11.2. Former Cabinet Secretary Lord Gus O’Donnell in an interview with the Times: “Freedom of Information that allows the public to ask questions about things is fine, but the bit that I’m really against in freedom of information is that bit where it reduces the quality of our governance...I want Cabinet to have real discussions, for people to be able to say, ‘I disagree with this policy’.”¹⁸

2.11.3. The Leader of Hampshire County Council: “I no longer believe that my staff should be spending their precious time on such spurious requests. I believe we should explain to the inquirer at the outset the lengths to which we will have to go to get the information and, if they persist, we should have the courage of our convictions and refuse to answer the inquiry. It should be left to the information commissioner to adjudicate as to whether the inquiry is a legitimate cost on the public purse and in the public interest”. [note that the Leader is effectively urging his staff not to comply with the requirements of the Act]¹⁹

2.11.4. The Registrar of the University of Warwick wrote in *Times Higher Education*: “Why does FOI legislation include universities within its remit when it so obviously undermines the whole idea of universities being independent, self-governing organisations?”²⁰

2.11.5. Universities UK, the body representing Vice-Chancellors of universities across the country, recently said in a blog post: “We don’t think Parliament envisaged how it would apply within universities, and especially to university research, when the Act

¹⁷ A. Blair, *A Journey*, Hutchinson, 2010

¹⁸ ‘Cabinet debates should be private – Cabinet Secretary’, *BBC News Website*, 17 December 2011 <http://www.bbc.co.uk/news/uk-politics-16229867>

¹⁹ K. Thornber, *Guardian blog*, 20 January 2010, quoted in B. Worthy, J. Amos et al, *Town Hall Transparency?*, 2011, p.23

²⁰ J.F.Baldwin, ‘Bad and mad: the FOI requests undermining our independence’, *Times Higher Education*, 11 September 2008 <http://www.timeshighereducation.co.uk/story.asp?storyCode=403484§ioncode=26>

was passed in 2000. In any case, since that time, the proportion of funding universities get from public sources has fallen considerably, and will continue to fall, making their inclusion within the definition of 'public authorities' all the more strange."²¹

2.12. Although everyone is entitled to their opinion, there is a damaging drip, drip, drip of negative statements by senior officials and politicians about FOI which are not robustly challenged. This allows the belief to grow that Ministers sympathise with such views, undermining the work of practitioners to promote compliance with the legislation. The public nature of criticism seems out of proportion to the way such matters are normally debated by senior and influential people. **Recommendation 1: There must be more leadership shown in Whitehall promoting the benefits of FOI and challenging negative perceptions.**

2.13. Linked to these criticisms of the Act, and threatening its future, is the irresponsible use of FOI by a small minority of those submitting requests. Examples include a requester submitting the same request to over 1400 public authorities, and individuals using the legislation as a tool to harass public employees. In my view, these activities need to be robustly confronted, but this need not require significant legislative change. Users of the legislation need to be better educated about the impact of their use of the Act and encouraged to use it responsibly. I have produced a Guide to Making Responsible FOI Requests which is available via my website and has proved useful to a number of campaigners and others who use FOI (I am enclosing a copy as supplementary evidence).²² It may be helpful for a Code of Practice along similar lines to be produced and widely publicised. Potentially, compliance with the Code could then be taken into account by the Information Commissioner, particularly where an authority considers a request to be vexatious. **Recommendation 2: users of the legislation should be encouraged to follow best practice, perhaps set out in a formal or informal Code of Practice (a "highway code" for FOI requests).**

3. What are the strengths and weaknesses of the Freedom of Information Act?

3.1. The strengths of the legislation are the presence of an independent ombudsman, in the form of the Information Commissioner, and the requirement to balance the public interest of disclosing or withholding information when considering the application of an exemption. It is important that any proposed amendments to the legislation do not diminish the powers of the Information Commissioner or strengthen

²¹ UUK Blogpost 'Yes to open debate and transparency in research, but FOI is the wrong tool for the job', 11 January 2012

<http://blog.universitiesuk.ac.uk/2012/01/11/foiexemption/>

²² <http://www.foiman.com/foiguide1>

the existing exemptions (which are adequate). Any change should not disproportionately reduce the level of access available to requesters. This is particularly important at this time when there is intense scrutiny of and debate over public services. It is essential that members of the public, the media and campaigners remain able to effectively scrutinise public sector decision-making through FOI.

Recommendation 3: there should be a transparency impact assessment (similar to a privacy impact assessment in Data Protection) of proposed amendments to FOI to ensure that existing levels of access to public information are at least maintained.

3.2. Practitioners can find it difficult to persuade colleagues, especially senior colleagues, of the need to comply with FOI. At the moment, the sanctions for non-compliance are limited. One obvious weakness is the limitation on the offence of altering or destroying information at s.77 of the Act. At present, this can only be enforced by the Information Commissioner within 6 months of the offence occurring. In practice, it may well not be evident that an offence has occurred within this timescale. **Recommendation 4: the Act should be amended so as to ensure that the Information Commissioner can prosecute offenders under s.77 of the Act up to three years after the offence occurred.**

3.3. Reporting on FOI is inconsistent. Central Government reports statistics on FOI quarterly and annually. This does not happen routinely in other parts of the public sector. The Information Commissioner has indicated that he will keep authorities under review that are regularly failing to meet the requirement to answer requests within 20 working days. However, this will not always be evident as reporting is not consistent. I would suggest that all public authorities be required to publish statistics on FOI compliance, perhaps as part of existing annual reporting processes. This would enable the public to see which authorities are meeting their FOI obligations. Consideration might also be given to a requirement for requesters to quote the Act in requests to bring clarity to the management and reporting of FOI requests. **Recommendation 5: reporting statistics on FOI compliance should be made mandatory for all public authorities, and consideration given to a requirement to quote FOI in requests to ensure consistency in management and reporting.**

3.4. Freedom of Information has led to more pro-active publication of information. However, Publication Schemes are an outdated concept. They are rarely looked at by users of the Act, who are more inclined to use search engines to find information. A list of information that authorities are required to make available would be more useful, without stipulating where the information should be placed on the authority's website. Authorities should be required to publish responses to FOI requests in a Disclosure Log. **Recommendation 6: public authorities should be encouraged to proactively disclose**

as much information as possible, and to publish responses to requests via a Disclosure Log, but the requirement to maintain a central Publication Scheme should be dropped.

3.5. In order to address the legitimate concerns of public authorities, it would be helpful for the provisions relating to vexatious and repetitive requests at section 14 of the Act to be clarified. However, any proposal to amend this section should be careful not to restrict legitimate and reasonable enquiries. It might be helpful to link the concept of vexatious requests to a failure to follow accepted best practice as set out in a Code of Practice. **Recommendation 7: section 14 of the Act, covering ‘vexatious’ requests should be clarified. This might be linked to the idea of a Code of Practice for requesters.**

3.6. It has been suggested that the cost of compliance with FOI is a matter for concern.²³ It is true that answering some FOI requests can be time consuming. However, the vast majority of FOI requests can be answered relatively easily. Some of those that are time consuming have led to important revelations. The Committee should also be wary of figures quoted for the cost of FOI,²⁴ as there is currently no agreed methodology for assessing this, and published estimates such as the Frontier Economics report of 2007 have often attracted criticism for their lack of reliability.²⁵ Such estimates rarely take into account the benefits of FOI which are harder to quantify.²⁶ The existing fees regulations²⁷ help authorities to manage FOI requests effectively, by allowing them to refuse the most onerous of requests. However, changes along the lines suggested by some practitioners²⁸ could disproportionately affect legitimate research and scrutiny of the public sector at a sensitive time. **Recommendation 8: maintain existing cost restrictions on FOI requests.**

3.7. I welcome Government proposals to improve transparency more generally. Any proposals to amend FOI must be considered in this context.²⁹ **Recommendation 9: amendments to FOI must be considered in the context of the Government’s wider transparency agenda and must be consistent with the aims of that agenda.**

²³ *Memorandum*, Ministry of Justice, 2011, pp.49 ff

²⁴ *ibid.*, para. 179

²⁵ B. Worthy, J. Amos et al, *Town Hall Transparency?*, 2011, p.35

²⁶ *ibid.*

²⁷ *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*, SI 2004 No.3244

²⁸ *Memorandum*, Ministry of Justice, 2011, pp.127-128

²⁹ <http://www.cabinetoffice.gov.uk/content/transparency-overview>