Response to Call for Evidence by the Freedom of Information Commission

Paul Gibbons

Introduction

This document is my formal response to the Call for Evidence launched by the Freedom of Information Commission in October 2015.

Currently I work as a freelance trainer in data protection, freedom of information, records management and related issues. Until the end of 2013 I was employed in the public sector as an FOI practitioner and records manager in organisations including the two Houses of the UK Parliament, the Greater London Authority, the NHS, and SOAS, a college of the University of London. I am the creator of the FOIMan blog (www.foiman.com) and Twitter feed (@foimanuk). My qualifications in this area include an LLM in Information Rights, Law and Practice and a Masters in Archives Administration. I have written about FOI for a number of publications including the Freedom of Information Journal and Times Higher Education magazine.

I previously responded to the Justice Select Committee's post-legislative scrutiny in 2012 and that response, much of which remains relevant to the current inquiry, can be found online at http://www.scribd.com/doc/82767805/Written-Evidence-From-Paul-Gibbons .

1. What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

At present, the FOI Act contains several exemptions that protect internal deliberations. In particular, section 35 protects the formulation and development of government policy, and section 36 provides further protection for Cabinet discussion, free and frank exchange of views expressed by officials not captured by section 35 (including internal deliberations of public bodies outside central government). It is my view that these exemptions provide sufficient protection for internal deliberations. As illustration, the chart below shows the number of times section 35 was utilised by the Cabinet Office, a prominent government department, the number of times its use was appealed, and the number of times that the Information Commissioner upheld, partly upheld, or overturned the Cabinet Office's decision within a 5 year period.

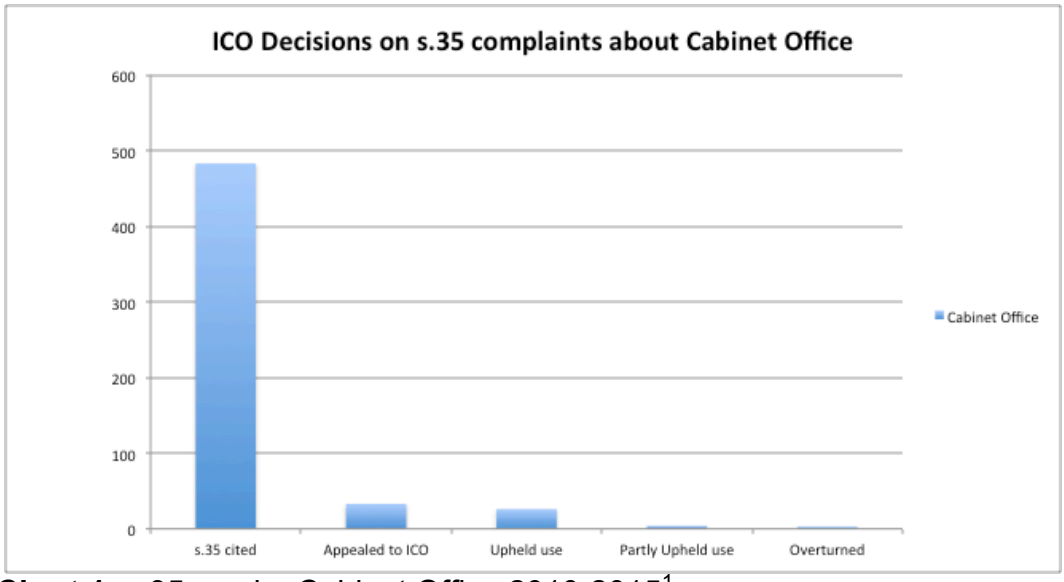

Chart 1: s.35 use by Cabinet Office 2010-2015[1]

The Cabinet Office was the department that used this exemption the most during the five-year period from May 2010 to May 2015. This chart shows that in practice, the use of the section 35 exemption went unchallenged in 93% of cases. Even in cases appealed to the Information Commissioner, the exemption was upheld the vast majority of the time. Only three uses of section 35 by this department were completely reversed by the Information Commissioner's Office (ICO) during these five years. These three cases were: the number of times the "Reducing Regulation Committee" has met (a case which is still being contended, so information has yet to be disclosed), the minutes of the Cabinet Meetings relating to the 2003 invasion of Iraq, and Cabinet information relating to the takeover of Rowntree's in 1988 (papers which in any case are likely to be disclosed soon under the transition to a 20 year rule). There were specific reasons for the ICO decisions in these cases. In a small number of cases disclosure was subsequently ordered by a Tribunal, but nonetheless it is rare that this exemption has been overturned.

What I think this data shows is that whilst there may be a perception in government that internal deliberations cannot be protected by section 35, it is just that – a perception. In practice, the ICO and the Tribunals generally recognise the need to protect such deliberations where such protection is needed.

One simple way to strengthen the protection offered by sections 35 and 36 would be to make the exemptions absolute, in full or in part. In the examples mentioned, the exemption was overturned because the ICO took the view that whilst the exemption was applied correctly, there was a public interest in disclosing the information concerned. I believe, however, that removing the

[1] Source: Government FOI Statistics, published quarterly by the Ministry of Justice (https://www.gov.uk/government/collections/government-foi-statistics); Information Commissioner's decision notices database (http://search.ico.org.uk/ico/search/decisionnotice). Both accessed July 2015.

public interest test would be a significant backward step for FOI and open government more generally.

The public interest test signals that government recognises the importance of taking a broader view when considering requests for access to information. By allowing an independent arbiter to consider whether government has correctly considered this, it similarly signals that such decisions will not simply be made for the convenience of government or public officials. Removing the public interest test would send out a message that the convenience of officials and Ministers is more important than recognising the importance of public involvement in policy-making. The public interest test also allows transparency to evolve in a way that takes account of ongoing developments.

I would point the Commission to the evidence provided by the Information Commissioner which expands further on the argument that I have provided here, including the provision of statistics in relation to section 36.[2]

2. What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

My view is that there is already sufficient protection for this. I refer the Commission to the evidence submitted by the Information Commissioner in respect of this point.[3]

3. What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

I agree with the Information Commissioner, who has submitted evidence on this point.[4]

4. Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

My personal view is that the appropriate way to decide whether information has been properly withheld is through a fair and transparent appeal process.

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[2] *Response of the Information Commissioner*, 16 November 2015 (https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf)

[3] *ibid*.

[4] *ibid*.

A Ministerial veto does not provide for this, seeking to override independent review mechanisms.

That said, when the Act was passed in 2000, I recognise that Parliament expressed the will that it should be possible for Ministers to veto disclosures. Given this, I was surprised by the decision taken by the Supreme Court earlier this year in relation to the FOI Act (though I was less surprised by their decision in relation to the Environmental Information Regulations (EIR)).[5]

From a pragmatic point of view, whilst in principle I am not in favour of the Ministerial veto, its occasional use has significantly less impact on transparency than would making certain exemptions absolute, whilst providing government with a backstop in cases that cause it most concern. The retention (and if necessary, clarification) of a ministerial veto for exceptional cases seems a proportionate price to preserve a strong FOI Act more broadly.

5. What is the appropriate enforcement and appeal system for freedom of information requests?

It seems to me that the existing system of enforcement and appeals is largely fit for purpose. I would be extremely concerned at any proposal to limit the ability of the Information Commissioner or the courts to issue binding decisions on public authorities.

Overall the Act works well at present and has led to increased transparency and accountability across the public sector. This would not have happened without there being a "stick". Even now some public authorities resist disclosure of information that ought to be in the public domain. Heels are dragged, and as is evident from the Information Commissioner's evidence, there is still a significant problem with timeliness of responses. Without enforcement powers, the Information Commissioner would not be taken seriously. Progress in opening up the public sector would be slowed and in all likelihood reversed.

As someone who has been involved in the process of handling and answering FOI requests, I am aware that on occasion public employees resist disclosure of information even where it would be appropriate to release it, and no exemption can legitimately be relied upon. Most FOI Officers are relatively junior in their organisations and are thus not well placed to stand up to resistance. Their only way to promote good practice is to point to the powers of the Information Commissioner. Without the existence of an independent regulator able to reverse incorrect decisions, these public officials will struggle to fulfil their role effectively and poor practice will proliferate.

It ought to be remembered that environmental information is subject to the EIRs. These regulations implement a European Directive which require an independent review process to be in place. If the Information Commissioner's

[5] *R (on the application of Evans) and another v Attorney General,* [2015] UKSC 21

powers were diminished in relation to FOI, there would be a divergence in the operation of these pieces of legislation which are so closely related.

There is another reason why I believe it would be short-sighted to remove the existing enforcement and appeal process, at least without putting something equally or more effective in its place. There has been a right of access to information for ten years. The public is used to being able to request information from public bodies. Whatever changes the Commission proposes, or that the government chooses to make, people will continue to make requests. Even now, on many occasions applicants are not satisfied with the response that they receive. The availability of an independent regulator to whom they can complain provides a safety valve. Without it, discontented requesters will merely continue to bombard public authorities with correspondence. Even if such correspondence is not answered, it will take up staff time. Trust will continue to be eroded, public authorities will spend money on repeating themselves, and there will be noone to act as arbiter. A strong and effective enforcement and appeal process is a benefit to government and public authorities as much as it is to those utilising the Act.

6. Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

FOI has a cost. This is indisputable. However, this can be said of most activities in government. I recently carried out research into the cost of public relations activities more broadly across central government.[6] A FOI request was sent to 20 central government departments asking them how much was spent on external relations, press offices and marketing activities in 2014/15. Only 16 departments have provided information, but the total that those 16 departments spent on public relations activities was £157 million in that period, according to their own figures. It is difficult to agree upon a formula to estimate the cost of FOI, but if we take the cost indicated by a Ministry of Justice commissioned report in 2012 (£184)[7] and multiply this by the total number of requests received by government departments in 2014 as cited in the Ministry of Justice's annual statistics for FOI,[8] we get a figure of £5.7

[6] Full details and copies of the responses received can be found at http://www.foiman.com/archives/2097

[7] *Strand 3 – Investigative study to inform the FOIA (2000) post-legislative review: Costing Exercise*, Ipsos Mori for Ministry of Justice, March 2012 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217390/investigative-study-informing-foia.pdf)

[8] Freedom of Information Statistics: Implementation in Central Government 2014 Annual and October - December 2014, Ministry of Justice Statistics bulletin, 23 April 2015, p.24 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf)

million. Compared to the £157 million spent on other communications in a 12 month period, FOI seems relatively inexpensive.

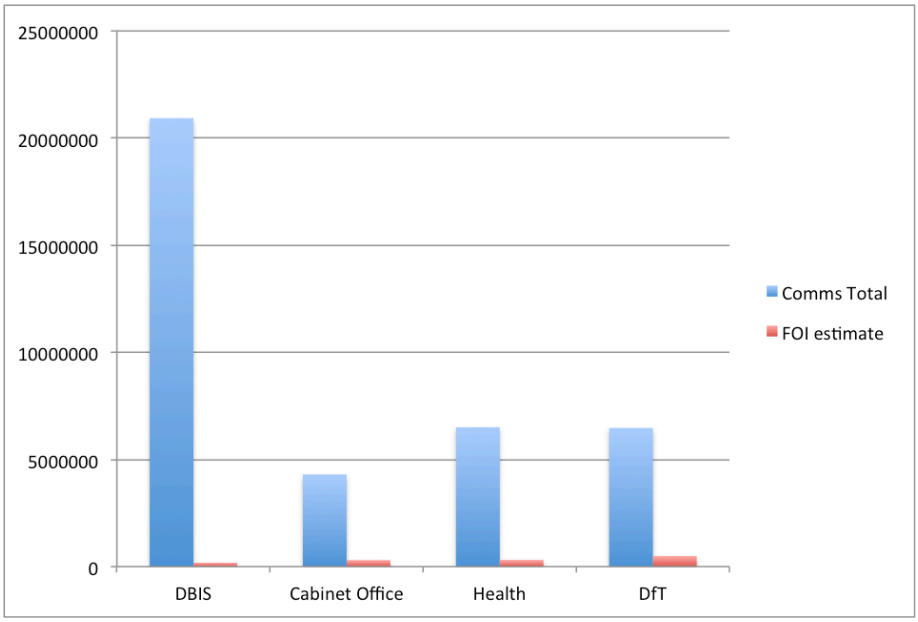

Chart 2: expenditure on public relations v expenditure on FOI in a sample of government departments

It is essential to see FOI in this context. As suggested earlier in this response, it is likely that people will continue to ask questions of public authorities whatever changes are made to their legal rights. It is surely important that public authorities engage with those funding them beyond merely publishing information that they deem of interest. FOI provides a legal framework through which individuals can make their enquiries – and sets out the circumstances when it will be appropriate to refuse requests. Importantly, it is a framework that has achieved some degree of public recognition and trust. Dismantling it may result in unexpected consequences including continuing and perhaps even increased public expenditure.

Another point worth making in relation to the burden of FOI is that there is some evidence that the volume of requests is starting to decline. Government statistics have shown a gentle reduction over the last couple of years, and certainly I have heard anecdotal evidence that this may be a common trend in other parts of the public sector. It is too early to be certain, but it may be that the high-water mark of UK FOI has been passed.[9]

Having seen how public authorities work and how they handle FOI requests, it seems to me that the cost of FOI could be reduced by improvements made to their administration. Despite claims that FOI would lead to improved records management, my own experience suggests that these improvements have been limited. Inadequate provision for record keeping impacts not just on the ability of public bodies to respond to FOI requests in a timely manner, but also

[9] Source: Government FOI Statistics, published quarterly by the Ministry of Justice (https://www.gov.uk/government/collections/government-foi-statistics)

on the efficiency of those bodies more broadly. Time is wasted by officials resisting disclosure of information even when given clear advice that there are no grounds for withholding it. Bureaucratic handling of requests increases their cost. In response to my recent FOI requests, several departments provided more information than had been asked for and wrote letters which were then scanned and attached to the email sent in response. Time could have been saved by merely responding within the body of the email. Byzantine approval processes delay responses, taking up the expensive time of senior public officials often unnecessarily.

One of the options explored in the Commission's Call for Evidence is the possibility of introducing a charge for FOI requests. I am very much against this, as it is a very crude tool for managing the volume of requests. Arguably, the most useful research carried out using FOI is that which compares spending or decision making by a number of public authorities. My own research described above relied upon this. For most people and organisations, even a relatively small fee of £10 would make this kind of research impossible. To take my own example, it would have cost £200 up front to carry out this research. For those scrutinising whole sectors, for example higher education or local government, the cost could well be as much as thousands. It would prevent important research from being carried out, in many cases resulting in damaging and expensive inconsistencies going uncovered. Examples include media revelations that significant numbers of home care visits last less than 5 minutes which led to Ministers taking action;[10] revelations that children with mental health problems can wait for over three years to be assessed;[11] and that reports of child sexual abuse have risen significantly over the last 4 years.[12]

Furthermore, such an approach would limit access to information to those who can afford it. The low paid, the elderly, the unemployed, and other groups with limited incomes would be disproportionately affected by such a change.

An exclusive focus on the burden of FOI would be unfortunate, as it ignores the significant benefits that FOI has brought, including savings to the public

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[10] Revealed: More than 500,000 care home visits last less than five minutes, *Daily Telegraph*, 15 February 2015 (http://www.telegraph.co.uk/news/health/news/11302534/Revealed-more-than-500000-home-care-visits-last-less-than-five-minutes.html - accessed 18 November 2015)

[11] Children with mental health problems can wait over 3 years to be assessed, *The Independent*, 30 March 2015 (http://www.independent.co.uk/life-style/health-and-families/health-news/children-with-mental-health-problems-can-wait-for-more-than-three-years-to-be-assessed-10142500.html - accessed 18 November 2015)

[12] Reported child sexual abuse has risen 60% in last 4 years, figures show, *The Guardian*, 9 April 2015 (http://www.theguardian.com/society/2015/apr/09/reported-child-sexual-abuse-has-risen-60-in-last-four-years-figures-show - accessed 18 November 2015)

purse. I mentioned above the cost of public relations to central government. In response to my request, the Foreign & Commonwealth Office pointed out that some of the expenditure they reported was on activities such as promotion of UK business abroad. Just as this expenditure may result in significant returns for the UK economy, FOI can lead to savings to public expenditure. Officials may be less inclined to make expensive decisions if they are aware that the public will find out about them. The Campaign for FOI has uncovered several examples of this over the last 10 years and will no doubt highlight these in its evidence. One example from my own experience involved a request for the expenses of the Chief Executive of my own employer at the time. As a result of the request, it was established that £9,000 had not been claimed back from an overseas institution, which was immediately rectified. The resulting saving of £9,000 may not have been a huge figure in the context of the overall budget, but was nonetheless significant recompense for an average expenditure of approximately £184 per FOI request. Beyond these kind of anecdotal examples, the savings that FOI has facilitated are difficult, if not impossible, to quantify. They are likely nonetheless to be significant, and possibly greater than the cost of FOI itself to the public purse.

Bearing the above in mind, I consider that the existing mechanisms for managing the burden of FOI are sufficient. Section 12 and the existing fees regulations can be used in most circumstances to refuse the more expensive and unfocussed requests. Where this is not available, recent case law has made clear that the exemption for vexatious requests at section 14 of the Act can be used to refuse overly burdensome enquiries. The Information Commissioner has provided some further detail on these provisions and recent case law relating to them in his evidence and I would encourage the Commission to consider these carefully.

Summary

In summary, my response to the Commission's Call for Evidence is as follows:

1. The existing provisions within the Act provide sufficient protection for internal deliberations. Such protection should not be absolute but, as at present, balanced against the benefits that transparency and accountability bring.
2. There is sufficient protection for Cabinet discussion and agreement in the Act at present. I am not persuaded of the need for more protection in this area.
3. The exemptions in the legislation provide for protection of risk assessments where such protection is necessary and appropriate. Again, I do not believe that this kind of information requires more specific or increased protection.
4. In principle I am not supportive of the concept of a ministerial veto. However, its sparing use, subject to judicial review, causes limited damage to transparency more broadly. As a backstop, its existence causes less damage than would an increase in the number of absolute exemptions.

5. In order to be effective, it is important that there is a “stick” to encourage public authorities to comply with FOI. In my view the current Act, through the powers of the Information Commissioner and the appeal process, largely provides this. If anything, the Commissioner requires more powers in order to ensure that compliance continues to improve.
6. The burden of FOI is often exaggerated and ought to be considered in relation to other expenditure by public authorities and their overall communication strategy. Existing mechanisms, focused on placing a limit on the cost of FOI requests to public authorities, are a far better way to manage any burden than the crude method of charging individuals to make requests. Finally, it is important to recognise the benefits that FOI has brought, including the saving of public money. These are much more difficult to quantify but are nonetheless significant.