

Independent Commission on Freedom of Information Report

March 2016

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Foreword

Matthew Hancock
Minister for the Cabinet Office and Paymaster General

You appointed us on 17 July 2015 to review the Freedom of Information Act 2000 (“the Act”) as it has developed in the ten years since the Act came into force.

It is the conclusion of the Independent Commission on Freedom of Information (“the Commission”) that the Act is generally working well, and that it has been one of a number of measures that have helped to change the culture of the public sector. It has enhanced openness and transparency. The Commission considers that there is no evidence that the Act needs to be radically altered, or that the right of access to information needs to be restricted. In some areas, the Commission is persuaded that the right of access should be increased. More generally, the Commission would like to see a significant reduction in the delays in the process whereby without good reason requests can go unresolved for several years. We have not been persuaded that there are any convincing arguments in favour of charging fees for requests and therefore we make no proposals for change.

It is of significance that the Act was substantially amended during its parliamentary passage. Partly as a consequence of this, the Commission is persuaded that there are areas where the Act is insufficiently clear, or where uncertainties have grown up around its operation. Also, there are aspects of the freedom of information scheme where decisions and interpretation appear to have departed from the original intentions behind the legislation.

The Commission is therefore making a range of recommendations to improve clarity and certainty around the operation of the Act. We do not expect that these will have a dramatic impact on the use of the Act, or on the range of information which is made available under it. They may however help to reduce some of the confusion and concern that the Act has engendered among public bodies.

Our terms of reference also cover ways to improve access to information for requestors. We received a wide range of suggestions for improvements in how the Act operates for requestors. We make a number of recommendations which we believe will provide assistance to requestors.

The need for a review of the freedom of information legislation is hardly surprising. The Act was substantially revised in the course of its passage through Parliament, and it is also quite common in other jurisdictions for information access regimes to need periodic review and amendment in order to deal with unintended consequences and uncertainties relating to drafting or interpretation. In deciding whether to recommend change, we have concentrated on areas which are unclear, confusing, or unnecessarily complex, while considering carefully any potential impact on the amount of information obtainable under the Act.

Our hope is that our recommendations will improve the operation of the Act, both for requestors and for those bodies subject to it.

We would like to record our thanks to the staff of the Commission, Steve Jones, Alexandra Avlonitis and Narinder Sahota. They have worked against very tight deadlines to cope with the huge amount of written evidence we received, to prepare it for publication and to organise the oral evidence sessions. In particular, we would like to recognise the important role of Steve Jones, the Secretary to the Commission, for his experience and knowledge of the Freedom of Information Act and for his drafting skills.

Lord Burns, Chair

Lord Carlile of Berriew

Dame Patricia Hodgson.

The Rt Hon Lord Howard of Lympne

The Rt Hon Jack Straw

Introduction

The Commission's terms of reference are:

"The Commission will review the Freedom of Information Act 2000 to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of the Act adequately recognises the need for a "safe space" for policy development and implementation and frank advice. The Commission may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information."

An important development was the creation of uncertainty around the ability of the Cabinet to exercise a veto over the release of information. This followed the successful appeal by The Guardian in a case involving correspondence between HRH the Prince of Wales and ministers in a previous administration.

In order to reach conclusions the Commission issued a public call for evidence that ran from 9 October to 20 November 2015. The call for evidence asked the following questions:

Question 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?

Question 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?

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

Question 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?

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

Question 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?

Written evidence

The Commission received over 30,000 written responses to that call for evidence. The responses comprised:

172 responses from organisations

693 responses from individuals

29,334 individual responses via the 38 degrees campaign website

744 nearly identical emails as part of a campaign organised by Liberty

All of the responses received have been read, and considered. The responses are summarised below.

Responses from organisations

We received 74 responses from public sector bodies subject to the Act, and public sector representative bodies, including NHS Trusts, police authorities, and local authorities, although none from central government departments. These responses were generally focused on the burdens imposed on them by the Act, and in particular requests made for the financial advantage of a business or individual. Many of these responses were supportive of imposing some restrictions, such as fees for making requests, changes to the cost limit for refusing requests, or increasing the range of activities that can be counted when determining if a request is too burdensome to answer.

We received 20 responses from media bodies, and their representative bodies, including newspaper and television companies. These responses were strongly in favour of the Act, and were opposed to restricting the right of access. They drew attention to the range of benefits the Act provided, and gave numerous illustrations of news stories which had only been made possible through use of the Act. These responses were generally very strongly opposed to the introduction of fees for making requests.

We received 60 responses from a range of other bodies that might broadly be termed 'civil society' groups, including the Campaign for Freedom of Information. These groups were generally strongly supportive of the Act and opposed to any restriction of the right of access. The Campaign for Freedom of Information in particular provided a detailed analysis of decisions reached by the Tribunals in respect of deliberative space over the previous three years. Many of these bodies also favoured extension of the Act, most frequently to those providing public services under contract.

We received 17 responses from other bodies, political parties, trade unions, and lawyers. These organisations were opposed to restrictions to the Act, and highlighted its benefits.

The Information Commissioner ("IC") plays a fundamental role in the enforcement of the Act (and of the Data Protection Act). He provided us with detailed evidence, including statistics on his decision making in order to highlight the proportion of cases where public bodies were able to protect sensitive information under the existing legislation.

Responses from individuals

We received a range of responses from individuals, including users of the Act, academics, parliamentarians, journalists, and public sector employees responding in a personal capacity. These responses were generally supportive of the Act and opposed to any restriction of the right to access information.

Responses via 38 degrees website

We received 29,334 responses from individuals via the 38 degrees website. These responses were overwhelmingly supportive of the Act, and opposed to restrictions on access to information. A large proportion of these responses also said that they believed that the Act should be extended to cover private companies delivering public services.

Responses as part of Liberty email campaign

We received 744 nearly identical responses as part of an email campaign organised by Liberty. These responses argued that the Commission should reach the same conclusions as the 2012 post-legislative scrutiny report of the Justice Select Committee into the Act.

Oral evidence

The Commission took oral evidence over two days (20th and 25th January), in Portcullis House, Palace of Westminster, from:

- The Information Commissioner: Christopher Graham
- The Rt Hon Lord McNally
- The National Police Chiefs Council: Ian Readhead and Mark Wise
- 38 Degrees: Blanche Shackleton
- Lord O'Donnell
- The Taxpayers' Alliance: Jonathan Isaby
- Liberty: Sam Hawke
- The Local Government Association: Councillor David Simmonds
- Universities UK: Nicola Dandridge
- The Health and Safety Executive: Peter McNaught
- NHS Providers: Chris Hopson
- Kent County Council: Caroline Dodge and Geoff Wild
- The Society of Editors and the Press Association: Bob Satchwell and Peter Clifton
- The Rt Hon Dominic Grieve QC MP
- The Rt Hon Lord Beith
- Professor Christopher Forsyth and Professor Richard Ekins
- The Campaign for Freedom of Information: Maurice Frankel

Introduction to the Act

The Act applies to more than 100,000 public bodies in England, Wales and Northern Ireland¹. It gives a general right of access to recorded information held by bodies subject to the Act. It requires that any written request is answered within 20 working days. Where a request requires consideration of the public interest balance, the statutory time limit for responding can be extended. The Act does not, however, apply to requests for environmental information or one's own personal data. These are considered under the Environmental Information Regulations 2004 (or, in Scotland, the Environmental Information (Scotland) Regulations 2004) and the subject access provisions of the Data Protection Act 1998 respectively.

There are 24 exemptions to the general right of access. These exemptions are, in summary:

Section 21 – information accessible to the applicant by other means

Section 22 – information intended for future publication

Section 22A – information obtained in the course of, or derived from, a pre-publication research programme (from 1 October 2014)

Section 23 – information supplied by, or relating to, bodies dealing with security matters

Section 24 – information which must be exempt for the purpose of safeguarding national security.

Section 26 – information that would, or would be likely to, prejudice defence

Section 27 – information that would, or would be likely to, prejudice international relations

Section 28 – information that would, or would be likely to, prejudice relations between administrations within the United Kingdom

Section 29 – information that would, or would be likely to, prejudice the economy

Section 30 – information that is held for the purposes of an investigation or bringing proceedings

Section 31 – information that would, or would be likely to, prejudice law enforcement

Section 32 – information held within court or tribunal records, or the records of a public inquiry

Section 33 – information that would, or would be likely to, prejudice audit functions

Section 34 – information which must be exempt for the purpose of avoiding an infringement of the privileges of either House of Parliament

Section 35 – information which relates to the formulation of government policy, Ministerial communications, the provision of advice by the Law Officers, or the operation of any Ministerial private office

Section 36 – information that would, or would be likely to, prejudice the conduct of public affairs

Section 37 – information that relates to communications with the Royal Family and Household and honours

¹ Scotland has its own legislation, The Freedom of Information (Scotland) Act 2002

Section 38 – information that would, or would be likely to, endanger health or safety

Section 39 – information which is within the scope of the Environmental Information Regulations

Section 40 – information which is personal data

Section 41 – information, the release of which, could lead to an actionable breach of confidence

Section 42 – information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings

Section 43 – information that would, or would be likely to, prejudice commercial interests, or which constitutes a trade secret

Section 44 – information the release of which is prohibited (e.g. by another enactment)

Most of these exemptions require the public authority to consider the public interest balance – these are referred to as ‘qualified’ exemptions. Where the public interest in releasing material subject to an exemption outweighs the public interest in withholding it, then the material cannot be withheld under that exemption. Where no such public interest balancing is required, the exemption is said to be ‘absolute’.² In addition to the public interest test, several exemptions require a ‘prejudice’ test to be satisfied before information can be withheld under that exemption.

The Act provides exemptions for requests which exceed the ‘appropriate limit’ (or ‘cost limit’). The cost limit is specified in regulations and is set at £600 for central government departments, and £450 for other public authorities. Staff time is calculated at a rate of £25 per hour and so this is equivalent to a limit of 24 hours for central government and 18 hours for other public authorities. The Act also provides for an exemption for requests which are ‘vexatious’, and for requests which are repeated (unless a reasonable interval has elapsed).

If a request is refused, the requestor must be notified in writing by the public authority, and must be informed of any right of review. While the Act does not create a statutory right of review, the Code of Practice made under section 45 of the Act states that public authorities should have a complaints procedure. There is no time limit for such ‘internal reviews’, but the Code requires that they be dealt with in a reasonable time.

Where a request continues to be refused in whole or in part, the requestor can appeal to the independent IC. The IC may issue a decision notice stating whether the public authority’s refusal is upheld or not. Where the IC upholds the decision of the public authority, the requestor can appeal to the First-tier (Information Rights) Tribunal. Where the IC overturns the decision of the public authority, the public authority can appeal to the Tribunal. If an appeal is unsuccessful, then further appeals on points of law can be heard by the Upper Tribunal, the Court of Appeal, and ultimately the Supreme Court.

The Act also contains a power which allows a Cabinet Minister, on reasonable grounds, to overrule a decision issued by the IC, or a reviewing court or tribunal. This power of ‘veto’ remains subject to the oversight of the courts because it is subject to challenge by judicial review. Ministerial undertakings were given during the passage of the Bill that any power to exercise the veto should be the subject of collective Cabinet agreement.

² 9 of the 24 exemptions in the Act are wholly or partly absolute: s.21 (information available to the applicant by other means), s.23 (information supplied by, or relating to, bodies dealing with security matters), s.32 (court records, etc), s.34 (parliamentary privilege), s.36 (in so far as relating to information held by the House of Commons or the House of Lords), s.37 (in so far as relating to communications with the Sovereign and the Heir, or person second in line, to the Throne), s.40 (personal data), s.41 (information provided in confidence), s.44 (prohibitions on disclosure)

Development

Since its implementation in 2005 the Act has continued to evolve. In 2010, the Constitutional Reform and Governance Act amended section 37 of the Act to make communications with the Sovereign and the second in line and Heir to the Throne absolutely exempt, and this change was commenced in January 2011. Following Mr Paul Dacre's *Review of the Thirty Year Rule*³ the Constitutional Reform and Governance Act also provided for a reduction in the maximum duration of some exemptions from 30 years to 20 years in parallel with a reduction in the point at which historical records are made available at The National Archives and other places of deposit.

Also in 2010 the Act was extended to academy schools by the Academies Act 2010. In 2011 the Act was extended by regulations to the Association of Chief Police Officers, the Financial Ombudsman Service, and the Universities and Colleges Admissions Service.

In 2012 further changes were introduced through the Protection of Freedoms Act (POFA) to extend the definition of a publicly-owned company in the Act so that companies wholly owned by the public sector were included. Until that change, companies were only covered if they were wholly owned by the Crown or otherwise by a single public authority. It also introduced changes to the appointment of the IC, and imposed additional requirements to make any datasets released under the Act available in an open format and licensed for re-use.

In 2014 the Intellectual Property Act 2014 introduced a new exemption (22A) to protect pre-publication research material, following concerns expressed by the Higher Education sector during post-legislative scrutiny of the Act conducted by the Justice Select Committee in 2012.

From March 2015 the Act was extended by regulations to include Network Rail.

Devolution implications

Freedom of information in relation to the devolved institutions and devolved public bodies is a devolved matter. Any changes to the Act made by the UK government would need the assent of the Welsh Government and Assembly, or the Northern Irish Executive and Assembly, if they are to apply to devolved institutions and public bodies. Scotland has wholly separate legislation (the Freedom of Information (Scotland) Act 2002).

³ <http://webarchive.nationalarchives.gov.uk/20090516124148/http://www.30yearrulereview.org.uk>

Executive Summary

Part one of this report sets out the Commission's recommendations and a brief introduction to the Act. **Chapter one** ("helping requestors") sets out a range of recommendations to assist requestors in their use of the Act. In this section we recommend that requests are dealt with much more quickly by public authorities. We recommend that instead of public authorities being able to extend the deadline for answering a request by an uncapped period while they consider the public interest, that this is limited to a statutory period of 20 working days; we also recommend that this extension to the time limit only applies where the request involves information that is complex or of a high volume, or where consultation is required with third parties who may be affected by the release of the information. In addition, we also address the delays that can occur where a request is refused and a requestor asks a public authority to review its own decision. There is currently no fixed limit on the time taken for such a review and we propose a statutory time limit of 20 working days.

We recommend that the prosecution powers of the IC are strengthened to make it easier for him to prosecute offences relating to destroying information that has been requested under the Act, and to increase the penalty for this offence. We make a number of recommendations to increase the amount of information that is released proactively by public authorities. We recommend that all public authorities who employ at least 100 full time equivalent staff are required to publish their compliance statistics in relation to their duties under the Act, and to publish responses to requests where information is given out, and we also recommend that more information is proactively published about the expenses and benefits in kind paid to senior public sector executives. Finally we recommend that the IC is given responsibility and powers of enforcement to ensure that public authorities are meeting their obligations to proactively publish information.

Chapter two ("section 35") considers the protection offered by the exemptions that protect government policy formulation, Cabinet material and inter-ministerial communications, Law Officer's advice, and the operation of ministerial private offices. Here we recommend that the exemption for government policy formulation is redrafted to more closely match the exemption in the Environmental Information Regulations 2004, and that sections 35 and 36 are clarified so that material relating to collective Cabinet agreement is protected under a single exemption instead of being spread across two different exemptions. In relation to the public interest test that is applied under section 35, we recommend that the Act is clarified so that it is clear that the need for safe space is not diminished simply because a decision has been taken (although it may be diminished for other reasons), and that section 35 is amended so that when a public interest assessment is made some weight is given to the need to protect collective Cabinet responsibility, and the need to protect frank exchanges of views or advice for the purposes of deliberation.

Chapter three ("section 36") considers the protection afforded by the exemption that protects information where its release would prejudice the effective conduct of public affairs. Here we recommend that the outdated and burdensome provision which requires the reasonable opinion of a qualified person to be obtained before the exemption can be applied is removed.

Chapter four ("risk assessments") considers the protection provided under the Act to candid risk assessments. It concludes that no additional protection is necessary.

Chapter five (“the Cabinet veto”) considers whether the executive should have a final veto over the release of information and, if so, on what terms. Here we find that it was clear that Parliament intended that the executive should have a veto, and we recommend that the government legislates to clarify beyond doubt that it does have this power. We recommend that the veto should be exercisable where the executive takes a different view of the public interest in release, and that the power is exercisable to overturn a decision of the IC. We recommend that in cases where the IC upholds a decision of the public authority, the executive has the power to issue a “confirmatory” veto with the effect that appeal routes would fall away, and any challenge would instead be by way of judicial review of that veto in the High Court.

Chapter six (“the appeals process”) considers the length and multiple stages of the existing appeals structure. This concludes that the First-tier Tribunal appeal too closely duplicates the full-merits assessment carried out by the IC, and we recommend that this appeal stage is removed. This would strengthen the position of the IC as final arbiter of the substance of cases, but (similar to the Scottish system) an appeal to the Upper Tribunal on a point of law would remain.

Chapter seven (“burdens on public authorities”) considers the burden of requests on public bodies against the public interest in information being available. Here we make clear that we do not consider it appropriate to impose an up-front charge. We recommend that the obligations of public authorities in respect of the form in which information must be provided are clarified; that the power to issue a code of practice under section 45 is reviewed; and that the code is updated and expanded. We also recommend that stronger guidance to public authorities is included in the code about the use of section 14 of the Act to address burdens. Section 14, which allows the refusal of vexatious or repeated requests, has recently been clarified and can be used to refuse requests which are disproportionately burdensome. Finally we recommend that the government reviews the resources available to the Commissioner to ensure that they are adequate for him to carry out his duties under the Act effectively.

Part two of this report sets out a small number of areas where the Commission felt unable to make recommendations, either because they fell outside our terms of reference, or because we did not receive sufficient evidence (or the evidence received was too finely balanced). For these issues we do not make any recommendations, but simply express our provisional views.

The first of these relates to the extension of the Act to new bodies. Here we express our opinion that the Act should be extended to those who are providing public services under contract. We suggest this should be done by treating information about the performance of the contract as being held on behalf of the contracting public authority, although we think this should be limited to new contracts only, and only those contracts where the annual value is £5m or greater. We also express our opinion that there is no convincing evidence for the exclusion of universities and higher education institutions from the scope of the Act.

The second of these areas is changes to the cost limit. We consider the option that the cost limit should be increased in line with the disproportionate costs threshold, and that the costs of redaction related to absolute exemptions should be included as a permitted activity (subject to the IC being able to overturn that refusal where there is a strong public interest in the request being responded to). However we were unable to make a recommendation on this, partly due to insufficient evidence, and partly as a result of the evidence we received being too finely balanced.

Recommendations

1. Helping requestors

The Commission's terms of reference extended to looking at both sides of the balance between transparency, accountability and the robust protection of sensitive material. We therefore welcome the wide range of proposals we received for improving how the Act operates for requestors.

Tackling delays due to the public interest time limit extension

At present section 10 of the Act makes clear that a public authority has 20 working days to respond to a request made under the Act. This time limit, however, can be set aside where the public authority needs to consider the public interest balance in applying a qualified exemption. Where the time limit is set aside, a request need only be answered within a period which is "reasonable in the circumstances".

According to government annual statistics, in 2014 there were 34,623 resolvable requests made to central government departments and bodies. In 5% of these (1695) a public interest test extension was relied on. There are 24 exemptions, of which 15 are qualified, 6 are absolute and 3 are partially absolute and partially qualified (sections 36, 37 & 40). Although the public interest comes into play in 60% of exemptions, the public interest test extension is actually only invoked in a small minority of resolvable central government requests.

Of the 1695 requests in 2014 that relied on the public interest test extension, 42% of these took 20 or fewer working days to resolve. 33% took 21-60 days; 7% took 61-100 days; and 2% took 101+ days. Therefore there are a minority of requests which are taking a significant amount of time to resolve. Whether it is better to describe a case that takes over 100 days to resolve as benefiting from a permitted time extension or simply late is debateable.

In its evidence to the Commission, the Campaign for Freedom of Information said:

"This provision has clearly been abused on occasions. The former National Offender Management Service (an MOJ executive agency) in the past issued 12 consecutive monthly extensions under this provision, delaying its response to an FOI request by a whole year. We do not consider that the public interest test requires extra consideration time. The need to consider whether an exemption applies and if so whether disclosure on public interest grounds should take place are part of a single continuous process. No government department requires 20 working days to decide whether particular information relates the formulation of government policy – and then a further 20 working days to consider whether disclosure should take place on public interest grounds."

We have considered carefully whether the additional time extension for public interest consideration is necessary. The Commission's view is that generally the time extension for public interest consideration is unnecessary and simply creates additional uncertainty and bureaucracy around the operation of the Act both for requestors and public authorities. Public authorities should be considering which exemptions apply and the public interest in release at the same time.

There may of course be a minority of particularly complex cases where a longer time limit is justified. Under regulation 7 of the Environmental Information Regulations 2004, an extension of 20 working days is allowed where the public authority reasonably believes that due to the complexity or volume of the information requested it is impracticable to comply with the request in time. In its written evidence to the Commission, the Campaign for Freedom of Information said:

“If there is a case for extending the time scale it should be where significant external consultation is involved, for example with third parties whose commercial interests may be affected by disclosure or where a request involves a substantial volume of information. The maximum extension should be specified, as has been done in regulation 7(1) of the EIR.”
(paragraph 129)

We agree, and we consider that if there is to be a time extension in should be where the information requested is complex, voluminous, or where it is necessary to consult with third parties who may be affected by the release of the information. This should not be an open-ended extension, but should be limited to an additional 20 working days.

Inevitably even this extended deadline will be missed in a small number of particularly complex or difficult cases, and there is no reason why public authorities cannot be transparent about that fact. Where the deadline is missed, a requestor can complain to the IC, who has the power to commence an investigation.

There are a number of bodies for whom special time limits apply under the Freedom of Information (Time for Compliance with Request) Regulations 2004, 2009 and 2010. As these bodies already benefit from extended deadlines for responding to requests, we do not consider that there is a case for them to be treated any differently than any other body in relation to the recommended changes to the time limit extension.

Recommendation 1: That the government legislates to amend section 10(3) to abolish the public interest test extension to the time limit, and replace it instead with a time limit extension for requests where the public authority reasonably believes that it will be impracticable to respond to the request on time because of the complexity or volume of the requested information, or the need to consult third parties who may be affected by the release of the requested information. This time limit extension will be limited to an additional 20 working days only.

Tackling delays due to internal review

Section 45 of the Act makes clear that public authorities must have procedures for dealing with complaints about the handling by them of requests for information. These complaints are known as “internal reviews”. Internal reviews can create significant delay for requestors who can only expect a response within a “reasonable” time period because there is no statutory time limit for these reviews. [Guidance](#) on internal reviews states that:

“authorities should set their own target times for dealing with complaints; these should be reasonable....” (paragraph 42, section 45 Code of Practice).

Some respondents to our call for evidence both questioned the value of internal review, and expressed concern at the delays that it could introduce. The Campaign for Freedom of Information said:

“We question the value of internal review. It may merely impose a further delay on the requester while reducing the pressure on authorities to reach a correct decision initially.”
(paragraph 132)

Associated Newspapers Limited said:

“There is a serious problem with the time it takes to appeal against a refusal. In practice, the delay inherent in the system operates a huge disincentive to pursue a request in the face of a refusal. However, short of providing the ICO with further resources, ANL sees no easy solution to the problem. It does, however, suggest that removing the need for internal review of a decision before an appeal may lie would be a sensible way of reducing delay. In ANL's experience, internal reviews seldom produce a different result.”

Cumbria County Council said:

“In the Council's experience the current three tier process: (1) request response, (2) Internal Review and (3) ICO Complaint/Tribunal; is ineffective, resource intensive and very rarely results in any amendment to the initial disclosure. Consequently, the Council is in favour of a system where our initial response is fully considered and signed off at a senior level, allowing for the applicant to complain directly to the Information Commissioner. Consequently, the Council is strongly in favour of removal of the 'Internal Review' process.”

Other respondents considered that the internal review process did have merit. The BBC said:

“The internal review system provides an opportunity for public authorities to review responses and provide further information about the reasoning behind a decision to requesters or to consider whether an informal resolution might be appropriate, thus preserving public resources.”

and the Campaign Against Arms Trade said:

“...the current system has the advantage of, at the internal review stage, allowing the public authority to look again at its own decision, before, at the Information Commissioner stage, allowing both parties to present their arguments.”

National statistics show that internal reviews can take a substantial amount of time. For example, for internal reviews completed in 2014 by central government bodies⁴, 62% of these reviews took 20 working days or fewer; 30% took between 21 and 60 working days; 5% took between 60 and 100 days; and 2% took more than 100 days.

The IC has issued guidance stating that he expects all internal reviews to be conducted within 20 working days. A requestor who is dissatisfied with the way that a public authority has dealt with their request cannot appeal to the IC until they have requested an internal review, although the IC may decide to hear an appeal before an internal review is completed if a public authority is taking an excessive amount of time.

In the Commission's view public authorities should be getting it right first time, and if they do not then requestors cannot be subjected to an unlimited further delay while the matter is reviewed a second time. We therefore consider that the IC's guidance should be made statutory, and a requirement be introduced that all internal reviews are completed within 20 working days. For the avoidance of doubt, we think this should be the case for all information requests (i.e. not just those relating to section 35 and 36).

Recommendation 2: That the government legislates to impose a statutory time limit for internal reviews of 20 working days.

⁴ Freedom of Information Statistics: Implementation in Central Government 2014 Annual; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf

Strengthening the Information Commissioner's prosecution powers

Section 77 of the Act makes it a summary offence to alter, deface, block, erase, destroy or conceal information after it has been requested under the Act with the intention of preventing its disclosure. The penalty is a fine not exceeding level 5 on the standard scale. On 12 March 2015 section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was brought into force. This had the effect of removing the £5000 cap on level 5 fines. Therefore the maximum penalty for an offence under section 77 is now an unlimited fine.

Under section 127 of the Magistrates' Courts Act 1980 any prosecution for a summary only offence must commence within 6 months of the offence being committed, unless legislation specifies otherwise. So far there has never been a prosecution under section 77, although there have been complaints to the IC.

In evidence to the Justice Select Committee during its post-legislative scrutiny of the Act, the IC explained that by the time the public authority had determined a request, and he had received and investigated a complaint, 6 months from any offence is likely to have elapsed already. This made it very hard for him to initiate an investigation in order to bring a prosecution within 6 months.

The Commission accepts that the prosecution power as currently drafted is unlikely ever to be used. In our view the Justice Select Committee were correct to recommend during post-legislative scrutiny that this should be made an either-way offence. This would have the effect of removing the time limit for those seeking to bring a prosecution, and would also allow for a custodial sentence for particularly serious acts of destruction.

Recommendation 3: That the government legislates to make the offence at section 77 of the Act triable either-way.

Mandating the publication of compliance statistics

In carrying out our task, the Commission has at times been frustrated by the lack of reliable statistics on compliance with the Act across the public sector. The government collects and publishes national statistics on the compliance of central government departments and bodies. Similar statistics do not exist for the wider public sector, although we recognise that some public authorities do choose to publish statistics on requests received. Giving oral evidence to the Commission, the IC said:

“The Scottish system of course is on a much smaller scale, but they are able to do something I would dearly like to be able to see. There's much better information about exactly what's going on in Freedom of Information in Scotland, because every public authority reports into the Scottish Information Commissioner with their performance statistics and they're upheld and they're not upheld. I don't have that picture for the rest of the UK. The only figures that I've got are the figures from central government, which are collective. But we've got so many more public authorities it would be good to have that sort of information to hand.”

We recognise that the lack of statistics from across the wider public sector makes the IC's job of monitoring and enforcing compliance with the Act significantly harder. Outside of central government he has to rely on monitoring the number of complaints received about a particular body in order to determine if enforcement action is needed. Therefore we are attracted to imposing a requirement on public authorities to publish performance statistics on their compliance under the Act.

While we have no objection to public authorities publishing their own statistics, we think these statistics would be most useful if they were also submitted to a central body who could compile them into an overall return that could be published. This would avoid the need for the public to consult

thousands of individual websites. A central body could also define the precise scope of the statistics that should be gathered, and thus ensure that the returns are consistent. We have no strong view on whether these statistics should be reported in to a government department (as is the case for the central government statistics which have historically been published by the Ministry of Justice), or the IC, but a central body should have responsibility for co-ordinating the statistics.

We are, however, keen not to impose additional burdens on small public authorities such as parish councils or schools which may not have the resources to process such statistics. Therefore we intend that this obligation only applies to those public authorities who employ 100 or more full time equivalent staff. We think this strikes the right balance in terms of improving the information available on compliance under the Act while not imposing a burden on small public bodies.

Recommendation 4: That the government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish statistics on their compliance under the Act. The publication of these statistics should be co-ordinated by a central body, such as a department or the IC.

Mandating the publication of responses to requests

The IC encourages (but does not mandate) through his proactive publication scheme that public authorities publish a disclosure log of their responses to requests made under the Act which may be of wider public interest. In our view this should be expanded so that all responses to requests are published routinely, and preferably as soon as the information is given out. We only intend this to apply to requests and responses where information is provided in whole or part, and not to requests which are refused. The requirement to publish responses and requests would be subject to usual compliance with the Data Protection Act 1998, and thus a requestor's personal data would not have to be published.

Answers to requests already are published where they are made through public websites like WhatDoTheyKnow.com, but we think that this should be the norm. We consider that this will have a number of benefits, such as helping requestors to obtain information which has in fact already been released without needing to make a request, reducing unnecessary requests for information that has already been published, and allowing public authorities to avoid answering duplicate requests where they can simply point to information on their websites.

We recognise that there may be an additional burden and cost for public authorities in complying with this requirement. While we would hope that this offset by a reduction in unnecessary requests, and the other recommendations included in this report, we recognise that this may be a significant burden for the smallest public authorities. We would therefore limit this new obligation to public authorities who employ 100 or more full time equivalent staff.

Recommendation 5: That the government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish all requests and responses where they provide information to a requestor. This should be done as soon as the information is given out wherever practicable.

Requiring greater proactive transparency about senior executive pay and benefits

There is already a range of important obligations on public sector bodies to publish information about the pay of senior executive staff. Section 5.2.2 of the Treasury's Financial Reporting Manual requires all public sector entities, other than local authorities, public corporations that are not trading funds, and charitable Arms' Length Bodies, to publish a remuneration report consistent with the Companies Act 2006, and regulation 11 of the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008. NHS Trusts and Foundation Trusts have separate but compliant reporting manuals which impose similar obligations.

This requirement applies (for departments) to ministers, the Permanent Secretary (or equivalent), and the management board, and for other bodies the Chair or Chief Executive and management board. These individuals are to be named, and section 5.2.27 of the Manual states that the salary information will include the actual salary of ministers and salaries in £5000 bands for officials.

Section 19 of the Act requires that public authorities subject to the Act have a publication scheme approved by the IC. The IC provides a model scheme which specifies that central government bodies should publish the total of the allowances and expenses paid to individual senior staff and management board or governing body members by reference to categories.

Within local authorities, section 38 of the Localism Act 2011 requires that local authorities publish an annual pay policy statement that sets out the remuneration of their chief officers, including pay increases, bonuses, and how these relate to the pay of the lowest-paid employees. The Accounts and Audit (England) Regulations 2015 require that public bodies, other than health bodies, publish the following information in their statement of accounts:

- the number of employees whose salary exceeds £50,000 p.a. (broken down into brackets of £5,000);
- for senior employees to publish the salary, allowances, fees, pension contributions, expenses, bonuses, and compensation for loss of employment. Senior employees are those who earn £50,000 p.a. and who are the head of a public service, or those who earn £150,000 p.a. or more; and
- Senior employees are identified by job title, but those earning £150,000 or more must also be identified by name.

While there are existing substantial proactive publication obligations in relation to senior executive pay, we have received evidence that more could be done. In particular we have noted that details of expenses and benefits in kind are in the main not published, and requests made under the Act have been effective in disclosing proper information and to uncover questionable practices.

We believe that there should be increased transparency concerning senior public sector executives in relation to expenses and benefits in kind. We do not wish to impose excessive burdens on public bodies however and any recommendation to publish all details of expenses and benefits in kind may be onerous. Therefore we consider that public authorities should be required to publish in their statement of accounts the total of senior employees' expenses and benefits in kind, and a breakdown of these by reference to categories. These categories should be understandable by the lay person, and could include for example, "company car", "medical insurance", and so on. These obligations should extend to senior employees as defined by the Accounts and Audit (England) Regulations 2015, but also to include health bodies.

Recommendation 6: Public bodies should be required to publish in their annual statement of accounts a breakdown of the benefits in kind and expenses of senior employees by reference to clear categories.

Enforcing proactive transparency obligations

Public authorities have a range of proactive transparency obligations. These include their obligations:

- in the Treasury's Financial Reporting Manual (as detailed above) to publish information about senior pay and benefits
- under section 19 of the Act to publish information in accordance with a publication scheme approved by the IC, which includes information about expenditure, contracts and tenders, and senior pay and benefits.
- for local government in England and Wales, the requirements of the Accounts and Audit Regulations 2015 to publish information about the pay and benefits of senior employees
- for local government in England, the requirements of the Local Government Transparency Code 2015, which includes information about expenditure, contracts and tenders, and senior employee pay and benefits

Some respondents have expressed concerns that public authorities are failing to proactively publish information which they are required to leading to unnecessary requests made under the Act. The Spend Network said, in its written evidence to the Commission:

“Since 2010, governmental authorities have been mandated to publish data on expenditure, so there is a presumption among many in government that procurement data is already open. We work with the spend files that are mandated to be published by local and central Government. Despite this mandate for publication, we frequently have to make FOI requests to public bodies in order to secure this data, and even then we often struggle to access data through these FOI requests...The burden of that [sic] making and managing these requests is high. This would be understandable if we were asking for data that isn't required to be published already, but we're requesting data that has been mandated for nearly six years and that has detailed instructions on the standards that publishers should meet.”

While the IC has the power to enforce compliance (via an enforcement notice) with the requirements of the publication scheme, he has no power or role in enforcing any other proactive transparency obligations, including in relation to the Local Government Transparency Code.

It is the view of the Commission that someone should be responsible for monitoring public authorities and ensuring that they are complying with their proactive publication obligations. Because the IC already has responsibility for publication schemes which overlap with some of the other transparency obligations, we consider that the IC should be the responsible person.

This should include monitoring and enforcing the new obligations recommended in this report in respect of the proactive publication of compliance statistics (recommendation 4), publication of responses to requests made under the Act (recommendation 5), and greater publication of information about senior employee pay and benefits (recommendation 6).

The IC has provided evidence that he is limited by what he can do outside his core duties by his existing budget, and any new duties would need to be properly resourced. We say more about this, below (see recommendation 21).

Recommendation 7: The government should give the IC responsibility for monitoring and ensuring public authorities' compliance with their proactive publication obligations.

2. Section 35

Section 35 of the Act is a class-based exemption. It applies only to government departments and provides for four exemptions to the release of information to protect good government and provide a safe space for policymaking. The exemptions are qualified by a public interest test.

Between 2005 and 2015, over 400,000 requests under the Act have been received by central government. In over 90,000 requests, exceptions and or exemptions were relied upon to withhold requested information. Of these, Section 35 exemptions were applied over 8,000 times. In the vast majority of these requests, the matter was not pursued. In a small minority of requests, the requestor sought an internal review.

In 213 cases, the information continued to be withheld under section 35 following an internal review and the requestor appealed to the IC. The outcomes of those appeals are set out in table 1 below.

Table 1: Outcome of section 35 appeals to the Information Commissioner							
Year (calendar)	Public authority decision upheld		Public authority decision partly upheld		Public authority decision overturned		Total
2015	24	83%	2	7%	3	10%	29
2014	21	68%	1	3%	9	29%	31
2013	18	69%	1	4%	7	27%	26
2012	23	66%	3	9%	9	26%	35
2011	12	52%	3	13%	8	35%	23
2010	10	56%	1	6%	7	39%	18
2009	7	35%	4	20%	9	45%	20
2008	8	44%	3	17%	7	39%	18
2007	0	0%	1	14%	6	86%	7
2006	0	0%	1	17%	5	83%	6
Total	123	58%	20	9%	70	33%	213
<i>Source: Information Commissioner's Office</i>							

This data shows that on average the IC upholds public authority decisions in full nearly 60% of the time. Since 2009 public authority success rates have increased markedly, and public authority decisions are now generally fully upheld in around 70% of cases.

The 213 appeals decided by the IC led to 40 further decisions on section 35 by the First-tier (Information Rights) Tribunal ("FTT") on appeal. 24 (60%) of these appeals were brought by public authorities, 14 (35%) of these were brought by requestors, and in 2 (5%) cases both sides appealed. These arose from 12 IC decisions that upheld the public authority's decision, 10 IC decisions that partly upheld the public authority's decision, and 18 IC decisions that overturned the

public authority's decision. The outcome of these appeals to the FTT are set out in figure 2 and table 2a.

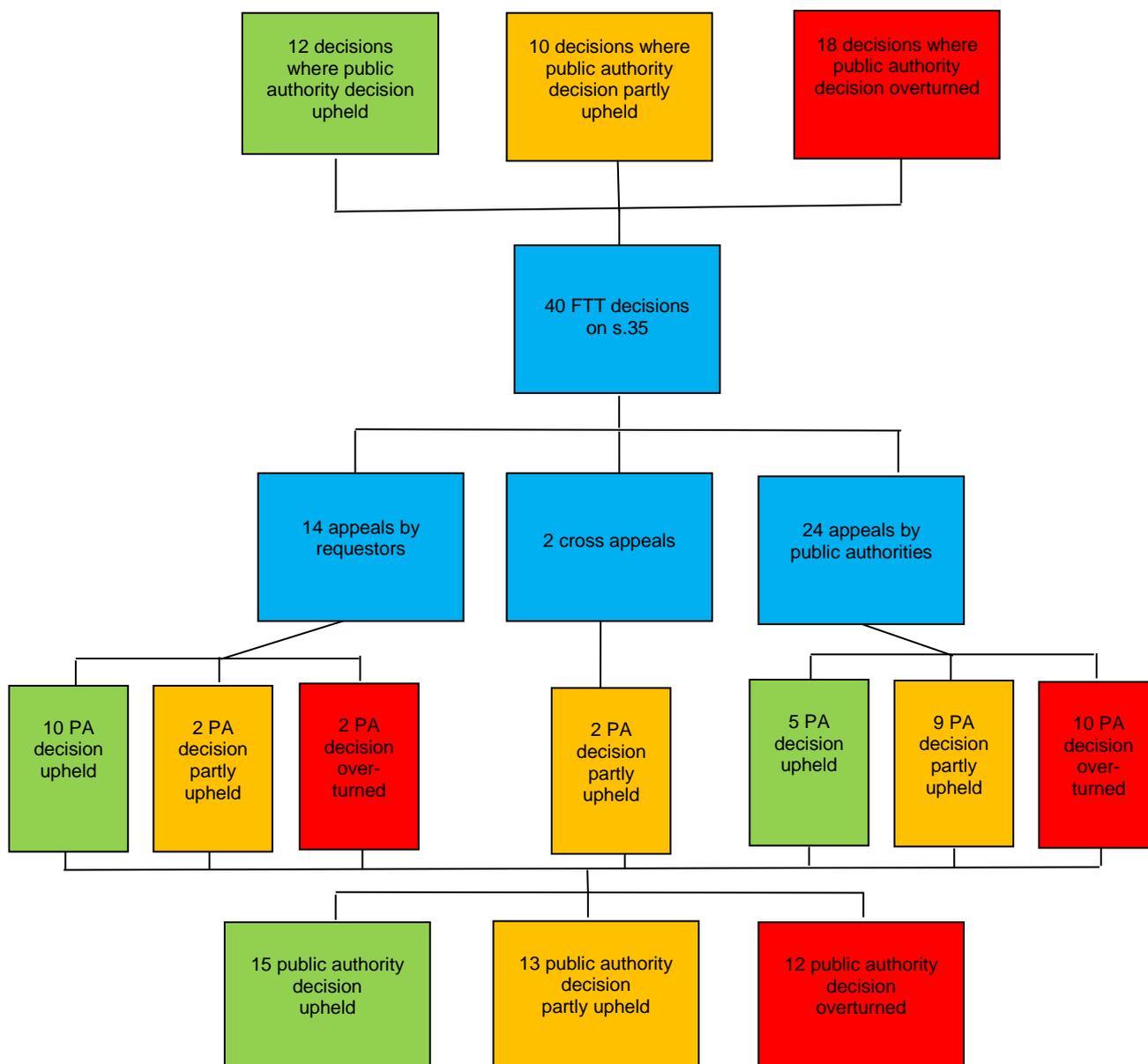


Table 2a: outcomes of FTT decisions on section 35 2005-2015

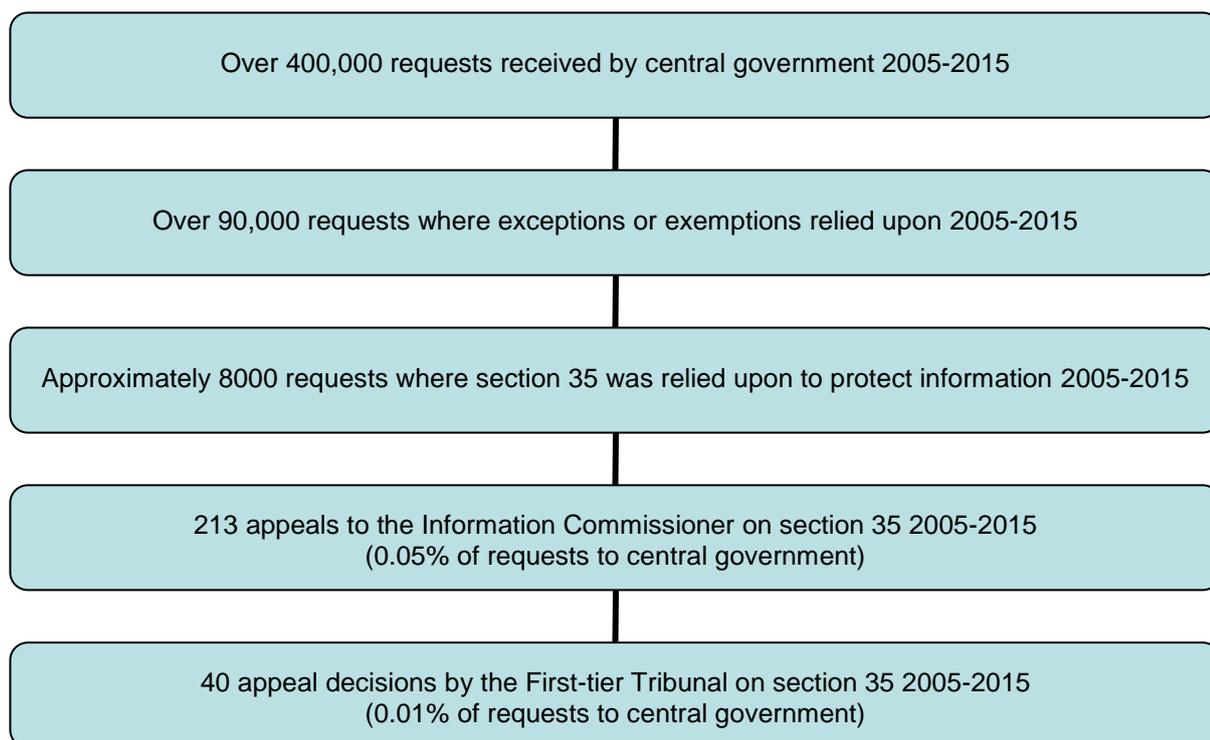
Public authority decision upheld	15	37.5%
Public authority decision partly upheld	13	32.5%
Public authority decision overturned	12	30%
Total	40	100%

Table 2a shows that the FTT upholds public authority decisions in 37.5% of section 35 decisions. Research⁵ shows that the FTT agreed with the ICO's original assessment in 28 out of 40 (70%) decisions.

In 9 decisions (22.5%) where the FTT disagreed with the ICO, it found more in favour of the public authority. In 3 decisions (7.5%) where the FTT disagreed with the ICO, it found less favourably for the public authority.

The FTT reached the complete opposite view to the ICO in 5 (12.5%) decisions (upholding the public body's decision on 4 occasions and overturning it on 1).

It is worth noting that the number of requests that these disputes concern is a tiny fraction of those received by government departments. This is illustrated by figure 3 below.



The operation of section 35

In response to our call for evidence we received strong representations about the effectiveness of existing protection, and the value in the exemption being subject to a public interest test. For example, in its evidence to the Commission, News Media Association said:

“When assessing where the public interest lies, both the Commissioner and the Tribunal are consistently and predictably deferential to the concerns set out in the call for evidence about the need to preserve a safe space for policy development and the delivery of frank advice. The NMA considers that the approach they adopt of robustly protecting information during the formulation of policy, and then weighing up the public interest in releasing it thereafter, is sensible and the best way of reaching fair outcomes that reflect the facts of the case.”
(paragraph 5)

⁵ <https://www.gov.uk/government/publications/tribunal-outcomes-for-the-freedom-of-information-act-sections-35-and-36-research>

The Campaign for Freedom of Information said:

“...the FOI Act’s existing approach to the disclosure of internal discussion provides more than adequate protection for sensitive information. There is no case for providing greater protection... The suggestion that these exemptions might operate without the public interest test, whether for 20 years or some shorter period, would be an enormously retrograde step entirely at odds with the public’s expectations, the requirements of accountability and the government’s own declared commitment to openness.” (paragraphs 2-6)

The views quoted above were supported by oral evidence heard by the Commission during public evidence sessions.

It is the view of the Commission that, in its operation, section 35 has afforded a significant degree of protection for sensitive information held by central government. We are persuaded that it is not necessary to provide absolute exemption for this category; that is, we do not support the removal of the public interest test element. Clearly, public bodies are able to use section 35 and have reasonable prospects of protecting sensitive information. In reaching this conclusion we have been persuaded by the evidence received from the Campaign for Freedom of Information and the IC, along with many others, that the public interest test is a valuable part of the Act’s scheme.

Where the IC and Tribunal have overturned public authority decisions, this has generally been in light of the age of the material, or that its release is unlikely to cause harm (because, for example, it is essentially factual). Occasionally the deciding factor appears to have been the high profile or controversy of the subject area.

We have been concerned by the evidence we have received about the approach of public authorities (particularly central government) to some requests. Some cases concerning anodyne or factual information appear to have been resisted solely on the basis that to release the requested information would set a precedent for similar requests regardless of the content. In the view of the Commission, this is a weak basis on which to refuse a request. It is clear that the IC and the tribunals take each decision on a case-by-case basis, and neither the IC’s nor the First-tier Tribunal’s decisions formally set precedents. Policy responsibility for freedom of information has recently moved to the Cabinet Office. We consider that this provides an opportunity for some central leadership in this area to remind public authorities that they should not be resisting requests solely on the basis that providing the requested information will set an unwelcome precedent regardless of the content.

Another area that has concerned us is the tendency for public authorities to rely on generic arguments in relation to the public interest in disclosure. While there are types of information which do and should attract a strong public interest on a class basis (for example, material relating to collective Cabinet responsibility or legal professional privilege), we are mindful of the guidance given in the Upper Tribunal decision *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC). In that case the Upper Tribunal made clear that in advancing public interest arguments both sides should try to identify the specific harms that would occur if the information was released, and the specific benefits (in so far as is possible) of the information being released, rather than making generic class arguments.

The drafting of section 35

There is, however, considerable uncertainty in how section 35 operates. This is due partly to how it is drafted and partly to the operation of the public interest test. We consider that this has caused unnecessary anxiety for central government and a lack of confidence in the protection it was designed to provide, as well as uncertainty for requesters.

In examining the evidence received, and the previous decisions of the IC and tribunals, we have noted that there have been instances where there has been confusion and dispute about the

scope of the exemption in section 35(1)(a) which exempts information relating to the formulation and development of government policy. We consider that these are symptomatic of a wider uncertainty about the scope of this exemption in cases that do not get as far as the IC or tribunal.

The first issue which creates confusion is whether there is a need for active policy development to be taking place in order for section 35(1)(a) to be engaged. In some cases the use of this exemption has been rejected because it is considered that the information relates to the implementation rather than development of policy⁶, or where the link between the information and the active policy development process was unclear⁷. All of this creates additional uncertainty about which exemption should apply to particular material, and creates an additional burden for public authorities, the IC and the tribunals.

Where section 35(1)(a) cannot apply for any of the above reasons, it is usually the case that section 36 could apply instead. This overlap between the two sections therefore means that the narrow scope of the exemption for policy formulation and development is not the end of the matter. Rather, the toing and froing between the two sections simply creates confusion and additional bureaucracy, and distracts from the key issue which is whether release of the information is, or is not, in the public interest.

Therefore the Commission considers that the drafting of section 35(1)(a) should be reconsidered while staying close to the original policy intention. We have considered various alternatives for redrafting section 35(1)(a). We are attracted, in principle, by the terminology of the exception provided for in regulation 12(4)(e) of the Environmental Information Regulations 2004 (EIRs). This makes exempt, subject to a public interest test, information which would disclose internal communications. The IC's approach to the internal communications exception makes clear that "the underlying rationale behind the exception is that public authorities should have the necessary space to think in private." (para 10). The IC notes that "many arguments about protecting a private thinking space will be similar to those made under section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of government affairs) of FOIA" (para 12). Therefore both the EIR exception and section 35 are aiming to give effect to the same policy intention.

The Commission is, however, concerned that the exemption under the EIRs for internal communications may be too broad to import directly into the Act. The EIRs are, by their nature, limited to environmental information, whereas such a provision in the Act would apply to all central government information. Because the key information that section 35(1)(a) is intended to protect is material concerning government policy, the Commission takes the view that the exemption for internal communications should be limited to information that relates to government policy.

This would be broader than the existing exemption at section 35(1)(a) and it would remove the existing limitation to "formulation and development". The revised exemption would cover information relating to policy development or formulation whether or not active policy formulation was taking place, or whether or not that there was a break in development, and it would cover implementation of policy as well as its review or evaluation. This would have the effect of removing the existing uncertainty about the scope of this exemption, and would allow requestors, public authorities and appellate bodies to focus on the key question of whether release of the information was, or was not, in the public interest.

A communication that relates to government policy will be internal and thus potentially protected by the exemption when it is not shared outside of a public authority. This extends to bodies which are part of a government department, such as executive agencies, but not to separate bodies such as non-departmental public bodies. Central government departments should be treated as if they

⁶ For example, these Commissioner decision notices: FS50420602, FS50375926

⁷ For example, these Commissioner decision notices: FS50378248, FS50512109

were a single public authority for the purposes of this exemption, as is currently the case for the EIR exception.

We do not consider that this change will lead to significant additional material falling under an exemption. This is because section 36(2)(c) already provides every public authority with a very wide exemption which could already be applied to internal communications. But this change will clarify section 35 and make it easier to use and understand.

Recommendation 8: The government should legislate to replace section 35(1)(a) with an exemption which will protect information which would disclose internal communications that relate to government policy.

The Commission has also considered the protection afforded under section 35 to material related to inter-ministerial communications including collective Cabinet responsibility. We received evidence on this issue from the Campaign for Freedom of Information who were concerned that protection for Cabinet minutes and papers might be made “absolute”:

“Any attempt to exclude Cabinet, and particularly Cabinet committee, papers from access would be particularly damaging. Much government discussion between departments takes place via the Cabinet committee system. Much of this is dealt with by correspondence and does not involve meetings at all...The fact that issues likely to result in ‘significant public comment or criticism’ are required to be dealt with under the Cabinet committee system highlights how unacceptable a new exemption for Cabinet or Cabinet committees would be. It would automatically exclude all contentious proposals from FOI. It would also provide a means of guaranteeing secrecy for any inconvenient information, on any subject, by ensuring that it was circulated ‘for information’ through the Cabinet committee system.”

The IC said:

“The process of collective Cabinet discussion and agreement is clearly deserving of significant protection. Maintaining the doctrine of collective responsibility will always carry significant public interest, even after a decision is taken. This may be reduced to some extent due to significant passage of time, if relevant individuals are no longer politically active, and/or confidentiality has already been undermined due to published memoirs or other public statements...The flexibility of the public interest test is an important component of FOIA and the Commissioner believes that, overall, the evidence illustrates that this flexible concept can provide the right protection and respect for this constitutional convention, whilst acknowledging that the convention is not absolute.” (paragraph 27, 32)

Having considered all of the evidence, it is the view of the Commission that section 35 affords an appropriate balance of protection for material that relates to inter-ministerial communications and collective Cabinet decision-making. We do not consider that absolute exemption is necessary, and we recognise that the exemption has – with the Cabinet veto as a backstop, and if operating as Parliament intended – provided adequate protection for Cabinet-related material.

There is, however, some difficulty with the drafting of this section. In particular, the narrowness of section 35(1)(b) means that some collective responsibility material falls outside of this section, and public authorities are also required to rely on the protection under section 36(2)(a).

As is made clear by section 35(5), “ministerial communications” means inter-ministerial communications, and includes Cabinet proceedings, and decisions made by Cabinet or Cabinet subcommittee. But it does not exempt information which might involve collective Cabinet responsibility, but which does not involve inter-ministerial communications, such as material revealing the position of an individual minister on a matter decided, or to be decided, by Cabinet.

In order to protect the latter, it is necessary to rely on section 36(2)(a) which covers material the disclosure of which would, or would be likely to, prejudice the maintenance of the convention of collective responsibility of Ministers of the Crown. Both section 35 and section 36 are subject to a public interest test.

It is the view of the Commission that splitting the exemptions protecting collective Cabinet responsibility in this way is unnecessarily complicated and confusing. Therefore the Commission considers that it would be better to expand the exemption in section 35(1)(b) so that, as well as covering inter-ministerial communications, it covered any material relating to collective Cabinet decision-making, whether by inter-ministerial communications or otherwise. This would mean that section 36(2)(a) could be repealed.

This would have the effect of providing clear and consistent protection for all aspects of collective responsibility, and would mean that some material that was subject to the prejudice-based exemption in section 36 would fall under a class-based exemption in section 35. We do not consider that this change will have a particularly significant impact on the amount of material released under the Act, given the considerable weight already afforded by the IC and tribunals to material which relates to collective Cabinet decision making. Nonetheless, such material could still be released where it was in the public interest to do so.

Recommendation 9: The government should legislate to expand section 35(1)(b) so that, as well as protecting inter-ministerial communications, it protects any information that relates to collective Cabinet decision-making, and repeal section 36(2)(a).

The public interest test

The public interest test is not defined in the Act, but it is generally considered to be a broad exercise allowing all relevant factors to be taken into account in assessing the overall public good. There are no exhaustive or prescriptive lists of the factors that need to be considered and balanced.

Some guidance is, however, given in relation to the exercise of the public interest test in respect of section 35(1)(a). Section 35(4) of the Act states that “regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking”. This is clearly intended to send a signal that should inform any consideration of the public interest in relation to requests for information about government policy.

Public authorities appear to be generally competent at assessing the public interest: the IC upholds around 70% of public authority section 35 decisions that are appealed to him, and around 80% of these decisions are unchallenged.

However, there remains a significant chance (1 in 3, on average) that the IC will overturn any decision which is appealed to him to rely upon section 35. The uncertainty around assessing the public interest also continues at FTT level. Although the FTT agrees with the IC more often than it disagrees, it is significant that in 12% of section 35 decisions and 23% of section 36 decisions the FTT reaches entirely the opposite conclusion to the IC, and many of these cases turn on decisions about the public interest. We do not draw attention to this fact to criticise either the IC or the FTT, but to highlight that in some cases there is considerable uncertainty in determining where the public interest lies, and that two sets of reasonable people may fairly disagree. This creates a difficult landscape for public authorities who are called upon to make these decisions.

There are particular issues that add to this uncertainty. The first is the issue of deliberative space, and when the public interest in maintaining a safe space for internal deliberation ceases. In our call for evidence we drew attention to the IC's guidance in which he says:

"The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight." (paragraph 196, ICO guidance on section 35 FOIA)

In his evidence to the Commission, the IC explained that his guidance referred only to the need for safe space for deliberation becoming unnecessary once a decision was taken. But he stressed that there were a range of other factors that could mean that pre-decisional information continued to be sensitive after a decision was taken, and this included the potential for a 'chilling effect'.

The Commission's view is that this interpretation significantly misunderstands the nature of safe space. The existence of a safe, internal, deliberative space allows for frank discussions and advice, and for the consideration of the full range of options, including some which might, after deliberation, be deemed to be unacceptable, and for these to be criticised and challenged. It is important that ministers and officials should not feel discouraged or impeded from setting out deliberative material in written form during a deliberative process. If these internal discussions are to be made public soon after a decision is taken, then this undermines the entire principle of a safe space. In the context of policy decisions, this interpretation would mean that unless there are additional factors that render pre-decisional material sensitive, advice from officials and records of frank discussions of options would be immediately releasable once a decision is taken. We do not see how participants can feel confident to engage in frank and imaginative deliberations when they know that these deliberations could be made public the moment that a decision is taken. It is no response to this concern to say that in most cases people do not make requests under the Act for this information: the fact is that they could, and officials and ministers are not to know in which cases requests will be made.

The release of material showing a frank appraisal of options and recommendations by officials immediately after a decision would generally be just as damaging as the release of such material during the deliberative process. Ministers would be likely to find themselves criticised if they had not followed official advice, and the impartiality of the civil service would be harmed where senior officials were seeking publicly to defend and explain a policy choice which in private they argued against.

This is an example of an issue where it is the interpretation and practices around the Act, rather than the legislation itself, which have led to some rather odd positions. During the Parliamentary debates that led to the passage of the Act, there was a general consensus that frank official advice and options for Ministers should be protected. For example:

"Ann Widdecombe (Conservative Shadow Home Secretary): No one will argue--no one has ever done so--that internal advice in the form of a judgment submitted by a civil servant to a Minister should be published. That would rapidly make government unworkable." (Commons Second Reading, Hansard 7 Dec 1999: Column 721)

"Dr David Clark (Former Labour Minister): On the issue of policy advice...I believe that the people of this country elect a Government to govern; therefore, it is important that the Government can govern. It is equally important that not every decision is taken in a goldfish bowl. I can understand why advice on current issues between Ministers and their advisers should not be made public." (Commons Second Reading, Hansard 7 Dec 1999: Column 743)

Mark Fisher (Labour backbench): "...Everybody shares the Government's ambition that interministerial discussions, analyses, debates and options, and advice from civil servants, should be exempt. Of course they should be exempt; government cannot continue unless it is exempt..." ([Commons Committee](#), 27 January 2000)

Lord McNally (Lib Dem Shadow): "...We would also accept the case for the release of different policy options subject to a prejudice test. Advice regarding the options would not be released, but broadly our view is that Ministers and their advisers should not be required to discuss policy in a goldfish bowl, but the basic background information should be made available to the public on request..." (Lords Second Reading, 20 Apr 2000: Column 838)

There was no suggestion that the protection afforded by section 35(1)(a) for internal deliberation about policy matters should end at the moment that a decision was taken.

The Commission considers therefore that the Act should be amended to clarify this issue. Although the fact that a decision had been made would no longer be determinative of the public interest, there are a range of other factors which would continue to be relevant. For example, the specific content of the material, or the age of the material in question, would still be relevant in assessing whether the public interest lay with withholding or releasing the information.

Recommendation 10: The government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35(1)(a), the public interest in maintaining the exemption is not lessened merely because a decision has been taken in the matter.

Another issue that has arisen in how the Act is interpreted is that of the weight to be afforded to the exemptions in assessing the public interest. To assess whether it is in the public interest to release information to which section 35 applies, a public interest balancing exercise is carried out. The fact that the information falls within the class of material covered by section 35(1)(a) and (b) has no bearing on this test and, in respect of the public interest in withholding the information, the scales begin empty. By contrast, on the other side of the scales there is always the general public interest in transparency and accountability.

In relation to certain exemptions it has been found that there is an "inherent weight" in the application of the exemption, such that there is a starting public interest in protecting information to which the exemption applies. An example of this is section 42 of the Act where it is recognised that there is an inherent public interest in protecting legal professional privilege given the key role it plays in legal disputes. This issue arises even more starkly in relation to Law Officer's advice, which is protected by section 35(1)(c), where there is a long-standing convention that such advice, and the fact that such advice has, or has not, been sought, is not made public unless the Attorney General determines that it is in the public interest to do so.

It is the view of the Commission that some weight should also attach to the need to protect the principle of collective Cabinet responsibility, and the need for a deliberative space in which advice and options can be weighed. This should include the need for officials to have a thinking space to protect not only advice, but their drafts and notebooks.

Our intention is not to bar material of this nature from being released, but to make a technical change to create a more level playing field in assessing the public interest balance. It is likely that this change will only affect a small number of cases where the public interest is finely balanced.

We did consider whether to add other factors to which regard must be had in assessing the public interest; for example, whether there is a plausible suspicion of wrongdoing on the part of the public authority. We consider however that such matters already are considered as part of the public interest test, and are attributed significant weight. This is supported by the IC's [guidance](#) on the public interest test which says: "A further example of a potential public interest in transparency is where there is a suspicion of wrongdoing on the part of the public authority" (paragraph 32).

Recommendation 11: The government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35, regard shall be had to the particular public interest in the maintenance of the convention of the collective responsibility of Ministers of the Crown, and the need for the free and frank exchange of views or advice for the purposes of deliberation.

3. Section 36

Section 36 applies to all public authorities and is prejudice-based rather than class-based. This requires a qualified person to provide a ‘reasonable opinion’ that release would be likely to prejudice the effective conduct of public affairs. And because it is a qualified exemption it also requires a public interest test. If Section 36 is involved then Section 35 cannot be invoked.

Between 2005 and 2014, Section 36 was applied 3,532 times by central government. In the vast majority of these requests, the matter was not pursued. In a small minority of requests, the requestor sought an internal review. We do not have statistics for the number of times this exemption was applied by other public bodies.

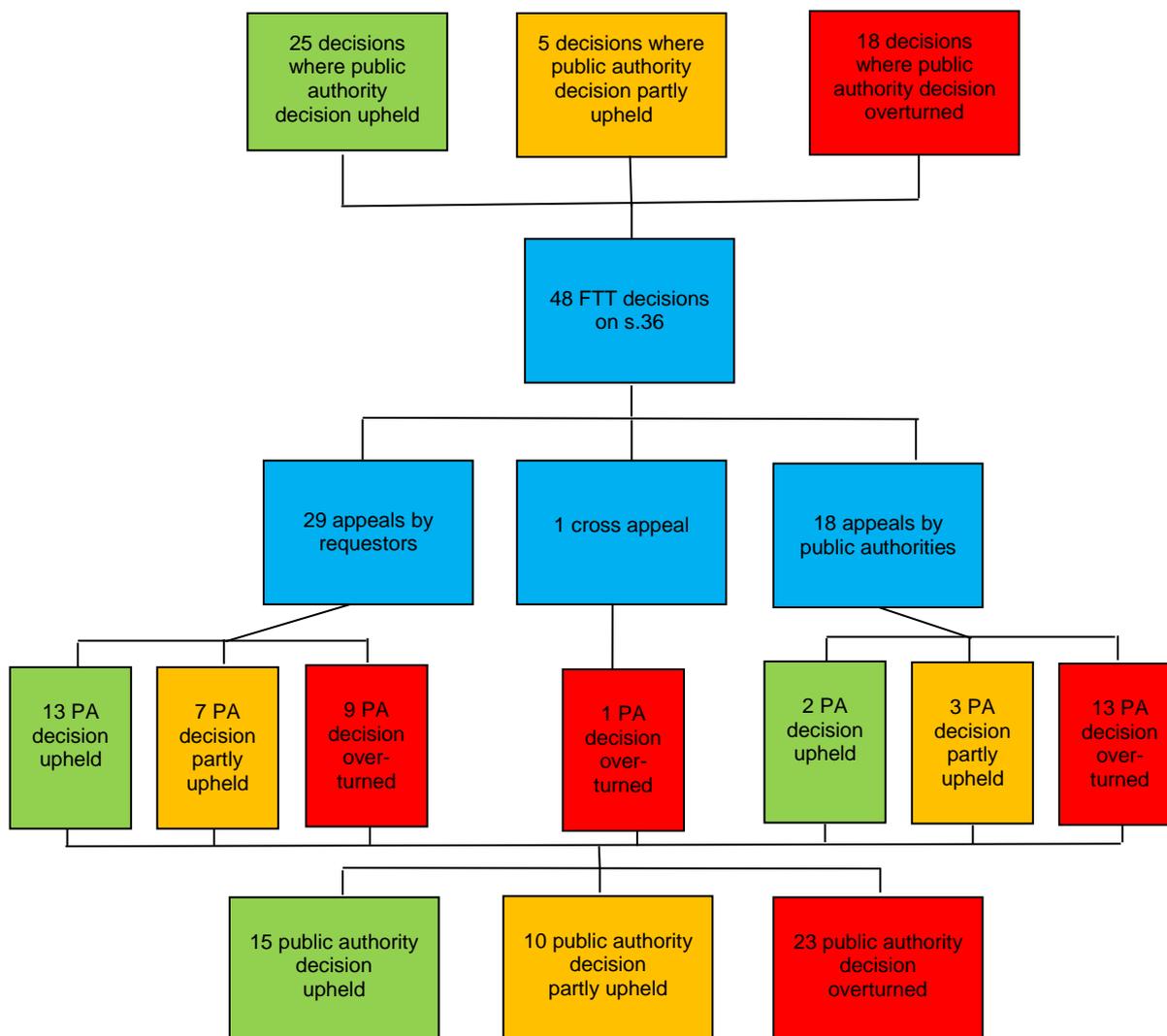
In 339 cases affecting all public authorities (and not just central government) the information continued to be withheld under section 36 and the requestor appealed to the IC. The outcomes of those appeals are set out in table 4 below.

Table 4: Outcome of section 36 appeals to the Information Commissioner (all public bodies)							
Year	Public authority decision upheld		Public authority decision partly upheld		Public authority decision overturned		Total
2015	21	57%	2	5%	14	38%	37
2014	36	54%	5	7%	26	39%	67
2013	46	64%	5	7%	21	29%	72
2012	44	70%	3	5%	16	25%	63
2011	11	55%	5	25%	4	20%	20
2010	15	75%	1	5%	4	20%	20
2009	10	50%	4	20%	6	30%	20
2008	5	24%	6	28%	10	48%	21
2007	4	57%	2	29%	1	14%	7
2006	9	75%	0	0%	3	25%	12
Grand Total	201	59%	33	10%	105	31%	339
<i>Source: Information Commissioner's Office</i>							

Table 4 shows that overall public authority decisions are upheld by the IC 59% of the time. 51% (173 of 339) of the cases where section 36 is relied upon involved central government departments and bodies. 19% (66) involved local government, and 7% (24) concerned educational bodies.

For comparison, the outcomes for central government are as follows: Public authority decision upheld 97 (56%), public authority decision partly upheld 21 (12%), and public authority decision overturned 55 (32%). This shows that the outcomes for central government are representative of wider outcome trends for all public bodies.

The 339 appeals decided by the IC led to 48 further decisions on appeal by the FTT on section 36. Research⁸ shows that 18 (37.5%) of these appeals were brought by public authorities, 29 (60.5%) of these were brought by requestors, and in 1 (2%) case both sides appealed. These arose from 25 IC decisions that upheld the public authority's decision, 5 IC decisions that partly upheld the public authority's decision, and 18 IC decisions that overturned the public authority's decision. The outcome of these appeals to the FTT are set out in figure 5 and table 5a.



Outcome	Count	Percentage
Public authority decision upheld	15	31%
Public authority decision partly upheld	10	21%
Public authority decision overturned	23	48%
Total	48	

⁸ <https://www.gov.uk/government/publications/tribunal-outcomes-for-the-freedom-of-information-act-sections-35-and-36-research>

The FTT agreed with the IC's original assessment in 32 out of 48 (67%) decisions. In 4 decisions (8%) where the FTT disagreed with the ICO it found more in favour of the public authority. In 12 decisions (25%) where the FTT disagreed with the ICO, it found less favourably for the public authority.

The FTT reached the complete opposite view to the ICO in 11 (23%) decisions (upholding the public authority's decision on 2 occasions, and overturning the public body's decision on 9 occasions).

The operation of section 36

It is the view of the Commission that - generally - section 36 affords an appropriate balance of protection for sensitive information held by public authorities. There is however one area where we have been persuaded that the provision needs to be amended.

The qualified person

When the Act was originally introduced to Parliament section 36 provided for a prejudice-based exemption that was in effect absolute. Where material was found to be exempt under this section, the public authority had a discretion to release the material if it decided that it was in the public interest to do so.

The IC would have had the power to determine for himself on appeal whether prejudice would, or would be likely to, occur. For example, in relation to section 43 where disclosure would prejudice commercial interests.

In relation to section 36, however, the requirement for the exemption to be applied by a "qualified person" limited the IC's power of review to a 'judicial review' type function. This meant that the IC would not have been able to decide for himself the issue of prejudice as he would have for other exemptions, but he could only determine whether the qualified person's opinion that prejudice would, or was likely to, occur was reasonable.

"The information commissioner decides at stage one whether any reasonable qualified person could come to the conclusion that there was prejudice. She can intervene at that stage only on the judicial review basis. If she concludes that no reasonable qualified person could come to the conclusion that there was prejudice under Clause 34, she can override the decision and require disclosure." (Lord Falconer of Thoroton, Lords Committee, Freedom of Information Bill, Hansard 24 Oct 2000: Column 307)

This meant that a higher form of protection was provided by section 36 than for other prejudice-based exemptions, subject to the exemption being exercised by the qualified person.

Subsequently, the then government introduced amendments that gave the IC the power to determine the public interest, including for section 36. The government did not, however, take the opportunity to remove the qualified person requirement. We now have a somewhat odd situation where the IC is barred from determining for himself whether prejudice will, or is likely to, occur, but he does have the power to determine whether it is in the public interest to release information where the qualified person has reached a reasonable opinion that prejudice will, or is likely to, occur. Added to this is the fact that where the IC does conclude that the qualified person's opinion is reasonable, the potential for prejudice becomes a relevant (but not determinative) factor in the IC's own determination of the public interest.

In its evidence to the Commission, the General Medical Council said:

"We feel that the exemption provided for by section 36 (prejudice to the effective conduct of public affairs) could be improved upon. We find the application of this exemption to be quite cumbersome as there are three aspects to it: the question of prejudice, the public interest

test and the opinion of a qualified person. In practice the qualified person is usually designated as the most senior person within the organisation and obtaining their opinion can delay a response to a request. We would question the value of obtaining the view of the qualified person on this particular exemption as opposed to any others.”

The Land Registry said;

“With regard to section 36, the requirement for the public authority’s “qualified person” to provide his or her reasonable opinion that the exemption is engaged can be burdensome. If there was greater freedom to obtain the opinion of, say, a senior manager as opposed to that of a prescribed “qualified person” this might lessen the burden.”

In the Commission’s view the requirement for a qualified person to exercise section 36 is a throwback to earlier drafting of the bill that should have been updated, and that this unnecessarily places restrictions on the powers of the IC and burdens on public bodies. We do however consider it important that decisions about applying section 36 are taken at a sufficiently senior level (below board level), and guidance should be provided in a revised section 45 Code of Practice (see below) indicating that the consent of a senior manager is required to apply section 36.

Recommendation 12: The government should legislate to amend section 36 to remove the requirement for the reasonable opinion of a qualified person.

4. Risk assessments

In our call for evidence we described risk assessments as a particularly relevant example of the tension between the public's right to know, and the need for public bodies to have an internal deliberative space. Many documents will contain mention of risks, but here we are concerned principally with documents that are explicitly devoted to setting out a candid risk assessment. We drew particular attention to risk assessments because two of the seven Cabinet vetoes have been in respect of risk assessments.

The most obvious example of a candid risk assessment is the 'risk register'. Project management processes typically utilise risk registers as part of their methodology. Risks are normally given a rating on a scale of 1 to 5 of the likelihood of the risk occurring (where 5 is the highest likelihood of the risk occurring) and the scale of the impact if that risk occurred. Using the scores for likelihood and impact, a "Red / Amber / Green" (RAG) rating is created denoting how serious a risk is. Risk registers do not generally provide detailed explanations of the risks involved, but only the headline risk and potential mitigation.

The Office of Government Commerce (OGC) Gateway Review is another example of a risk assessment. Gateway Reviews examine programmes and projects at key decision points using a peer review process in which independent practitioners examine progress and likelihood of successful delivery. These reviews can apply to e.g. IT or procurement processes, but can also apply to policy development.

Policy impact assessments are formal evidence based procedures that assess the economic, social and environmental costs and risks and benefits of a policy. These are published for example: at the same time as a consultation, response to consultation or at introduction of a Bill or as part of any change during the passage of the Bill.

Major Project Authority Project Assessment Reviews (PARs) are detailed assessments of large projects. They are more tailored to specific projects than Gateway Reviews. Following frank interviews with staff they culminate in a report for the Senior Risk Owner for the project setting out recommendations and assessment of risks.

In its response to the call for evidence Kent County Council highlighted the difficulties that could arise if candid risk assessments were made routinely available:

"...it could mean that people do not feel confident enough to put risks they have identified onto the registers, or that risk registers themselves are not compiled in the first place for fear of repercussions. This could lead to potential "nasty surprises" and poor decision-making if people choose to keep risks "in their heads". (paragraph 3.3)

By contrast, in their evidence the Open Government Network said:

"The public acknowledgement of the existence of certain risks will enhance the public debate about major projects and their implementation. It is when risks can be silently ignored that the consequences are dramatic, often then requiring the complete publication of a flawed risk register when it is too late to prevent the overlooked problems."

The Commission agrees with the evidence of the IC in which he says that the impact of disclosing candid risk assessments can vary depending on the sensitivity of the topic and what is already in the public domain.

There will be risk assessments where it is so keenly in the public interest that the risks identified be disclosed (for example, where these concern serious risks to public health or life) that, notwithstanding the need for these assessments to be part of an internal deliberative process, they

should be disclosed. In other cases the nature and candour of the risks may mean that they should not be published. The Commission has reached the conclusion that the public interest test provides the best way to assess whether specific risk assessments should be published, and that no additional or specific protection is required for risk assessments.

5. The Cabinet veto

The introduction of the Cabinet veto, alongside the power for the IC to determine on appeal the public interest in disclosure, was a significant moment in the development of the Act. The veto provisions of the Act are set out in Section 53. The key parts of section 53 are:

“(1) This section applies to a decision notice or enforcement notice which—

(a) is served on—

- (i) a government department,
- (ii) the Welsh Government, or
- (iii) any public authority designated for the purposes of this section by an order made by the Chancellor of the Duchy, and

(b) relates to a failure, in respect of one or more requests for information—

- (i) to comply with section 1(1)(a) in respect of information which falls within any provision of Part II stating that the duty to confirm or deny does not arise, or
- (ii) to comply with section 1(1)(b) in respect of exempt information.

(2) A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b)....”

“(4) In subsection (2) “the effective date”, in relation to a decision notice or enforcement notice, means—

- (a) the day on which the notice was given to the public authority, or
- (b) where an appeal under section 57 is brought, the day on which that appeal (or any further appeal arising out of it) is determined or withdrawn.”

It is clear to the Commission that Parliament did intend the executive to have the last word when it came to whether information should be released under the Act. The Cabinet veto was part of the parliamentary bargain for the concession by the then Government that the IC would have significantly expanded powers to determine appeals. Giving oral evidence to the Commission, the IC said:

“It's very clear to me that the point in the legislative debate, where the Commissioner was given order making power, as opposed to a recommendation, was in exchange for the executive override being explicit.” (oral evidence session, 20 January 2016)

In our view the veto is an important and valuable part of the Act, and is fundamental to its balanced architecture. However, the decision of the majority of the Justices of the United Kingdom Supreme Court in *R (Evans) v Attorney General [2015] UKSC 21* in practice means that there are serious doubts that the veto can be exercised as Parliament intended.

The Commission takes the view that the language of section 53 reflected the will of Parliament that on reasonable grounds the executive should be able to override decisions made by the IC, or, on appeal, by a tribunal or court. We note that whilst a majority of the Supreme Court justices took a

different view, they did concede that if Parliament made its intentions “crystal clear” about how the veto could be used, then the courts would give effect to that provision.⁹

Therefore we consider that the correct course of action is for the legislation to clarify beyond doubt that the executive has the ability to exercise a veto in those cases where it considers it appropriate. Aside from the intention of Parliament, the executive is trusted with responsibility for national security, defence and international relations, and is in a unique position to assess the wider public interest, and is directly accountable to Parliament and the electorate in a way that others are not.

Recommendation 13: The government should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act.

The public interest

When the veto was first introduced into the Bill, by amendment, it was linked directly to decisions about the public interest, and the responsible minister stated explicitly that it was only exercisable where the executive reached a different conclusion on the public interest (clause 13 concerned disclosure in the public interest).

“52. - (1) A decision notice or enforcement notice which relates to a failure to comply with section 13 in relation to any one or more requests for information shall cease to have effect if, not later than the twentieth working day following the day on which the notice was given to the public authority, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that the authority did not fail to comply with section 13 in relation to that request or those requests.” (Bill as introduced to the Lords)

“...this is not a general override of the commissioner's decisions; it applies only to decisions taken under Clause 13” (Lord Falconer of Thoroton, Lords Second Reading, Hansard 20 Apr 2000: Column 829)

The legislation was amended further in Lords Committee to combine clauses 1 (the right of access) and clause 13 (disclosure where it is in the public interest).

“I now describe the principal amendments which restructure and simplify the provisions of the Bill. As currently drafted, the general right of access in Clause 1 is separated from the provisions of Clause 13 which give a right of access where the public interest in disclosure outweighs the public interest in maintaining the exemption. These amendments bring the rights of access together at the head of the Bill. They express more clearly the effect of the exemptions in terms of public interest disclosure by distinguishing between the provisions in Part II which confer an absolute exemption, where the need to balance the public interest in disclosure against the public interest in maintaining the exemption does not arise, and other exemptions whose application must be balanced against the public interest in disclosure. This is preferable to the current drafting where the relation between the general right of access, the duty on authorities to disclose information in the public interest and the effect of the various exemptions is not clear.” (Lord Falconer of Thoroton, Lords Committee, Hansard 17 Oct 2000: Column 902).

These changes led to consequential changes to the drafting of the veto power bringing it close to its current form. The changes broke the explicit link with clause 13 (disclosure where it was in the public interest). The power instead referred to an ability to conclude that “there was no failure” to comply with the obligations in section 1 of the Act either to confirm or deny that information was held, or to provide that information.

⁹ *Evans*, UKSC, *ibid* per Lord Neuberger, para 58

The effect of these amendments arguably means that the veto could be used to overturn any decision or enforcement notice, and it is not limited explicitly to disagreements about the public interest. But given the clear statements by Lord Falconer on behalf of the then government that the veto could only be used in respect of public interest disputes, it seems highly unlikely that the government would have meant radically to have extended the veto without drawing Parliament's attention to that fact. Undertakings were given in Parliament by ministers that the veto would be used rarely. These undertakings have been respected by successive governments.

In the view of the Commission, the veto power should be clarified so that it is clear that it is to be exercised where the executive takes a different view of the public interest in disclosure. We consider that this more closely gives effect to the original will of Parliament.

In exercising the veto, the accountable person should take into consideration the contents of any decision or enforcement notice. A decision to exercise the veto should of course be made on reasonable grounds, although we do not anticipate that this requirement needs to be included within the legislation itself, since it is settled administrative law that ministers have to have reasonable grounds in exercising a discretion of this kind, or their decisions can be overturned on judicial review.

Recommendation 14: The government should legislate to make clear that the power to veto is to be exercised where the accountable person takes a different view of the public interest in disclosure.

This should include the ability of the accountable person to form their own opinions as to all the facts and circumstances of the case, including the nature and extent of any potential benefits, damage and risks arising out of the communication of the information, and of the requirements of the public interest.

Stage at which the veto should be exercisable

The Commission has also considered the question of the stage at which the veto should be exercised. The veto has been exercised on seven occasions. On four occasions the veto was exercised to overturn a decision of the IC, on two occasions to overturn a decision of the First-tier (Information Rights) Tribunal, and on one occasion to overturn a decision of the Upper Tribunal.

It was the latter decision that gave rise to successful challenge and the decision in *R (Evans) v Attorney General [2015] UKSC 21*. It should be noted that in this case, there was no First-tier Tribunal consideration of the matter. Instead, because of the importance of the matter, the Upper Tribunal sat both with First-tier jurisdiction to consider the facts of the case, and as well as with its normal jurisdiction to consider the appeal on points of law.

In its evidence to the Commission the Campaign for Freedom of Information said:

“...There was no suggestion [in Parliament] that the veto could also be used against a decision of the Tribunal or High Court, both of which dealt with appeals under the scheme set out in the bill as originally drafted.”

In the Commission's own research into the passage of the Act, we found that, when the veto was first introduced at Commons Report (in parallel with the power for the IC to determine the public interest on appeal), public authorities were to have no right of appeal from the IC's decisions about the public interest. Therefore, at the earliest stage of the veto's introduction, there was no possibility for the veto to be used other than to overturn a decision of the IC. The power to veto appears to have been considered to be sufficient protection where there was a disagreement with the IC about where the public interest lay.

Later, at Lords Committee, the government tabled amendments to allow public authorities (just like requestors) to appeal to the tribunal where they disagreed with the IC's decision about the public interest. The clause as amended did explicitly allow the veto to be exercised to overrule a decision by tribunal or court by use of the words (now to be found in section 53(4) that the effective date (for the exercise of the veto) includes, "...where an appeal under section 57 is brought, the day on which that appeal (or any further appeal arising out of it) is determined or withdrawn." It is however fair to say that though the words of the sub-section are clear, this possibility does not appear to have been debated in Parliament. The responsible minister, Lord Falconer, remarked upon the amendments:

Lord Falconer of Thoroton: "...The other amendments grouped here propose changes which flow from the debate we have been having on Clause 52 [veto clause, now section 53]. As currently drafted, Clause 56(3) of the Bill provides that a complainant has a right of appeal against the commissioner's decision when she upholds the authority's decision not to disclose in the public interest. However, public authorities do not have the same option of bringing an appeal to the tribunal in relation to a decision or enforcement notice issued by the commissioner requiring them to disclose exempt information in the public interest.

Government Amendment No. 317 rectifies this by allowing for such an appeal. The right of appeal will exist for those few public authorities covered by the provisions at Clause 52. That should ensure that disagreements between the commissioner and such authorities are litigated in the tribunal and, if necessary, by the courts, rather than recourse being had to Clause 52." (Lords Committee, Hansard, 25 Oct 2000: Column 445)

In the Commission's view, while no one in debate drew attention to the possibility of a veto after an appeal to the IC, neither was there any suggestion that the veto could not operate after an appeal to the IC. The Act was amended during debates in the Lords to make it quite explicit that a veto can be issued after an appeal to the tribunals or courts.

Successive governments have all considered that the veto could be exercised at later stages: the Labour government that introduced the legislation exercised it to overturn a decision of the First-tier Tribunal in 2009 (in relation to the Iraq War Cabinet minutes). The Coalition Government exercised it to overturn a decision of the First-tier Tribunal in 2012 (in relation to a ministerial diary), and a decision of the Upper Tribunal in 2012 (the Prince of Wales correspondence case).

Nevertheless, having considered all of the evidence before it, the Commission takes the view that the form of the veto that is most appropriate is a veto that applies at the IC stage. This links the veto as closely as possible with the circumstances of its introduction, which was to counterbalance the IC's additional powers to overturn public authority decisions about the public interest.

In making this recommendation we recognise that by forcing the government to exercise the veto earlier or not at all, the veto may be used more frequently than previously. However, we would hope that the veto is held in reserve for the most serious cases, and that it continues to be exercised relatively rarely. That any exercise of the veto will continue to be subject to judicial review is a factor that will be in the minds of all decision makers considering use of the veto.

We are concerned that there remains a legal risk following the decision of the Supreme Court that any exercise of a veto could be challenged on the basis that if there is an appeal route that could be taken instead, then to issue a veto would be unreasonable. If such an argument was to stand it would have the effect of making any veto power a nullity, even if reinstated in fresh legislation. Therefore the government should consider whether any future legislation makes clear that the fact that the executive could choose to appeal rather than issue a veto is not a material consideration in determining the lawfulness of the exercise of the veto.

In the interim, before legislation can be enacted, we recommend that the government only uses the veto to overturn a decision of the IC. In our view, this is the only viable way in which the veto might be successfully exercised following the Supreme Court's decision.

Recommendation 15: The government should legislate so that the executive veto is available only to overturn a decision of the IC where the accountable person takes a different view of the public interest in disclosure.

Where a veto is exercised, appeal rights would fall away and a challenge to the exercise of the veto would be by way of judicial review to the High Court.

The government should consider whether the amended veto should make clear that the fact that the government could choose to appeal instead of issuing a veto will not be a relevant factor in determining the lawfulness of an exercise of the veto.

Until legislation can be enacted, the government should only exercise the veto to overturn a decision of the IC.

Exercising the veto where the Information Commissioner agrees

In recommending that the executive veto is limited to overturning a decision of the IC, we have to consider carefully what this would mean for cases where the IC upholds the decision of the government on the public interest in disclosure. If he does so in a case in which the government would have exercised the veto had he not, this would appear to leave the government seriously exposed.

In giving oral evidence to the Commission, the IC said:

“The difficulty about the point at which the veto was applied relates to the veto being applied to a judicial decision. Decisions that I take are not judicial, but it's very difficult to veto a decision of the Commissioner with which you agree. So I suggest that the challenge for the Commission is to come up with a equivalent of the veto, which is an executive override that simply stops the matter being debated further, if it is of such crucial importance. It's basically a simple anagram. You simply turn veto into vote of confidence.” (oral evidence session, 20 January 2016)

Our preferred solution is for the veto to be exercisable even in those cases where the IC upholds a public authority's decision on the public interest, if permission to appeal that decision has been granted to another party. This 'confirmatory' use of the veto would have the same implications as when the veto is used to overturn a decision by the IC on the public interest; that is, it would mean that appeal rights would fall away and the use of the veto could only be challenged by way of judicial review.

The government currently has 20 working days in which to exercise the veto following the issuing of a IC decision, or the withdrawal or determination of an appeal. In a case where the veto is to be exercised in a confirmatory way, it may not be appropriate for the same time limit to apply.

Where no appeal is forthcoming or granted in a case where the IC upholds a decision by a government department on the public interest, then no veto would be necessary. But the requestor will have 28 calendar days to apply for permission to appeal against the IC's decision, and the government will not know if a requestor will appeal (or indeed if an application to appeal will be granted). There is therefore a risk that the government may feel the need to issue a confirmatory veto to protect its position in cases where a veto turns out to be unnecessary. In our view the issuing of unnecessary vetoes as a result of administrative deadlines would be highly unwelcome.

This problem could be resolved if the time limit for exercising a confirmatory veto was 20 working days from the point at which permission to appeal was granted. This would, however, involve the executive interfering with a judicial process in circumstances where the judiciary had accepted that there was an arguable case. We think there is an important distinction between issuing a veto to overturn a final judicial decision reached by a tribunal on a case, and between issuing a veto that removes a right of appeal after a tribunal had determined that there is an arguable case (although a challenge by way of judicial review would remain).

Recommendation 16: The government should legislate to allow the veto to confirm a decision of the IC where the IC upholds a decision of a public authority on the public interest in release.

This would mean that the right of appeal would fall away and challenge would be instead by way of judicial review.

6. The appeals process

The appeals process for requests made under the Act can be lengthy. In the longest cases, it involves a request, an internal review, an appeal to the IC, an appeal to the First-tier Tribunal, and appeal to the Upper Tribunal, and then onward appeals to the Court of Appeal and Supreme Court. If cases are referred back to the First-tier Tribunal to be re-decided, the process can be even longer. Some cases take years to resolve, by which time the value of the requested information may have diminished.

The Commission is concerned by the complexity of the appeals process, both because of the delay in requestors obtaining information, and because of the burden on public bodies. We are also surprised by how complex the system under the Act is compared to some of the international jurisdictions we examined.

In the responses to our call for evidence we noted some support for re-considering the appropriateness of the First-tier Tribunal in these cases. There were also those who were satisfied with the existing system.

The First-tier (Information Rights) Tribunal

In looking at ways to reduce delays for requestors and the burden on public authorities, we have looked carefully at the role of the First-tier (Information Rights) Tribunal. The First-tier Tribunal, usually comprising a tribunal judge and two lay members, is not a superior court of record, and its decisions do not create legal precedents.

The Commission was struck by the abundance of appellate bodies under the existing system whose role is to carry out a full merits-based review of any decision to refuse an information request. First, the public authority itself through the internal review process (dealt with above), second the IC, and third the First-tier Tribunal.

To have two independent bodies carrying out a full merits review of a decision also appears to be unusual when compared to other jurisdictions, who normally have one such body. The current arrangements are also unusual when compared with other kinds of appeal that pass through the tribunals system. For example, where an individual disagrees about a benefit entitlement decision they can ask the Department for Work and Pensions to reconsider. If they remain dissatisfied they can ask for a full merits review of the matter by the First-tier Tribunal. There is then a right of onward appeal on a point of law to the Upper Tribunal.

Although the First-tier Tribunal can hear oral evidence on oath, the role it performs is similar to the IC in that both of them are attempting to establish on a factual and non-precedent setting basis the facts and the merits of the appeal. In their evidence to the Commission, Cruelty Free International said:

“In relation to question 5 (enforcement and appeal), we can say, however, that we recognise that there is a case for removing one of the current fact-finding tiers where a request has been rejected (internal review, Information Commissioner and First-tier Tribunal Information Rights)). The process is slow and laborious for both parties and there does not need to be this many fact-finders.”

The IC said:

“Provided the core principles of the FOIA system continue to be respected, the Commissioner accepts that proportionate reform of the Tribunal and Court appeal system for FOIA could be beneficial and make the process more efficient. For example, the Commissioner notes that in Scotland, where the Freedom of Information (Scotland) Act (FOISA) applies to public authorities exercising devolved functions, appeals against

decisions of the Scottish Information Commissioner are available only on matters of law and by application to the courts.”

The IC expanded on this in oral evidence on 20 January 2016 where he said:

“...where there isn't really a legal point to be argued, it's simply a question of setting someone else's judgment against the Commissioner's... certainly the system at the moment is very expensive for all concerned...and time-consuming.”

Other respondents felt that the First-tier Tribunal stage was helpful and important. The Chartered Institute of Journalists said:

“The Information Tribunal system at first tier and with its upper level offers an effective balance for more informal involvement of lay appellants and traditional legal process where there is representation of public authorities by counsel.”

The Media Lawyers Association said:

“...the structure of the appeal system, with roles for the requester, the Information Commissioner and the Tribunal which includes two lay members should be maintained. Access to public information under FOIA and public confidence in the system will be eroded and undermined if the current independent and binding appeals mechanism is weakened.” (paragraph 47)

Overall, in three-quarters of cases the First-tier Tribunal upholds the IC's decision - 77% of the IC's decisions in 2014. We are concerned that the benefit of the First-tier Tribunal stage is limited compared to the additional delay, costs and burden that it introduces into the system. The vast majority of appeals (87% in 2014) against the IC's decisions are brought by requestors, and 79% of these were dismissed or withdrawn. In our view considerable resources and judicial time are being taken up by unmeritorious appeals.

We are also concerned that having two independent bodies conducting a full-merits review creates additional uncertainty for public authorities and for requestors. We consider that removing the right of appeal to the First-tier Tribunal would serve to enhance and strengthen the role of the IC, who would be the final arbiter of appeals on the substance of requests. We think this should be the case for all information requests (i.e. not just those relating to section 35 and 36). Where someone remained dissatisfied with the IC's decision, an appeal would still lie to the Upper Tribunal on a point of law (and onwards to the Court of Appeal and Supreme Court).

For the avoidance of doubt, our proposals concern only the right of appeal under the Act. As it is outside our terms of reference we make no proposals for appeals in relation to the Data Protection Act 1998, the Environmental Information Regulations 2004, the INSPIRE Regulations 2009, the Privacy and Electronic Communications (EC Directive) Regulations 2003, and the Re-Use of Public Sector Information Regulations 2015.

Recommendation 17: That the government legislates to remove the right of appeal to the First-tier Tribunal against decisions of the IC made in respect of the Act.

Where someone remained dissatisfied with the IC's decision, an appeal would still lie to the Upper Tribunal. The Upper Tribunal appeal is not intended to replicate the full-merits appeal that currently exists before the IC and First-tier Tribunal, but is limited to a point of law.

7. Burdens on public authorities

The Commission received a very substantial response to its call for evidence on the question of burdens, both from those in favour of measures to reduce the burden on public bodies, and from those opposed to any restrictions on the right of access.

Many public bodies, including local and parish councils, NHS Trusts and policing bodies felt that information requests are unduly burdensome. Several councils referred to increasing numbers of requests being a difficult financial burden in the context of straightened economic circumstances and reducing budgets. For example, Liverpool City Council said:

“...by way of example of the experience of Liverpool City Council, the number of requests received in 2010 (1,217 requests) to the number of requests received in 2014 (2,139) shows an increase of 922 or in percentages of approximately 76%, and an increase in costs of approximately £150K per annum. This increase can be set against a context whereby the City Council has seen the funding it receives from Central Government reduced by 58% during the same period, placing substantial pressures on the viability of the delivery of essential services for its residents.”

And Gateshead NHS Foundation Trust said:

“Like other NHS organisations, we are operating in a very difficult financial landscape resulting from an unprecedented increase in demand for our healthcare services combined with rising costs of providing care and flat funding. To be able to continue to provide outstanding healthcare to all our patients, sustainable both clinically and financially, we must make best use of our resources. The FOI regime in its current form is at odds with this objective.”

The Police & Crime Commissioner for Cheshire said:

“The burden placed on public authorities by the Freedom of Information Act is substantial and in my view excessive [sic], and its impact must not be under-estimated. The number of requests received in my Office and by Cheshire Constabulary continues to increase year on year, whilst the police budget has been reduced over this period. Responding to FOI requests is not simply a back office function; it often requires input from frontline officers who are required to provide information or advice in relation to a request. This diverts resources away from policing services that keep our communities safe from harm.”

The area most often singled out for criticism was requests made with an apparent commercial objective, such as requests seeking information about contract expiry dates, or the bids of competitors. Authorities submitted that these requests were not what the Act was intended for, and some public authorities resent having to respond to these requests. For example, West Somerset Council said:

“FOI is being used increasingly for commercial purposes rather than for scrutiny of issues in the public interest. Certain businesses have been seemingly using FOI as a back door to avoiding charges or for their own marketing /promotional purposes; using Council staff as an unpaid administrative/research resource. This latter example creates a double drain on resources since following provision of requested information the authority is invariably cold-called for all manner of goods and services, taking up additional officer time.”

Public bodies were also often concerned about vexatious requestors, and large numbers of “round robin” requests.

Public bodies made a range of suggestions for how burdens imposed under the Act could be addressed. The proposals most commonly put forward were:

- imposing a fee for making a request
- lowering the cost limit for refusing a request
- expanding the range of activities counted in assessing whether a request exceeds the cost limit

A number of public bodies also thought that requestors should have to justify why it was in the public interest to be provided with the requested information, and that they should have the ability to aggregate requests on dissimilar issues in assessing whether the requests exceeded the cost limit (the power to aggregate similar requests already exists).

The Commission also received substantial evidence from media bodies and civil society organisations arguing that any burden imposed by the Act was exaggerated, and in any event justified by the strong public interest in many of the stories uncovered using the Act.

In its evidence to the Commission, the Society of Editors said:

“It seems wholly wrong to consider the “burden” without taking into account the “benefits” that have resulted from FOI. If a similar lopsided study was undertaken of other areas of government activity it would be difficult to justify any spending at all, from defence and education to health and policing. The fact is that the “burden” of FOI is almost vanishingly small when weighed against the budgets of the organisations covered by FOI. It is claimed that many FOI requests may be frivolous. This is not the case: the overwhelming majority from media organisations represent responsible journalism in the public interest. And every editor can cite examples where FOI requests, submitted in pursuit of serious investigations, have exposed matters of public interest. In many cases, the stories have led to official action to reduce waste and protect lives.”

Associated Newspapers Limited said:

“Local authorities and other public bodies have all kinds of overheads and expenses which mean that of course not every pound they collect can be spent on services. But it is a necessary part of their functions that in order to provide their services to the public they need to engage staff, rent premises, purchase insurance, and so on. It is ANL's view that compliance with the Act is a necessary part of the functions of any public authority and the cost of such compliance should not be viewed as a "diversion" of resources from more worthwhile purposes.”

Charging for requests

Section 9 of the Act allows (by regulations) a fee to be set for answering requests. It was the original intention of the Labour government that a small charge would be set. A small fee (around £10) is generally charged for responding to requests for someone's own personal data under the Data Protection Act 1998. In the event, it was decided, between Royal Assent in 2000, and the coming into force of the Act in 2005, that no charge would be made for requests other than in very narrow circumstances¹⁰. Whether a new charge should for the future be set was one of the issues on which the Commission specifically sought evidence.

¹⁰ The disbursement costs (e.g. copying or postage) of responding to requests can be charged, and if a request exceeds the cost limit a public authority can offer to respond to it anyway if the requestor is willing to meet the full costs, including staff time, of responding to it.

Media organisations were particularly concerned about the prospect of a fee being charged for those making a request under the Act. They objected in strong terms to this, and argued that a fee would be particularly onerous for media organisations who may have to make a large number of requests. ITN said:

“There is no doubt that in many cases information can only be found through FOI requests. Making these requests to, for example, hundreds of councils or NHS trusts is extremely time-consuming for journalists. Investigations must be extremely focused in order to generate meaningful data that can illuminate an issue which was previously impenetrable. ITN understands that the government is concerned about the cost and time spent responding to FOI requests. However, we would argue that the benefit to the public interest of bringing important issues to light strongly outweighs other costs.”

Concerns were expressed that a large number of investigations which were clearly in the public interest would be prevented if a new fee were introduced for requests. In particular this would impact on investigations into, for example, the practices across a range of health authorities, hospitals or police forces where multiple fees would be levied, giving rise to a large cumulative expense. The Press Gazette said:

“I would like to emphasise that any fees for FOI requests would greatly reduce Press Gazette’s ability to use the act. We simply do not have any budget for FOI requests and would be unlikely to be granted one in the future. Many of our FOI requests involve surveys of every local authority, or every police force. We have used this method to collect details of public expenditure on PR and communications. Any fees would make it impossible for us to make such use of the act in future. I suspect many other small business and specialist news titles would also fall in the same category.”

And ITN said:

“Levying a charge for individual FOI requests would render them untenable for media organisations, for both logistical reasons and because they operate on lean budgets, as it is necessary to often make hundreds of requests for just one investigation in order to get a comprehensive picture.”

The Commission has weighed the evidence received on this issue carefully, and has reached the conclusion that it would not be appropriate to impose a request fee. While we do recognise that requests under the Act do impose a financial burden on hard-pressed public authorities, in our view this is justified by the general public interest in accountability and transparency of public bodies. We recognise in particular that some use of the Act by the media gives rise to some very important investigations that are clearly in the public interest, and that a fee for information requests could hamper those investigations in future.

The form of the information

An issue raised with the Commission concerns the way that section 11 has been operating and interpreted. Section 11 allows a requestor to specify the form in which they would prefer requested information to be provided. This can include a permanent form (a hard copy), or another form acceptable to the applicant (such as electronic form), an opportunity to inspect a record, or for information to be provided in a digest or summary form. Public authorities are required to give effect to a requestor’s preference so far as reasonably practicable. This provision has caused some difficulties for public bodies. In its evidence to us, the Local Government Association said:

“Under section 11 of the Act, authorities are required to provide information in a format acceptable to the requester. There is evidence that this is misused by some commercial organisations, journalists and researchers who demand the information in specific formats such as online survey forms or excel spreadsheets, effectively ensuring that councils produce their research findings for them in final form.”

East Northamptonshire Council said:

“...requesters are using this to become more and more demanding. We are now being asked to complete online surveys to provide the data, i.e. typing the data into an online form. We are being asked to provide spreadsheets with columns in particular orders and formats. This is effectively expecting the public body to do the requesters’ data analysis for them.”

We note that section 11 has recently been clarified by a recent decision of the Court of Appeal¹¹ which found that public authorities were required to provide information in a particular electronic document format (e.g. an Excel spreadsheet or Word document) if it held it in such a format, or it could be readily converted into it.

Where requestors are requesting information that is already reasonably accessible to them, the request can be refused under section 21 of the Act. Where a requestor is making unreasonable demands about the format in which information is provided to them, public authorities are at liberty to refuse on the basis that the request is not reasonably practicable, and indeed they should do so.

The Commission welcomes the clarification brought by the recent Court of Appeal decision, but is concerned that there continues to be scope for confusion about the interpretation of section 11. This seems to be an area that could benefit from legislative clarification to make clear what the obligations that fall to public authorities are and, by implication, what they are not.

We note that the wider context has in any event developed. When public authorities provide information, it should be provided in open and machine-readable format together with its metadata (and licensed for re-use), where possible and appropriate, in accordance with the Re-use of Public Sector Information Regulations 2015.

In addition, since 2013 the obligations at section 11(1A) of the Act also require that where datasets are provided under the Act, that these be provided where reasonably practicable in an electronic form capable of re-use. The relevant Code of Practice¹² makes clear this means machine-readable form, if such is held or readily convertible.

Recommendation 18: That the government legislates to clarify section 11(1)(a) and (c) of the Act so that it is clear that requestors can request information, or a digest or summary of information, be provided in a hard copy printed form, an electronic form, or orally.

Where a requestor specifies a specific electronic document format, that request should be granted if the public authority already holds the information in that format, or if it can readily convert it into that format. Where the information requested is a dataset, the requirements at section 11(1A) will apply.

The legislation should make clear that the obligations on public authorities to provide information in a particular format extend no further than this.

The section 45 Code of Practice

The [Code of Practice](#) under section 45 of the Act allows ministers to set out the practice that they consider be desirable for public authorities to follow in discharging their obligations under Part 1 of the Act. It must, in particular, include provision relating to (a) advice and assistance to requestors, (b) the transfer of requests between public authorities, (c) consultation with third parties, (d) the

¹¹ Innes v. Information Commissioner & Buckinghamshire County Council, [2014] EWCA Civ 1086 [judgement](#)

¹² <http://webarchive.nationalarchives.gov.uk/20141203235408/http://www.justice.gov.uk/downloads/information-access-rights/foi/code-of-practice-datasets.pdf>

inclusion in contracts entered into by public authorities of terms relating to the disclosure of information, and (e) complaints procedures.

The IC is required by section 47 of the Act to promote the observance of the provisions of the Code, and he can issue a practice recommendation under section 48 to any public authority whose performance does not conform to the Code.

We note that the Code of Practice under section 45 was issued in 2004, a year before the Act came into operation, and it has not been updated or revised since then. We think the government should review section 45 of the Act to ensure that the range of issues on which guidance can be offered to public authorities under the Code is adequate. For example, at present it is unclear whether the Code can offer guidance to public authorities on the operation of exemptions or the public interest test. We also consider that the Code should be reviewed and updated to take account of the ten years of operation of the Act's information access scheme.

As noted above, although we have recommended the abolition of the "qualified person" requirement in section 36, we consider that it is important that sufficiently senior people within public authorities have oversight of the Act. For example, in relation to applying section 36 we consider that a senior manager should make the decision about whether section 36 should be relied upon. Revised guidance under the Code of Practice can offer guidance on the appropriate levels of authority required for internal decisions under the Act.

Recommendation 19: That the government reviews section 45 of the Act to ensure that the range of issues on which guidance can be offered to public authorities under the Code is adequate.

The government should also review and update the Code to take account of the ten years of operation of the Act's information access scheme.

Vexatious requests

Section 14(1) of the Act allows a public authority to refuse to respond to a request if it is "vexatious". "Vexatious" is not defined in the Act, and there has been some considerable confusion about its meaning. Public authorities told us that they had been reluctant to use it because doing so could be more labour-intensive than simply responding to a request, and that labelling a request as "vexatious" tended to upset the requestor leading to further requests and correspondence.

The approach of the IC in his guidance ("*When can a request be considered vexatious or repeated?*") on refusing to respond to a request because it was vexatious involved public authorities having to provide "relatively strong arguments" under more than one of the following factors:

- Can the request fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a significant burden in terms of expense and distraction?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

As many respondents explained, the interpretation of a vexatious request has recently been clarified by case law and section 14(1) had developed into a much broader and more effective tool for public authorities. The Upper Tribunal's decision in the case of *Information Commissioner v Dransfield* [2012] UKUT 440 (AAC) (28 January 2013)¹³ set out clear guidance on how to determine if a request is vexatious. The Upper Tribunal took the view that:

“The purpose of section 14...must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA”

The Upper Tribunal rejected an interpretation of the IC's guidance that viewed it as saying that a request which triggered only one of the IC's five factors could not be vexatious. One particular factor (such as burden) exemplified to a significant degree could be sufficient to render a request vexatious.

The Upper Tribunal went on to identify four broad issues or themes: (1) the burden (on the public authority and its staff); (2) the motive (of the requester); (3) the value or serious purpose (of the request) and (4) any harassment or distress (of and to staff). The Upper Tribunal emphasised however that these factors were not intended to be exhaustive, or to create a “checklist” approach.

The Commission is fully supportive of the appropriate use of section 14 to prevent public authorities from being burdened by vexatious requests. We also accept that public authorities may benefit from stronger guidance encouraging the use of this provision where appropriate. Many authorities did not appear to understand that trivial or frivolous requests could be deemed vexatious. In his written evidence, the IC suggested

“...strengthening the guidance on section 14 by putting it on a statutory basis in a special code of practice issued under section 45. This could reduce any uncertainty that public authorities may feel about the current approach and the risk of the Commissioner's guidance being overturned by the courts.” (paragraph 62)

We agree, and recommend that the section 45 Code of Practice includes guidance encouraging public authorities to use section 14 to refuse vexatious requests where appropriate.

Recommendation 20: That the government provides guidance, in a revised Code of Practice issued under section 45, encouraging public authorities to use section 14(1) in appropriate cases.

Resources of the Information Commissioner

Like other public authorities, the budget of the IC has been reduced in recent years. Information which he submitted to us at our request after his oral evidence session showed that his budget has been reduced year-on-year and is now frozen. This is in spite of the volume of requests made under the Act, and the EIRs, increasingly significantly over the same period.

¹³ Subsequently [confirmed](#) in *Dransfield v The Information Commissioner* [2015] EWCA Civ 454 (14 May 2015)

Table 6: Information Commissioner's Office grant-in-aid		
financial year	grant-in-aid*	FoI/EIR complaints received
2008-2009	£5.6m	3100
2009-2010	£5.7m	3734
2010-2011	£5.25m	4298
2011-2012	£4.5m	4616
2012-2013	£4.25m	4688
2013-2014	£4m	5151
2014-2015	£3.7m	4981
<i>Source: Information Commissioner's Office *includes value of staff seconded to ICO from other public bodies</i>		

Although as everyone has become more familiar with the Act, the complications of dealing with individual requests has reduced, and the IC has sought to make sensible economies, nonetheless the ability of the IC effectively to regulate requests, as the Act requires him to do, is bound to be constrained by the resources available to his office. In his oral evidence the IC told us that his income from his data protection work has been buoyant, but at present he is unable to use this income stream to fund his work in regulating and enforcing the Act because of Treasury accounting rules.

The Commission is sympathetic to the IC's position and considers that the government should review whether the existing funding for the IC is adequate. In doing so they should take into account the overall impact on the IC of the reforms set out in this report, and any other relevant circumstances, such as forthcoming reforms to EU data protection legislation. Recommendations of ours, such as the removal of the right of appeal to the First-tier Tribunal, have the potential to significantly reduce costs for the IC. However we recognise that other recommendations, such as his enhanced role in enforcing proactive transparency obligations, could lead to additional costs.

Recommendation 21: That the government reviews whether the amount of funding provided to the IC for delivering his functions under the Act is adequate, taking into account the recommendations in this report and the wider circumstances.

Matters on which we felt unable to make recommendations

There were a small number of areas where the Commission felt unable to make a recommendation, either because they fell outside our terms of reference, or because we did not receive sufficient evidence (or the evidence received was too finely balanced). For these issues we do not make any recommendations, but simply express our provisional views.

Bodies covered by the Act

Although the Commission did not explicitly ask for evidence on the extension of the Act to bodies, because we considered this to be outside our terms of reference, we received a significant number of responses which addressed this issue.

On reflection, we consider that we should address this issue. But given that we did not explicitly seek views on this question in our call for evidence, we do not consider that we have received sufficient evidence to make a recommendation. However we express below the opinion the Commission has reached on this issue.

Private contractors providing public services

Substantial numbers of members of the public who responded to our call for evidence through the 38 degrees website argued that the Act should extend to private companies providing public services under contract. An example of some of the comments we received follows:

“I believe FOI should include private companies providing public services. I want to know if my taxes are spent on private company contracts appropriately.”

“I do believe that FOI should cover private companies providing public services. If something is being paid for by the public for the public then the public should be able to scrutinise it and have its questions answered. It should make no difference who is providing the service. In fact it is probably more important to cover private companies in these circumstances since they are driven by profit and not by altruism.”

“FOI should be applicable to all private companies providing public services (except in cases where intellectual property; specifically patents might be involved). This is to help ensure that the public interests remain respected whenever a private firm is tasked with public duties.”

Similar views were echoed by other individual respondents, and by organisations. For example, the News Media Association said in its written evidence:

“The role of FOI in exposing waste and driving up standards of governance was acknowledged by the Public Accounts Committee of the House of Commons in 2014, which recommended extending FOI to private sector companies that carry out public services. The Committee considered FOI an important part of the solution to the poor performance and cost and deadline overruns that have plagued government contracts with companies such as G4S, Serco and Atos. We have long called for this extension and it is a pity that the call for evidence does not invite views on that proposal, when there has been a groundswell of support for it expressed by major political parties and wider civil society.”

The UK Open Government Network said:

“We are disappointed that the opportunity to examine where the Act is working well and where an extension to the scope would better support the transparency and accountability of key government functions, for example contracted out public services, was not taken.”

The Commission is persuaded that there is a need for greater transparency in outsourced public services. But we are concerned that significant additional burdens should not be imposed on the public sector, and companies (particularly small companies) should not be discouraged from bidding for public contracts. Giving evidence to the Justice Select Committee during post-legislative scrutiny, the Campaign for Freedom of Information said:

“The solution is either to designate the contractor as a public authority in its own right where it undertakes substantial work, which the Act permits, or, in effect - I would make this an amendment to the Freedom of Information Act itself - to say that, where an authority has a contract with a contractor, the information that the contractor holds in relation to that contract is deemed to be held on behalf of the authority. That makes it accessible via the authority.”

In March 2015 the IC published a report, *Transparency in Outsourcing: a roadmap*, in which he said:

“Given the range of outsourcing, it is clearly not proportionate for all contractors to be designated as public authorities. But we do feel there is a strong case for designating outsourced services as falling under FOIA when they are of significant monetary value and long duration: for example, those over £5 million in value or continuing over 5 years or where the contractor solely derives its revenue from public sector contracts...We think the definition of information held should be amended, so that information held by a contractor in connection with their delivery of an outsourced service is always considered to be held on behalf of the public authority.”

In our view extending the Act directly to private companies who deliver outsourced public services would be burdensome and unnecessary. But we are persuaded that information concerning the performance or delivery of public services under contract should be treated as being held on behalf of the contracting public authority. This would make such information available to requestors who make requests to the contracting public authority.

Public authorities issue a large number of contracts of all kinds, and some are very low in value. We do not want to impose an unnecessary burden on either public authorities or small businesses, so we think there should be a threshold from which these obligations commence. In our view any private company which is delivering public services under contract with a value at or greater than £5m per financial year should be covered. The total of £5m should relate to either a single contract, or the cumulative value of contracts with that public authority within a single financial year.

We consider that imposing this obligation on existing contracts would create additional costs and uncertainty for the contracting parties who would not have been aware of these obligations when the terms of the contract were agreed, and therefore the obligation should apply prospectively only to contracts signed after the enabling legislation comes into force.

While the Commission has not received persuasive evidence that the Act should be extended to charities in their own right, we consider that charities providing public services under contract should be treated in the same way as other contractors.

Universities and other Higher Education Institutions

The Commission received representations from the Higher Education sector arguing that universities should cease to fall under the scope of the Act. The Russell Group of universities said in its written evidence to the Commission:

“In this new market environment, universities and alternative providers are in competition for the same students and the same private-sector partnerships to augment their educational offering. The imposition of FOI regulation on universities, including the Russell Group universities, puts established providers at a significant disadvantage compared to alternative providers in the higher education market. Furthermore, this continued imbalance contravenes the UK Competition and Market Authority’s stated desire for “market neutrality” in higher education regulation.”

In oral evidence to the Commission, Universities UK said:

“...at the time that the FOI legislation was introduced, we were talking about a very different sector in England. Now we are operating in a highly competitive environment, a consumer market which is now controlled very much by the Competition and Market Authority. We are in very close touch with them and with associated bodies and despite the fact that there is very little direct State funding, we are yet treated as a public authority. To conclude, we believe the way forward on the back of the Green Paper is to see a full review of the operation of the Act to higher education institutions to ensure that the application is appropriate but also that there is a level playing field.”

Other respondents highlighted the value of universities being covered by the Act. For example, Guardian News and Media said:

“Many journalistic investigations using FOI requests have raised important public interest issues later picked up by government. An example is an FOI request to all Russell group universities regarding their policies around sexual assault and rape. The Guardian published two front page stories on the issue and the follow-up led to the business secretary Sajid Javid announcing that he had ordered vice-chancellors to look into sexual assault and sexist ‘lad culture’ on campus and best practice to deal with it.”

Greenpeace said:

“Greenpeace’s latest investigation, which involved scores of freedom of information requests, found three quarters of all the funds given to Universities, were given by just two companies: Shell and BP. Because there is no routinely aggregated source of this information, the information can only be made public via sending FOIs to individual Universities.”

Unison said:

“By way of example, during 2015 UNISON has made Freedom of Information requests to universities regarding the decision making processes through which consultants have advised on “restructuring reviews” that have frequently entailed staff redundancies. The experience of negotiators for UNISON members in higher education is that only Freedom of Information requests have been able to extract material on this subject with sufficient speed to allow any challenge to decisions as they unfold and change the major ramifications of those decisions for staff and students.”

The opinion of the Commission is that it continues to be appropriate and important for universities to remain subject to the Act. They are highly important institutions that play a key public role. Although it is correct that the environment in which our universities operate has altered significantly since the Act was going through Parliament, they continue to benefit from large sums of public money (albeit that much of this comes to them indirectly). We found the evidence that the

requirements of the Act placed 'public' universities at a competitive disadvantage compared with wholly private providers unpersuasive.

Changes to the cost limit

Section 12 of the Freedom of Information Act provides that a public authority is not obliged to comply with the duty to provide information if the cost of doing so would exceed the cost limit. The cost limit, set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, is £600 for central government and £450 for other public authorities. This is estimated at an average staff cost of £25 per hour, which represents 24 and 18 hours work respectively.

Cost activities

Many public authorities were strongly in favour of extending the range of activities that could be counted in assessing whether a request can be refused under the cost limit, and in lowering the limit. It was suggested that redaction, consideration, and consultation time should all be included in assessing the cost of a request. For example, North Yorkshire County Council said:

“...we would suggest extending the range of activities which can be taken into account. Currently the fees regulation excludes time spent on reviewing information, considering exemptions, consulting with third parties and making redactions. These activities can need very significant amounts of time, even when (say) an automated search has retrieved information in a matter of minutes.”

By contrast other respondents objected to the expansion of the range of cost activities. For example, the Media Lawyers Association said:

“It would also be inappropriate to restrict the workings of FOIA by increasing the activities which can be taken into account in determining compliance with the statutory cost limits for addressing requests under s.12 FOIA. Permitting time spent “considering” a request to fall within the scope of s.12 FOIA would introduce subjective criteria and encourage innocent or deliberate manipulation of the system. It might well encourage public authorities to employ more junior members of staff who might take longer to “consider” a request than more experienced staff. It would operate against the disclosure of information which may not have been requested previously and would therefore take longer to consider. It would also mean that requests which took a long time to consider but where a decision was ultimately made that disclosure should be allowed would fall outside the scope of FOIA because of the length of time which had been spent “considering” the issue...The same applies for other potential changes such as including the time spent on redaction. Such a proposal would have a very detrimental impact upon the workings of FOIA and the promotion of transparency and accountability.”

The Commission was sympathetic to concerns that the existing cost rules are ineffective at allowing public authorities to refuse excessively costly requests. But the Commission also recognises the serious concerns expressed by some that some activities may be too subjective or imprecise to include, and that this may open the system to abuse. In the Commission's view the strongest case is for the inclusion of costs relating to redaction where the public authority has no effective choice but to carry out redactions. In such cases the redaction is unavoidable if the personal data of individuals is to be protected. We were also sympathetic to including as a permitted activity any redaction which is for the purpose of removing information which is subject to an absolute exemption¹⁴. Where material falls under an absolute exemption redaction will almost¹⁵

¹⁴ 9 of the 24 exemptions in the Act are wholly or partly absolute: s.21 (information available to the applicant by other means), s.23 (information supplied by, or relating to, bodies dealing with security matters), s.32 (court records, etc), s.34 (parliamentary privilege), s.36 (in so far as relating to information held by the House of Commons or the House of

always be necessary. In addition, including redaction costs would be helpful in managing some particularly burdensome commercial requests, such requests for extensive tender documents that require substantial amounts of material that was provided in confidence to be redacted. It would also be of assistance where requestors are provided with the information asked for in extracted form, but where they insist on seeing the original documents leading to substantial redaction costs.

But we did receive evidence that expressed concern that the cost limit provides an absolute bar to requests irrespective of the purpose or value of the request. For example, Greenpeace said, in its written evidence:

“...we understand that the public interest in disclosure cannot be taken into account in deciding whether the cost limit has been reached. So the proposed changes would make it easier for authorities to refuse requests – irrespective of the value of the information to the public.”

If the range of permitted activities were expanded to encompass the redaction of absolutely exempt material, the Commission can also see the merit in some provision to allow a request to be responded to even if it exceeds the cost limit as a result of this change. For example, the IC could have the power, in an appeal against a refusal under the cost limit, to order that the request be in any event responded to by the public authority where there is a prima facie strong public interest in them doing so, notwithstanding that the upper cost limit will be exceeded.

The cost limit

In addition, some respondents argued that the cost limit should be reviewed. For example, in their written evidence the National Union of Journalists said:

“The existing cost limits should be subjected to annual increases in line with inflation”

However many public authorities argued that the cost limit should be reduced. For example, in its written evidence to the Commission Suffolk Coastal and Waveney District Councils said:

“Even were the “real” time of responding to a request included, we are also of the view that the current Appropriate Limit of £450 (equivalent to 18 hours) is excessive and incurs a disproportionate cost and disruption to public service in responding to complex or wide-ranging requests. We believe that the Appropriate Limit ought to be reduced.”

The cost limit was originally based¹⁶ on the limit set by the Treasury for refusing to answer a parliamentary question on the basis of disproportionate cost. The disproportionate cost threshold is eight times the average marginal cost of answering written parliamentary questions. The marginal cost is judged as the direct cost of civil servants' time. The average marginal cost is based on a 1 month sample of all written parliamentary questions answered by those departments with the highest volume of questions. The sampling and uprating occurs once every five years. In 2010 the limit stood at £800, but it was increased¹⁷ to £850 in February 2012.

Lords), s.37 (in so far as relating to communications with the Sovereign and the Heir, or person second in line, to the Throne), s.40 (personal data), s.41 (information provided in confidence), s.44 (prohibitions on disclosure)

¹⁵ While it is possible for a public authority to decide in any event to release information to which an absolute exemption could apply (other than information falling under section 44 of the Act which relates to statutory bars to disclosure), we consider that this is likely to be very rare.

¹⁶ See, for example [debate](#) on 9 June 2004: “The Parliamentary Under-Secretary of State for Constitutional Affairs (Mr. Christopher Leslie): ...the regulations also provide an appropriate upper limit—a cost ceiling—beyond which authorities are not obliged to provide the information requested. The draft regulations link that with the disproportionate cost limit for answering parliamentary questions and set the amount at £550, although that would now be £600.”

¹⁷ <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120208/wmstext/120208m0001.htm#12020833000525>

The Commission is sympathetic to the fact that the cost limit has not been increased since 2005, and can see a case that it should be increased to match the current disproportionate cost threshold.

Conclusion

The Commission have considered carefully the option that the cost limit should be increased in line with the disproportionate costs threshold, and that the costs of redaction related to absolute exemptions should be included as a permitted activity (subject to the IC being able to overturn that refusal where there is a strong public interest in the request being responded to).

We were however unable to make a recommendation on this. Partly this was as a result of receiving insufficient evidence from public bodies about the burden of redaction activity that is currently carried out, and partly as a result of the evidence that we did receive being finely balanced.

While we are attracted to increasing the cost limit, we do not think we can recommend that without the cost rules being reformed to more accurately reflect the real costs imposed on public bodies in responding to requests.

Summary of recommendations

Recommendation 1: That the government legislates to amend section 10(3) to abolish the public interest test extension to the time limit, and replace it instead with a time limit extension for requests where the public authority reasonably believes that it will be impracticable to respond to the request on time because of the complexity or volume of the requested information, or the need to consult third parties who may be affected by the release of the requested information. This time limit extension will be limited to an additional 20 working days only.

Recommendation 2: That the government legislates to impose a statutory time limit for internal reviews of 20 working days.

Recommendation 3: That the government legislates to make the offence at section 77 of the Act triable either-way.

Recommendation 4: That the government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish statistics on their compliance under the Act. The publication of these statistics should be co-ordinated by a central body, such as a department or the IC.

Recommendation 5: That the government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish all requests and responses where they provide information to a requestor. This should be done as soon as the information is given out wherever practicable.

Recommendation 6: Public bodies should be required to publish in their annual statement of accounts a breakdown of the benefits in kind and expenses of senior employees by reference to clear categories.

Recommendation 7: The government should give the IC responsibility for monitoring and ensuring public authorities' compliance with their proactive publication obligations.

Recommendation 8: The government should legislate to replace section 35(1)(a) with an exemption which will protect information which would disclose internal communications that relate to government policy.

Recommendation 9: The government should legislate to expand section 35(1)(b) so that, as well as protecting inter-ministerial communications, it protects any information that relates to collective Cabinet decision-making, and repeal section 36(2)(a).

Recommendation 10: The government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35(1)(a), the public interest in maintaining the exemption is not lessened merely because a decision has been taken in the matter.

Recommendation 11: The government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35, regard shall be had to the particular public interest in the maintenance of the convention of the collective responsibility of Ministers of the Crown, and the need for the free and frank exchange of views or advice for the purposes of deliberation.

Recommendation 12: The government should legislate to amend section 36 to remove the requirement for the reasonable opinion of a qualified person.

Recommendation 13: The government should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act.

Recommendation 14: The government should legislate to make clear that the power to veto is to be exercised where the accountable person takes a different view of the public interest in disclosure. This should include the ability of the accountable person to form their own opinions as to all the facts and circumstances of the case, including the nature and extent of any potential benefits, damage and risks arising out of the communication of the information, and of the requirements of the public interest.

Recommendation 15: The government should legislate so that the executive veto is available only to overturn a decision of the IC where the accountable person takes a different view of the public interest in disclosure. Where a veto is exercised, appeal rights would fall away and a challenge to the exercise of the veto would be by way of judicial review to the High Court. The government should consider whether the amended veto should make clear that the fact that the government could choose to appeal instead of issuing a veto will not be a relevant factor in determining the lawfulness of an exercise of the veto. Until legislation can be enacted, the government should only exercise the veto to overturn a decision of the IC.

Recommendation 16: The government should legislate to allow the veto to also be exercised even where the IC upholds a decision of a public authority. This would mean that the right of appeal would fall away and challenge would be instead by way of judicial review.

Recommendation 17: That the government legislates to remove the right of appeal to the First-tier Tribunal against decisions of the IC made in respect of the Act. Where someone remained dissatisfied with the IC's decision, an appeal would still lie to the Upper Tribunal. The Upper Tribunal appeal is not intended to replicate the full-merits appeal that currently exists before the IC and First-tier Tribunal, but is limited to a point of law.

Recommendation 18: That the government legislates to clarify section 11(1)(a) and (c) of the Act so that it is clear that requestors can request information, or a digest or summary of information, be provided in a hard copy printed form, an electronic form, or orally. Where a requestor specifies a specific electronic document format, that request should be granted if the public authority already holds the information in that format, or if it can readily convert it into that format. Where the information requested is a dataset, the requirements at section 11(1A) will apply. The legislation should make clear that the obligations on public authorities to provide information in a particular format extend no further than this.

Recommendation 19: That the government reviews section 45 of the Act to ensure that the range of issues on which guidance can be offered to public authorities under the Code is adequate. The government should also review and update the Code to take account of the ten years of operation of the Act's information access scheme.

Recommendation 20: That the government provides guidance, in a revised Code of Practice issued under section 45, encouraging public authorities to use section 14(1) in appropriate cases.

Recommendation 21: That the government reviews whether the amount of funding provided to the IC for delivering his functions under the Act is adequate, taking into account the recommendations in this report and the wider circumstances.

