

Outsourcing Oversight?

The case for reforming access to information law

Report of the Information Commissioner
to Parliament, 2019



INFORMATION COMMISSIONER'S OFFICE

**“Outsourcing Oversight? The case for reforming access to
information law”**

**Report of the Information Commissioner to Parliament,
2019**

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Commissioner's message

Information is an asset. Information is knowledge. Information is power. That's why having access to it goes to the heart of a healthy, functioning democracy.

The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) seek to challenge a monopoly on information.

These laws equip citizens, the media, advocacy groups and others with information through which they can scrutinize the myriad of decisions and actions taken by public authorities at all levels.

Services that are both accountable and transparent are *better* public services. The principles of access to information laws promote better decision-making, which in turn improves services. Strong laws are an essential part of the bigger picture for effective open government that is democratically accountable to the people it serves.

As UK Information Commissioner, my job is to uphold information and privacy rights on the public's behalf. This requires me to ensure that the legislation regulated by my office fulfils its objectives and remains relevant.

The recent reforms introduced by the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR) have shown the importance of keeping privacy rights under review and adapting them to changing circumstances. FOIA and the EIR now face similar challenges.

In the modern age, public services are delivered in many ways by many organisations. Yet not all of these organisations are subject to access to information laws. Maintaining accountable and transparent services is a challenge because the current regime does not always extend beyond public authorities and, when it does, it is complicated. The laws are no longer fit for purpose.

In a major review of FOIA in 2016, the Independent Commission on Freedom of Information chaired by Lord Burns (the Burns Commission) said that there was a case for improving access to information about the performance and delivery of outsourced services.¹ The level of public concern was so great that the Commission referred to it even though it

¹ Independent Commission on Freedom of Information Report. March 2016. P. 52 URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/independent_freedom_of_information_commission_report.pdf

was outside the scope of the inquiry. These concerns have not diminished.

When I was appointed Commissioner in 2016, I raised the prospect of extending FOIA to contractors delivering public services.² Following the collapse of Carillion last year, I submitted evidence to the Public Administration and Constitutional Affairs Committee (PACAC) and was clear that FOIA should be extended.³ After the Grenfell Tower tragedy in 2017, I also highlighted my concerns about access to information about fire safety and the fact that housing associations are not always covered by information access law.⁴ These events have sharpened my resolve to improve transparency and accountability.

I want the evidence-based case made in this report to promote an urgent and constructive dialogue that will result in the strengthening of our access to information laws. This reflects one of the key priorities of our draft information rights strategy 'Openness by Design'.⁵

Urgent action is required because progress has been too slow. It is now time to act. This report sets out solutions that can extend the law to make it fit for the modern age. I am committed to working with Government and Parliament to achieve this report's vision of more accountable public services, regardless of how they are delivered.

Elizabeth Denham

Information Commissioner

² Elizabeth Denham. Speech: Freedom of Information and the digital world. Holyrood FOI Conference in Scotland. 1 December 2016. URL: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2016/12/freedom-of-information-and-the-digital-world/>

³ The Information Commissioner's written evidence to the Public Administration and Constitutional Affairs Committee's inquiry into sourcing public services: lessons learned from the collapse of Carillion. 12 February 2018. URL: <https://ico.org.uk/media/about-the-ico/consultations/2260320/public-administration-and-constitutional-affairs-committee-icos-written-evidence-to-pacac-inquiry-carillion.pdf>

⁴ Elizabeth Denham. Blog: Information Commissioner encourages disclosure of fire safety information in light of the Grenfell Tower tragedy. 2 August 2017. URL: <https://ico.org.uk/about-the-ico/news-and-events/blog-information-commissioner-encourages-disclosure-of-fire-safety-information-in-light-of-the-grenfell-tower-tragedy/>

⁵ Information Commissioner's Office. Openness by design: our draft access to information strategy. 9 January 2019. URL: <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/call-for-views-openness-by-design-our-draft-access-to-information-strategy/>. This is out for consultation until 8 March 2019.

Executive summary

The landscape of public service delivery has fundamentally changed and continues to evolve. The Government and the wider public sector today relies heavily on a multitude of organisations, other than public authorities, to deliver and support many core public services. Data published by the Institute for Government (IfG) in December 2018 said that the Government spends £284 billion - almost a third of its total expenditure - with external suppliers.⁶

Services that are not delivered 'in house' by public authorities may be delivered by private companies, charities, social enterprises and voluntary organisations through various service models. A common model is 'outsourcing', when services are delivered by an external supplier under a public sector contract but public services may be delivered through other models such as joint ventures and public service mutuals.

Many other organisations exercise functions of a public nature across different sectors including health, justice and education. Examples include housing associations, which provide social housing, and Local Safeguarding Children's Boards (LSCB), which play a central role in protecting children.

Organisations other than public authorities build vital UK infrastructure. They also deliver or support many other essential public services including critical areas such as health and justice. These services have a considerable impact on the lives of the UK public in many different ways. They are particularly significant to the most vulnerable in society.

The importance of effective accountability and transparency when services are delivered by organisations other than public authorities was brought into sharper focus in 2018 when Carillion, which had approximately 420 UK public sector contracts, collapsed.⁷ Following the Grenfell Tower fire in 2017 difficulties accessing information relating to

⁶ The Institute for Government. Government Procurement: The scale and nature of contracting in the UK. December 2018. P.5 URL: <https://www.instituteforgovernment.org.uk/publications/government-procurement>

⁷ The National Audit Office. Investigation into the government's handling of the collapse of Carillion. 7 June 2018. P.4 URL: <https://www.nao.org.uk/wp-content/uploads/2018/06/Investigation-into-the-governments-handling-of-the-collapse-of-Carillion-Summary.pdf>

social housing were highlighted.⁸ Kensington and Chelsea Tenant Management Organisation (KCTMO), which was established by the local authority to manage and maintain its housing stock, was not subject to FOIA.

For public services, in all their various guises, to respond to the public there must be an effective system of openness and transparency in place holding both public authorities and organisations delivering public services to account. Despite the fundamental role that private companies play as one of the major providers of public services, only 23% of the public we polled thought information about their activities was accessible.⁹

Why change is needed

There are many ways to ensure that public services are accountable, but effective access to information is key. Without information to understand how public services are performing, how levels of service compare and how problems are tackled, the public will be left in the dark about the operation of public services. Access to information legislation is essential to democratic accountability and helps to create what we all want to see – better public services.

Public services are delivered in many ways, including by organisations that are not public authorities. This report is not about whether certain methods are to be preferred. It is about highlighting the clear risks to transparency and accountability when information held by such organisations is removed from the scrutiny offered by access to information law. The current law is not fit for purpose. It needs to keep pace with the changes in the modern public sector and public expectations.

Our report includes many examples where FOIA or the EIR have not provided the information access that the public sought, and shows the negative impact this has had on accountability. The most striking example we found was a case involving Wye Valley NHS Trust (the Trust)¹⁰ where

⁸ The Guardian. Grenfell: report criticised ‘inadequate’ management 12 years before fire. 1 November 2017 URL: <https://www.theguardian.com/uk-news/2017/nov/01/grenfell-report-criticised-inadequate-management-12-years-before-fire>

⁹ See Annex 1.

¹⁰ As note 50.

fire safety surveys produced by Carillion were not subject to FOIA as they were deemed not to be 'held' by the Trust.

Parliament clearly intended information rights to adapt to changes in public sector delivery - section 5 of FOIA includes a provision to bring contractors under its scope but it has never been used since the law came into force in 2005. There is a strong case for contractors to be more accountable when delivering public services. Similarly, powers to bring other organisations exercising functions of a public nature under the scope of FOIA have only been used a few times since the legislation came into force 13 years ago. This should now be addressed urgently.

In 2015, we published our discussion document 'Transparency in Outsourcing: a roadmap', in which we recommended improvements to increase transparency and accountability, focusing on outsourced public services.¹¹ Our latest research has found that information about many contracts is still inaccessible to the public and that contractual terms have not improved access to information sufficiently.

Information is only accessible under FOIA and the EIR if it is held by outsourced providers on a public authority's behalf. In practice this can be very difficult to determine, and attempts to improve contractual provisions to tackle this issue have not made enough progress.

Wider proactive (and largely voluntary) transparency initiatives regarding outsourced providers are positive and should be maintained, but have had limited success. We share our stakeholders' significant concerns in this report. There continues to be substantial support for change in access rights, and validation of the proposal that access to information law should be extended.

Our access to information laws were progressive and ambitious when they were introduced at the start of the millennium. However, we are falling behind our counterparts in Scotland and internationally who have done more to expand the reach of information access when services are delivered by organisations other than public authorities.

¹¹ Information Commissioner's Office. Transparency in outsourcing: a roadmap. 2015. URL: <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

Our recommendations

The challenge posed to transparency and accountability by the scale and complexity of organisations other than public authorities delivering public services highlights the urgent need for Parliament to debate these issues and consider the evidence for reform. The Commissioner would welcome a Parliamentary Inquiry via a Select Committee into the issues raised in this report. We have submitted this report to the Public Accounts Committee (PAC) and PACAC for their consideration.

We recognise that the Government would need to consult and assess the impact of our recommendations outlined below. More detail is included in our report.

Greater use of existing powers under section 5 of FOIA -secondary legislation

We recommend that the Government should:

1. Designate contractors regarding the public functions they undertake where this would be in the public interest, whether because of the scale, duration or public importance of the contracts.
2. Designate a greater number of other organisations exercising functions of a public nature, and do so more frequently and efficiently.

Designation orders under section 5 of FOIA would give the public the right to make requests directly to these organisations and require them to proactively disclose information in line with a publication scheme.

Legislative reform of FOIA and the EIR - primary legislation

We recommend that the Government should:

3. Consider reforming the EIR to allow organisations exercising functions of a public nature, including contractors, to be designated to increase consistency across the two information access regimes.
4. Amend section 3 of FOIA and regulation 3 of the EIR ('held on behalf of' provisions) to give a clearer legislative steer about what

information regarding a public sector contract is held for the purposes of the legislation.

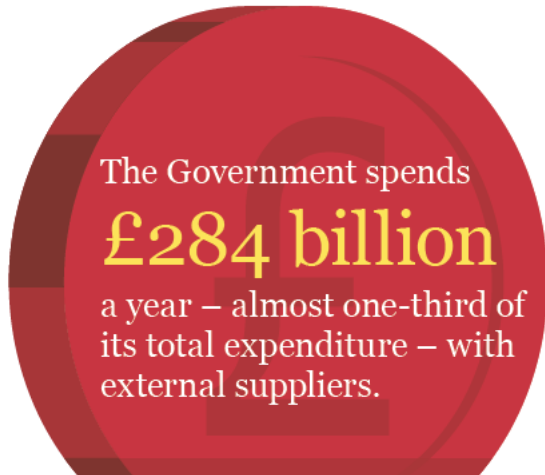
5. Introduce a legal requirement to regularly report on the coverage of the legislation.

Government review of proactive disclosure provisions regarding contracting


We recommend that the Government should:

6. Conduct a comprehensive review of all proactive disclosure provisions regarding contracting, and which affect the public sector. This would include a review of the publication scheme provisions in FOIA, and relevant provisions in the EIR, and how they complement other procurement laws and government requirements. This should consider how such provisions are monitored and enforced, and what resources are available.

Why transparent and accountable public services matter



The Government spends **£284 billion** a year – almost one-third of its total expenditure – with external suppliers.




Of the 169 new children's homes opened in 2017-18 **86%** were opened by private organisations.

“Freedom of information legislation should be extended to enable greater transparency in the delivery of public services. This would promote democratic accountability but also act as a driver for improving contractual oversight and service delivery”.


– Elizabeth Denham, Information Commissioner



of people believe that information about the activities of private companies delivering public services is accessible.



The National Audit Office estimates that Carillion had **420 public sector contracts** when it collapsed.



86% of people thought it was important to be able to access information relating to the public services provided by housing associations.

“Government agrees with the Information Commissioner that if more diverse models of service delivery develop we will have to ensure that transparency is not lost”.

– Response to PACAC report 'After Carillion: Public Sector Outsourcing and Contracting'

Introduction

The Information Commissioner (the Commissioner), Elizabeth Denham, is the UK's independent regulator responsible for upholding information rights in the public interest. Her vision is to increase the confidence that the UK public have in organisations that process personal data and those that are responsible for making public information available.

The Commissioner has a range of responsibilities across various information rights related legislation, mainly those in the DPA 2018, the GDPR, FOIA, the EIR, and the Privacy and Electronic Communications Regulations 2003 (PECR).

Under section 139(3) of the DPA 2018, the Commissioner may produce reports about the carrying out of her functions and arrange for them to be laid before Parliament. The Commissioner generally exercises this power in areas of significant concern and public interest. Strengthening FOIA and the EIR to enable greater transparency and accountability in modern public services is such an issue.

Successive governments have encouraged diversity and choice in public service provision and various delivery models have developed in an attempt to secure efficiencies.¹² There are also many other organisations that exercise functions of a public nature across different sectors. This report is about ensuring that FOIA and the EIR are fit for purpose and keep pace with these changes, in order to ensure effective transparency and accountability for the public.

In 2015, the Information Commissioner's Office (ICO) published a discussion document which explored ways to achieve greater transparency and accountability when public services are outsourced.¹³ We said that the level of uncertainty about accessing information about outsourced services in particular was no longer acceptable. We cautioned that if significant improvement did not happen, the Commissioner would exercise her powers to report to Parliament.

¹² HM Government. Open Public Services White Paper. July 2011. URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/255288/OpenPublicServices-WhitePaper.pdf

¹³ As note 11.

The Commissioner has decided to do this now because of the substantial public interest in this topic, and the ongoing level of public concern. Recent events, in particular last year's collapse of Carillion (a key strategic Government supplier), and the Grenfell Tower fire in 2017, have acted as catalysts.

We have reviewed legislation, relevant literature, government policy and real-life examples to compile the evidence that supports our case for change. We procured independent research to examine datasets on public sector procurement, which was provided by Spend Network in collaboration with freelance researcher and journalist Lucas Amin.¹⁴ The International Conference of Information Commissioners (ICIC) also surveyed other countries about the coverage of their access to information law.¹⁵

We held meetings and one-to-one telephone interviews with a range of stakeholders to ensure we heard different perspectives on this issue. These included teleconferences with key 'strategic suppliers' to the Government (Serco, Capita, G4S and Amey) facilitated by the Confederation of British Industry (CBI).

This report sets out our case for change and ICO recommendations to strengthen FOIA and the EIR. The aim is to stimulate urgent debate and encourage clear, practical commitments to improve the transparency and accountability of the public services that all of us, as citizens, rely on.

¹⁴ See Annex 1.

¹⁵ As above.

1.0 Legal context

1.1 The Freedom of Information Act 2000

FOIA applies to public authorities in England, Wales and Northern Ireland. Scotland has its own access to information legislation. Public authorities have a general obligation to respond to written requests and disclose information or provide details of why the request is being refused. A disclosure under FOIA is considered to be disclosure to the public. There are several exemptions, some of them subject to a public interest test.

The Commissioner may issue a decision notice including steps for a public authority to take to achieve compliance with FOIA. There is a right of appeal to the First-Tier Tribunal (Information Rights) (FTT). Further appeals on points of law can also be heard by the Upper Tribunal, the Court of Appeal and the Supreme Court.

When information is held by another person on behalf of a public authority, the information is held by the public authority for FOIA purposes.

In FOIA, 'public authority' means any person or holder of public office listed in Schedule 1, designated by order under section 5, or a publicly-owned company as defined by section 6 and as extended by the Protection of Freedoms Act 2012.

Section 5 contains a power for the Secretary of State or the Minister for the Cabinet Office (CO) to designate any person who is neither listed in Schedule 1 nor capable of being added under section 4 as a public authority where they:

- appear to exercise functions of a public nature; or
- are providing under a contract made with a public authority any service whose provision is a function of that authority.

A section 5 order must state the functions or services provided under contract for which an organisation is designated. FOIA would not apply to any other information held by the organisation. A section 5 order can designate a class of organisations.

Any Government changes to FOIA affecting devolved institutions and public bodies would need the assent of the Welsh Government and Assembly, or the Northern Irish Executive and Assembly.

1.2 The Environmental Information Regulations 2004

The EIR implement the European Council Directive 2003/4/CE on public access to environmental information (the EC Directive) in the UK. The source of the EC Directive is an international agreement, 'the Aarhus Convention (the convention)', adopted in Aarhus, Denmark on 25 June 1998. The European Union and the UK have signed the convention, which states what its signatories must do to provide access to environmental information.

The EIR cover any recorded environmental information held by public authorities in England, Wales and Northern Ireland. Public authorities have a general duty to make environmental information that they hold available. Verbal or written requests for information can be made and a public authority must respond, either disclosing the information or providing details of why the request is being refused. As under FOIA, disclosure is to the public and there are several exceptions, some of them subject to a public interest test.

If a request is refused, a public authority must confirm this in writing and provide details of the right of review, including the right to appeal to the ICO. As for FOIA, the Commissioner may issue a decision notice and there are the same rights of appeal.

There are similar provisions in the EIR that concern when information is deemed to be 'held'. Environmental information is held by a public authority if it is in the authority's possession and has been produced or received by the authority or it is held by another person on behalf of the authority.

A separate definition of public authority under the EIR includes, Government departments and their executive agencies, bodies listed in Schedule 1 of FOIA unless they are listed for only some of the information they hold and companies wholly-owned by other public authorities under FOIA.

Bodies carrying out functions of public administration are also included. Such bodies will have been given special legal powers to carry out services of public interest. Special legal powers are created in law and can only be used by the relevant body. They go beyond the normal rules of private law that apply to any company or person. Services of public

interest are not defined in the EIR, and do not have to relate to the environment.

The definition of public authority also includes bodies that have public responsibilities, carry out functions of a public nature or provide public services relating to the environment and which are under the control of another public authority. This means such bodies must have no genuine autonomy in deciding how to carry out their functions.

When new bodies are added into Schedule 1 of FOIA, they will also be public authorities for EIR purposes. However, a body designated a public authority under section 5 will not be brought under the EIR's scope.

2.0 What is the case for change?

2.1 FOIA and the EIR are essential to democratic accountability and improve services.

The significant benefits of strong access to information laws should not be overlooked or underestimated. The legislation is used by the public, campaign groups, businesses, the media and MPs. It shines a spotlight on the public sector, encouraging a more open and responsive culture.¹⁶ The Justice Committee described it as a “significant enhancement of our democracy”.¹⁷ The Supreme Court said it “reflects the value to be attached to transparency and openness in the workings of public authorities in modern society”¹⁸ and “adds to parliamentary scrutiny a further and more direct route to a measure of public accountability”.¹⁹

Access to information laws aim to increase Government’s transparency and accountability. Secondary objectives flow from this, which include better decision-making, greater public participation in decision-making, the ability to understand the nature of decisions, and greater confidence in how they are made.²⁰ The scrutiny of decision-making by the public provides democratic accountability which in turn improves services. In short, transparent and accountable public services are better public services.

The need to strengthen the reach of access to information legislation and the benefits of doing so was highlighted specifically in the Commissioner’s written evidence to PACAC in its Carillion inquiry. She said that FOIA “...should be extended to enable greater transparency in the delivery of modern public services. This would promote democratic accountability but also act as a driver for improving contractual oversight and service delivery”.²¹

¹⁶ Independent Commission on Freedom of Information: Call for Evidence. Response of the Information Commissioner. 16 November 2015. P.21 URL: <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf>

¹⁷ Justice Committee. 3 July 2012. Post Legislative Scrutiny of the Freedom of Information Act 2000. Summary. URL: <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/9602.htm>

¹⁸ Lord Mance. Paragraph 110. Sugar v BBC [2012] UKSC 4 URL: <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

¹⁹ As note above. Lord Walker. Paragraph 76.

²⁰ As note 17. Paragraph 11.

²¹ As note 3.

The Commissioner acknowledges that access to information laws have detractors but has stressed the considerable benefits to be gained:

“Some might see [the legislation] as a drag on resources, consuming public funds that would be better invested in front-line services. Yet time and again we have seen examples of how access to information has shone a light on incompetence, even misfeasance, and has yielded good public policy”.²²

FOIA’s role in exposing waste and raising governance standards was recognised by the PAC in 2014, which recommended extending it to private sector companies carrying out public services.²³ The PAC said FOIA was an important part of the solution to poor performance supporting the ability to follow the public pound wherever it was spent. The Society of Editors has also said that “...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”.²⁴

When public service provision is becoming increasingly diverse and open, these laws also help to promote consistency and equity of access to information across different sectors. The Scottish Government cited this as one of the reasons for extending the Freedom of Information (Scotland) Act 2002 (FOISA) to contractors operating prisons.²⁵ In a Ministry of Justice (MOJ) consultation, the UK Government acknowledged that access to information about a particular service may vary across the country if in some areas it is provided by a public authority and in others by other types of organisations.²⁶

It is easy to assume that if there is a risk to accountability, then the way to address it is through proactive transparency alone. That is understandable in an age driven by digital technologies and open data.

²² Elizabeth Denham. Speech: Trust, Transparency and Just-in-Time FOI: Sustainable Governance and Openness in the Digital Age. 22 March 2018. URL: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/03/trust-transparency-and-just-in-time-foi-sustainable-governance-and-openness-in-the-digital-age/>

²³ House of Commons Committee of Public Accounts. Contracting out public services to the private sector. Forty-seventh Report of Session 2013-14. 26 February 2014. P. 5 URL: <https://publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf>

²⁴ As note 1 p. 45.

²⁵ Scottish Government. Extending coverage of the Freedom of Information (Scotland) Act 2002 – Consultation Response Paper. 11 January 2016. URL: <https://www2.gov.scot/Publications/2016/01/2218/0>

²⁶ Ministry of Justice. Freedom of Information Act 2000: Designation of additional public authorities. P. 10 URL: <http://ccrinepal.org/files/documents/legislations/13.pdf>

The Commissioner has consistently supported open data and proactive measures to improve transparency. This is often quantitative data that provides an important level of accountability, such as helping to assess comparative performance. However, FOIA and the EIR are not a backstop. In a statement to Parliament in 2016, the Government said FOIA “is one of the pillars on which open government operates”.²⁷ Open Government is about much more than open data and proactive transparency. It also needs the democratic engagement and accountability provided by access to information law.

In the Commissioner’s response to the Burns Commission’s Call for Evidence²⁸ and in our roadmap discussion paper²⁹, we referred to the “push and pull” of information. We said there must be a right to information alongside proactive transparency and stressed the importance of people having the ability to obtain information whether or not there is a wider policy or commitment to providing it. A statutory right is far less susceptible to change and revision. In its response to post-legislative scrutiny of FOIA, the Government acknowledged that, “Governments and public authorities can promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power”.³⁰

Nevertheless, FOIA and the EIR are not just about the ‘pull’ of information; both also impose proactive publication responsibilities. FOIA requires publication schemes and advice and assistance to the public who wish to make requests. The EIR includes a duty to proactively seek to disseminate information to the public by easily accessible electronic means. Public authorities must also take reasonable steps to organise the information relevant to their functions with a view to active and systematic dissemination to the public.

Access to information law can also secure service improvements that provide the public with lasting benefits in the form of increased proactive

²⁷ Written statement laid in Parliament on the Independent Commission on Freedom of Information’s report. Rt Hon Matt Hancock MP. 1 March 2016. URL: <https://www.gov.uk/government/speeches/open-and-transparent-government>

²⁸ As note 16 P. 23 URL: <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf>

²⁹ See note 11. p. 15

³⁰ Government Response to the Justice Committee’s Report: Post Legislative Scrutiny of the Freedom of Information Act 2000. November 2012 p.8 URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

transparency or other reforms. Individual requests, often fiercely resisted initially, have been translated into broader proactive transparency initiatives or reforms. After the MPs 'expenses scandal'³¹ was exposed by a FOIA request, the Independent Parliamentary Standards Authority (IPSA) was created to provide oversight of MPs' pay and expenses and now publishes expenses data. Other examples we have highlighted in the past include the following:

- Ministry of Transport (MOT) test data is now regularly published.
- Nationwide data on landlords who have been convicted of offences under the Housing Act 2004 is now available.
- Standard publication of food hygiene ratings was driven by FOIA requests for restaurant inspections held by local councils.
- More information is published about how to apply to open free schools.³²

As explained later in this report, voluntary cooperation and goodwill are unlikely to provide the level of transparency and accountability that the public expect. It is important to build a broad and consistent culture of transparency and accountability but this must be backed by democratic engagement, provided in the form of strong access to information laws, and the means to enforce where necessary.

Neither proactive transparency nor access to information laws provide the complete picture. We must recognise the important partnership between the two and how much more effective and democratic open government can be when it is supported and driven by the public's rights to access information.

2.2 Information access rights must be fit for purpose and keep pace with modern public service delivery

The landscape of public service delivery has fundamentally changed and continues to evolve. The Government and the wider public sector today rely heavily on many organisations, other than public authorities, to deliver and support core public services. Data published by the IfG in

³¹ The Telegraph. MPs' expenses scandal: a timeline. 19 January 2019. URL: <https://www.telegraph.co.uk/news/newstopics/mps-expenses/6499657/MPs-expenses-scandal-a-timeline.html>

³² As note 16 p. 22

December 2018 indicated that the Government spends £284 billion - almost a third of its total expenditure - with external suppliers.³³

The use of organisations other than public authorities to deliver public services is not new but has expanded rapidly over the last 30 years. Compulsory competitive tendering in the 1980s led to a significant expansion in services being delivered in such ways and successive governments have built on the concept.³⁴ There has been an emphasis on encouraging diversity and choice in public service provision or 'open public services'³⁵ and a range of innovative delivery models have developed to try to secure efficiencies.

Services that are not provided 'in house' by public authorities may be delivered by private companies, charities, social enterprises and voluntary organisations through various service models. A common model is 'outsourcing', when services are delivered by an external supplier under a public sector contract but public services may also be delivered through other models such as joint ventures and public service mutuals.³⁶

At a local level, the Government has acknowledged that, "Most councils no longer rely solely on in-house operations...Many have used their legal powers to establish a mixed portfolio of provision, involving delivery models that operate across areas including adult social care, children's services, youth services, building control, and adult education".³⁷

There are also other organisations that exercise functions of a public nature across sectors including health, justice and education. Examples include housing associations, which provide social housing, and LSCBs, which play a central role in protecting children.

Organisations other than public authorities build vital UK infrastructure, and deliver or support many other essential public services including critical areas such as health and justice. These services significantly affect the lives of the UK public in many ways. Their importance to the most

³³ As note 6.

³⁴ The Guardian. Timeline: outsourcing and the public sector. URL: https://www.theguardian.com/society/microsite/outsourcing_/story/0,13230,933819,00.html

³⁵ As note 12.

³⁶ Department for Digital, Culture, Media and Sport. Alternative delivery models explained. 28 March 2017. URL: <https://www.gov.uk/government/publications/libraries-alternative-delivery-models-toolkit/alternative-delivery-models-explained>

³⁷ As note 36.

vulnerable in society must also be recognised. To provide just a few examples; a range of non-NHS providers offer health services, including social enterprises, local authorities, charities and community interest companies.³⁸ The demand for children’s social care services is increasingly being met by the private sector³⁹ and probation services were partially outsourced in 2015.⁴⁰

Given the range of services and the increasing pressure on them, it is not surprising that public service delivery models are becoming more complex. Innovative trends such as payment-by-results commissioning involve government relying heavily on private companies to manage long and complex supply chains. The Work Programme, which ran from 2011 to 2017, is a good example.⁴¹ The National Audit Office (NAO) has noted that, “...the role of providers in the public sector has evolved from relatively simple contracts to provide goods and services, to innovative high profile commissioning arrangements in sensitive areas such as health and justice”.⁴²

However, this report is not about the relative merits of different public service delivery models. Outsourcing can deliver successfully and in-house services may fail. This report is about recognising the reality of modern services being delivered in alternative ways and ensuring that access to information laws are fit for purpose and keep pace with change in order to provide effective accountability.

For public services, in all their various guises, to respond to the public there must be an effective system of openness and transparency in place holding both public authorities and other organisations delivering public services to account. Despite the fundamental role that private companies play as one of the major providers of public services, only 23% of the

³⁸ The King’s Fund. Is the NHS being privatised? URL: <https://www.kingsfund.org.uk/projects/verdict/nhs-being-privatised>

³⁹ Ofsted. Jason Bradbury. Blog: The changing picture in children’s homes sector. 22 August 2018 URL: <https://socialcareinspection.blog.gov.uk/2018/08/22/the-changing-picture-in-the-childrens-homes-sector/>

⁴⁰ Reuters. UK government to cancel private probation service contracts early. 27 July 2018 URL: <https://uk.reuters.com/article/uk-britain-outsourcing-probation/uk-government-to-cancel-private-probation-service-contracts-early-idUKKBN1KH12P>

⁴¹ Department for Work and Pensions. The Work Programme. December 2012. URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/49884/the-work-programme.pdf

⁴² National Audit Office. Government Commercial and Contracting: an overview of the NAO’s work. Spring 2016. P. 1. URL: <https://www.nao.org.uk/wp-content/uploads/2016/05/Government-Commercial-and-Contracting-overview-NAOs-work.pdf>

public we polled thought that information about their activities was accessible.⁴³

The importance of effective accountability and transparency when services are delivered by organisations other than public authorities was brought into sharper focus in 2018 by the collapse of Carillion which had about 420 UK public sector contracts at the time.⁴⁴ After the Grenfell Tower fire in 2017, there were concerns about accessing information relating to social housing.⁴⁵ KCTMO, which was established by the local authority to manage and maintain its housing stock, was not subject to FOIA.

2.3 Our access to information laws do not provide effective accountability

FOIA and the EIR provide a general right of access to information that is held by public authorities. Citizens cannot effectively exercise these rights in instances where public services are being delivered by organisations other than public authorities because:

- services delivered under a contract with a public authority (outsourced services) are not effectively covered by our access to information laws.
- services delivered by organisations other than contractors that exercise functions of a public nature are not subject to access to information laws.

2.3.1 Services delivered under a contract with a public authority (outsourced services)

Parliament provided a specific mechanism for extending FOIA under section 5 that allows contractors to be designated as public authorities. Designation means a public authority is covered by FOIA and the public can request information directly from them. This is an important tool within the legislation to support transparency and democratic

⁴³ See Annex 1.

⁴⁴ Report by the Controller and Auditor General. Investigation into the government's handling of the collapse of Carillion. Session 2017-2019. P6 URL: <https://www.nao.org.uk/wp-content/uploads/2018/06/Investigation-into-the-governments-handling-of-the-collapse-of-Carillion.pdf>

⁴⁵ As note 8.

accountability when services are outsourced, but crucially it has never been used.

Some contractors may already be covered by the EIR, which take a broader and potentially more permissive approach to defining a public authority, but there is significant uncertainty. Bodies are public authorities for the purposes of the EIR if they are under the control of another public authority and have public responsibilities, exercise functions of a public nature or provide a public service relating to the environment.

In our roadmap discussion document published in 2015, we drew attention to the difficulties of ensuring transparency and accountability when services are outsourced by public authorities.⁴⁶ We explained that when dealing with information requests, one difficulty is deciding whether the information sought is *held on behalf of* a public authority by a contractor. If it is, then FOIA and the EIR apply. That may sound straightforward but in practice, can be very difficult to determine. This problem can significantly hinder the public's ability to access information.

Section 3 of FOIA provides that:

"For the purposes of this Act, information is held by a public authority if –

- (a) It is held by the authority, otherwise than on behalf of another person, or
- (b) It is held by another person on behalf of the authority".

In 2012, the Government said it recognised that "not all information about a contract and its delivery will be held on behalf of the contracting public authority for the purposes of section 3 of FOIA". It also said:

"We were encouraged to hear suggestions in evidence to the [Justice] Committee that some public authorities and their contractors interpret holding information on behalf of one another broadly. This is a highly commendable approach. To maximise transparency, the Government strongly encourages public authorities and contractors to interpret their obligations in this way, so as to provide, on a voluntary basis, information that they think the requester and the wider public may be interested in but which is additional to the bare minimum that is technically covered by an FOI request to the public authority".⁴⁷

⁴⁶ As note 11.

⁴⁷ As note 30 P. 24

In 2015 we suggested that FOIA and the EIR could be amended to clarify that the 'held on behalf of' provisions covered material held by a contractor in connection with their delivery of an outsourced service.⁴⁸

In 2016, the Burns Commission also acknowledged the limitations of the 'held on behalf of' provision in FOIA, saying it was:

"...persuaded that information concerning the performance or delivery of public services under contract should be treated as being held on behalf of the contracting authority. This would make such information available to requesters who make requests to the contracting public authority".⁴⁹

There are similar provisions in the EIR regarding information held on behalf of public authorities. In most cases under both FOIA and the EIR, decisions are reached by reference to the terms of the contract. However, contracts often do not outline what information is held on behalf of public authorities. Generally we have found that what is held on behalf of a public authority is limited to information needed to successfully fulfil the contract. Other information requested about the service can fall outside the reach of the legislation.

In one striking example, a report by Carillion into fire safety at a NHS hospital built under a private finance initiative (PFI) scheme was not accessible under FOIA. This outcome was clearly out of step with reasonable public expectations highlighting the concerning practical consequences of not getting clear access arrangements in place. Had a public authority held the information, disclosure would probably have been required because of the substantial public interest in transparency and the fact that further safety deficiencies came to light after the Carillion report.

⁴⁸ As note 11.

⁴⁹ As note 1.

Sid Ryan v Information Commissioner and Wye Valley NHS Trust (EA/2016/0125)⁵⁰

Wye Valley NHS Trust (the Trust) entered into a PFI scheme with Mercia Healthcare Limited to design, construct, redevelop and manage Hereford County Hospital. The Trust remained the owner of the hospital site's freehold, but the building itself was owned by Mercia and leased back to the Trust. Mercia also provided facilities management services.

The Trust identified potential fire safety defects in the 'fire barrier' walls in the hospital and sought assurances from Mercia that the defects were not present elsewhere. Mercia then instructed Carillion, which had constructed the original building, to survey the hospital and determine the adequacy of the fire barriers. Verbal assurances were provided. The Trust was later notified of further defects in the fire barriers. This prompted the Trust and Mercia to each commission their own surveys.

A member of the public requested copies of the Carillion and Mercia surveys and, when they were not disclosed, complained to the Commissioner. The Commissioner investigated and concluded⁵¹ that the surveys were not covered by FOIA because they were not held by or on behalf of the Trust.

The requester pursued the matter, appealing to the FTT. The Trust conceded that it held Mercia's survey. However, the FTT concluded that the Trust had no power to compel Mercia to provide the Carillion survey and agreed it was not covered by FOIA.

The Campaign for Freedom of Information (CFOI) has said that the limits on accessing information regarding outsourced public services represents a 'major loophole' in the law. It said the public had been refused access to many items of information in such circumstances including; the number of officers, complaints and staff charged with offences at privately run prisons.⁵² Further examples cited by the CFOI are in annex 2.

⁵⁰ Sid Ryan v the Information Commissioner and Wye Valley NHS Trust (EA/2016/0125) First-tier Tribunal (General Regulatory Chamber). 7 April 2017. URL: [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1986/Ryan,%20Sid%20EA.2016.0125%20\(7-04-17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1986/Ryan,%20Sid%20EA.2016.0125%20(7-04-17).pdf)

⁵¹ URL: <https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1623983/fs50590687.pdf>

⁵² Campaign for Freedom of Information. Bring housing associations and public service contractors under FOI. 6 July 2017. URL: <https://www.cfoi.org.uk/2017/07/bring-housing-associations-and-public-service-contractors-under-foi/>

We have found more examples in ICO casework where information about outsourced public services has fallen beyond the reach of access to information law. This would not occur if the services were provided by public authorities. These cases show that one unintended consequence of outsourcing can be a significant reduction in the public's ability to access information about a public service. We have highlighted some examples below and in annex 2.

Olympic Delivery Authority

During the London Olympics, Leyton Marsh was used as a basketball training venue. After the Olympics, the reinstatement work was carried out by a subcontractor of Nussli, the main contractors to the Olympic Delivery Authority (ODA). A member of the public requested information about the work carried out under access to information law but it was not made available.

The Commissioner received a complaint and found that although the information held by the subcontractor related to work it was doing on the ODA's behalf, it was not held for EIR purposes.⁵³ The Commissioner reached this conclusion because the ODA had no direct contractual relationship with the subcontractor. Its contract with Nussli did not contain a clause permitting the ODA direct access to or any control over the information held by the subcontractor.

Stockton-on-Tees Borough Council

Stockton-on-Tees Borough Council (the council) entered into a joint venture with Spark of Genius Ltd and created a limited liability partnership (LLP).⁵⁴ The LLP contracted Spark of Genius Ltd to provide residential services for children with complex needs. Spark of Genius Ltd rented a house from the council and converted it to provide residential services. The council placed children in residence and paid a contracted fee for the service.

A member of the public requested information about the cost of refurbishing the property. As the costs were not to the council, the Commissioner concluded that the information was not held for the purposes of access to information laws.

⁵³ Information Commissioner's Office. Decision notice FER0484371. 16 October 2013. URL: https://ico.org.uk/media/action-weve-taken/decision-notice/2013/906162/fer_0484371.pdf

⁵⁴ URL: <https://sparkofgenius.com/sog-north-east/>

2.3.2 Services delivered by organisations, other than contractors, that exercise functions of a public nature

A range of other organisations exercising functions of a public nature are not directly covered by the legislation. This means the public cannot make requests directly to them and may not be able to access any information at all. Some of these bodies make information available voluntarily but in those circumstances there is no enforcement by the ICO or right of appeal.

The WhatDoTheyKnow website lists a large number of organisations that are not directly covered by access to information law despite significant public responsibilities. It claims these include bodies that operate as regulators, make public appointments or distribute large amounts of public funds.⁵⁵

We have mentioned that powers to extend FOIA coverage to contractors have never been used. Similarly, despite the array of organisations exercising functions of a public nature, separate powers under section 5 of FOIA intended by Parliament to extend the law to them have seldom been used in the 13 years since the law came into force. FOIA has been extended in this way to only a few bodies as follows: Financial Reporting Council, Academy schools, Association of Chief Police Officers (ACPO), the Financial Ombudsman Service, the Universities and Colleges Admissions Service, Network Rail, and the National Police Chiefs' Council (NPCC). Notably, it took two years to designate the NPCC when it became the ACPO's successor.

The reasons behind the low use of section 5 powers are unclear but observations in the previous Scottish Information Commissioner's special report to the Scottish Parliament about extending FOISA are relevant.⁵⁶ She observed there had also been low use of equivalent powers under FOISA citing several potential factors including political will, uncertainty about what is meant by 'public function' and fear of what designation actually means in practice.⁵⁷ This issue has persisted across government administrations since FOIA came in, showing that this is a longstanding

⁵⁵ URL: https://www.whatdotheyknow.com/body/list/foi_no

⁵⁶ Scottish Information Commissioner. FOI 10 years on: Are the right organisations covered? URL: <http://www.itspublicknowledge.info/nmsruntime/saveasdialog.aspx?IID=8212&SID=377>

⁵⁷ As note above. p. 13.

issue that must be tackled. It is very important that access to information laws can be extended proportionately.

A body can be a public authority under the EIR if it is found to be carrying out functions of public administration. This can be the case if they have been given special legal powers to carry out services in the public interest. For example, case law has established that a group of water companies were public authorities under the EIR.⁵⁸

Bodies will also be public authorities for the purposes of the EIR if they are under the control of another public authority and have public responsibilities, exercise functions of a public nature or provide a public service regarding the environment. Coverage for such bodies relies on falling within one of these descriptions and, as with contractors, this can create significant uncertainty. Some bodies that exercise functions of a public nature can be beyond reach.

Service models other than outsourcing: public service mutuals and joint ventures

It is much more difficult these days to understand the relationships between public authorities and other organisations exercising functions of a public nature. 'Alternative delivery model' captures everything that is not traditional in-house provision or orthodox outsourcing. The Government has published detailed guidance about the different models that are possible, as well as the associated legal forms and status they may have.⁵⁹

Public service mutuals are organisations that have left the public sector but continue delivering public services. Public sector employees play a significant part in their operation as a result of a staff group 'spinning out' from councils. There are various ownership options such as council and staff, staff and community or 100% staff.⁶⁰ Mutuals work in healthcare, social care and education among other sectors. There are about 115 public service mutuals in England, delivering an estimated £1.6 billion of public services across a range of sectors.⁶¹

⁵⁸ Fish Legal vs ICO [2015] UKUT 0052 (AAC) URL: <http://www.bailii.org/uk/cases/UKUT/AAC/2015/52.html>

⁵⁹ As note 36.

⁶⁰ As note 36.

⁶¹ Department for Digital, Culture, Media and Sport. Introduction to Public Service Mutuals: A brief overview of Public Service Mutuals and their benefits. 3 April 2017. URL: <https://www.gov.uk/guidance/introduction-to-public-service-mutuals>

The case below relates to a community interest company (CIC) that has contracts with the NHS and two county councils. Despite performing a range of public services regarding health, and presenting as part of the NHS by using its logo, it is not a public authority under FOIA. Several requests to it have been logged on the WhatDoTheyKnow site⁶² but each time, a standard response has refused access because it is not covered by access to information law. There is nothing to prevent it responding voluntarily, but if it chooses not to do so, a citizen cannot enforce access.

East Coast Community Healthcare CIC

East Coast Community Healthcare CIC provides a range of NHS community health services including district nursing, health visiting, speech and language therapy, physiotherapy and palliative care.⁶³ It also provides primary care services, school nursing and health improvement services. Before 1 October 2011, it was part of NHS Great Yarmouth.

CICs are a type of company introduced by the Government in 2005 under the Companies Act 2004, designed for social enterprises that use profits and assets for public good.

A request was made for information about an inspection by the Care Quality Commission. As East Coast Community Healthcare is a CIC owned by its staff it is not a public authority under FOIA so the request was rejected.

Joint ventures are partnerships between a public body and other public, private or third sector bodies. There is potential for joint ownership, including staff, councils and/or third-party providers.⁶⁴ The think-tank Localis reported in 2016 that "A majority of councils (57%) operate a joint venture with the private sector".⁶⁵

⁶² URL: <https://www.whatdotheyknow.com/body/ecch>

⁶³ URL: <https://www.ecch.org/>

⁶⁴ See note 36

⁶⁵ Richard Carr. Commercial Councils. The rise of entrepreneurialism in local government. P. 7. URL: <http://www.localis.org.uk/wp-content/uploads/2016/02/Localis-Commercial-Councils-FINAL.pdf>

2.3.3 Legal form and status

The term 'alternative delivery model' does not relate specifically to legal form, but instead describes the type of delivery model and indicates the nature of the relationship between the delivery model and the public authority. The term 'legal form' refers to the way a particular delivery model is structured, ie what type of company it is. Examples of legal form include a company limited by guarantee or shares, a community interest company or a community benefit society.⁶⁶

The terms 'social enterprise' and 'charity' refer to the status of the delivery model. Whether an organisation qualifies for social enterprise and/or charitable status depends on its function and legal form. Social enterprises are defined as "businesses with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community..." A charity is defined by the Charities Act 2011.⁶⁷

Only companies that are wholly owned by public authorities are directly covered by access to information law. The following case shows how the legal form of a company can put information about important local services beyond the direct reach of the law if it is not wholly owned by a public authority.

Warrington Borough Council

Warrington Borough Council set up two organisations to run its leisure and cultural facilities: Culture Warrington (a charitable trust)⁶⁸ and a CIC called LiveWire. LiveWire runs the council's libraries and leisure centres under contract to the council. It does not have any shareholders, capital or assets. Capital and assets are 'licensed' by the council.⁶⁹ Board members are made up of council members and independent director members. Council members' votes cannot account for more than 20% of the total votes on a company resolution, so overall control of decisions rests with the independent directors. As LiveWire is not listed in Schedule 1 of FOIA, nor designated under section 5 and is not wholly owned by a public authority, the Commissioner concluded it is not directly covered.

⁶⁶ As 36.

⁶⁷ As above.

⁶⁸ URL: <https://culturewarrington.org/>

⁶⁹ URL: <https://livewirewarrington.co.uk/>

One unintended consequence of innovation in public service delivery is that some models have been removed from direct public scrutiny. The implications for accessing information are significant, so there should be a commensurate level of consideration given to ensuring that access to information rights are not lost when new bodies are created, whatever their model, legal form or status.

Housing associations

Housing associations are one of several organisations that exercise functions of a public nature that are not directly covered by FOIA (unless they are wholly owned by a public authority). The CFI has published details of information that the public were unable to access about housing association services. These include the number of repossession orders served since the 'spare room subsidy' came into force, the cause of a fire and the amount of waste collected from a housing association's estates.⁷⁰

After the Grenfell Tower fire, the Commissioner expressed concerns in a blog post about the general inaccessibility of fire risk information.⁷¹ The tragedy led to significant public debate about fire safety in social housing and what can be done to improve it.⁷² The Commissioner appealed to housing associations to disclose appropriate information relating to fire safety voluntarily and said the failure to designate them as public authorities under FOIA was a "significant gap in the public's right to know".

The following case shows that the public must unacceptably rely on the voluntary cooperation of housing associations for information of significant public interest, such as that relating to fire safety.

⁷⁰ Campaign for Freedom of Information. 6 July 2017. Bring housing associations and public service contractors under FOI. URL: <https://www.cfoi.org.uk/2017/07/bring-housing-associations-and-public-service-contractors-under-foi/>

⁷¹ As note 4.

⁷² As note 8.

Richmond Housing Partnership

Richmond Housing Partnership (RHP) is registered as a non-profit private provider of social housing. It has charitable status as a community benefit society. It has the power to buy and sell property and land connected with its provision of social housing.

A member of the public requested information on its management of fire safety. RHP refused to supply some of the information requested, saying that it was not a public authority for EIR purposes. It provided some information voluntarily.

The Commissioner concluded that some of the information requested was environmental in nature but agreed that RHP was not a public authority under the EIR.⁷³ This was because it could not be said to be undertaking functions of public administration since it had no special powers over and above those normally held by private individuals and companies. Nor did the Commissioner consider that RHP was under the control of another public authority.

For the first time, we recently ruled that a housing association was a public authority under the EIR in England.⁷⁴ This involved complex considerations. The ruling is currently being challenged by Poplar Housing and Regeneration Community Association through an appeal to the FTT. In our view this is inefficient and costly for all parties. It would be better for the public if the Government sent a clear message that housing associations that are not publicly-owned are still covered by the law by using its section 5 FOIA powers. Of course, that would not resolve the issue relating to the EIR, which does not currently permit designation of any organisations. That should be explored to improve the consistency of information access.

⁷³ URL: <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259424/fer0700353.pdf>

⁷⁴ URL: <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2259626/fer0735350.pdf>

2.3.4 Benefits of designating organisations that exercise functions of a public nature, including contractors

We have highlighted the wide range of considerable benefits that FOIA and the EIR can bring. Information access can promote greater consistency in the information available to the public about organisations and services across different sectors. This is particularly important when considering the benefits of designation in general. Making greater use of designation powers would promote equity for citizens seeking to access information about public services too. This was a key reason given by the Scottish Government when it designated private prison contractors.⁷⁵

The NAO has highlighted that changes in public service provision have increased the risk of provider failure.⁷⁶ Failed contracts cost the taxpayer and reduce trust and confidence in the delivery of public services. Various other high profile contract failures over several years, such as the Serco and G4S tagging scandal⁷⁷, highlight the importance of ensuring appropriate oversight of essential public services. At the heart of this issue lies a need for strengthened accountability, with information access a key component in driving it.

Fundamental to rebuilding public confidence, which has suffered in the wake of the Carillion collapse, is the ability to access information about public services being provided by contractors. In a recent speech, the Rt Hon David Lidington MP, underlined the importance of rebuilding public trust between government private sector providers and the public noting that “Carillion’s failure reinforced a widespread crisis of confidence in government reliance on the private sector to deliver public projects and services on which the public relies”.⁷⁸

Designation would send an important message to those providing public services that transparency and accountability to the public are an essential part of the deal. In 2014 the PAC said that “Contractors...need to accept that spending public money brings with it a greater degree of

⁷⁵ As note 25.

⁷⁶ NAO. Principles Paper: Managing Provider Failure. 21 July 2015 P. 9 URL: <https://www.nao.org.uk/wp-content/uploads/2015/07/Principles-paper-managing-provider-failure.pdf>

⁷⁷ BBC News. Serco and G4S face billing probe over electronic tagging. URL: <https://www.bbc.co.uk/news/uk-22568970>

⁷⁸ The Rt Hon David Lidington CBE MP. 25 June 2018. Speech to Reform think tank. URL: <https://www.gov.uk/government/speeches/chancellor-of-the-duchy-of-lancaster-speech-to-reform>

public scrutiny and transparency; they must be far more open through, for example, the publication of contracts and performance indicators being standard practice".⁷⁹

Other mechanisms and initiatives support the accountability and transparency of contractors exercising public functions. For example, the CO is currently exploring the publication of selected Key Performance Indicators (KPIs), and some contracts include open-book accounting clauses so that suppliers are more transparent and accountable to the contracting public authority. However, we explained earlier that giving the public the right to request information is essential to democratic accountability, and this is more important than ever in the changed landscape of modern public services. Designating contractors who are actually delivering the public service would make them more directly transparent and accountable to the public they serve.

Introducing the requirement for certain contractors to routinely and proactively publish information as part of a publication scheme that is subject to enforcement would also drive forward transparency and accountability in an even more direct way. Designating contractors would require them to take more of a lead in making information about outsourced services proactively available to the public. Contractors have a wealth of resources and commercial experience. Great benefits would accrue from putting them in the driver's seat and incentivising them to work more in partnership with public authorities to improve transparency and accountability.

We have said that strong information access rights can improve services. Greater transparency and accountability regarding outsourced public services could reduce corruption, promote an open and competitive market for a more diverse range of suppliers (a key Government target), encourage innovation, increase collaboration in the supply markets, lead to greater efficiencies and improve value for money for the taxpayer. While we were preparing this report, our stakeholders told us that the Government must get much better at communicating and appreciating these substantial benefits.

⁷⁹ Public Accounts Committee. Transforming Contract Management. Twenty-third Report of Session 2014-15. 26 November 2014. P. 4. URL: <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/585/585.pdf>

More transparent and accountable outsourced services could also significantly improve the Government's data quality. In 2018, the IfG published a report which found that high-quality government data is important for both government effectiveness and for holding it to account. It said there are many basic output measures for which no data is currently published. It also argued that difficulties in collecting and collating data have been worsened by outsourcing many public services to organisations that are not subject to FOI rules.⁸⁰

Designating contractors would encourage them to collaborate much more actively in trying to improve data quality, to develop publication schemes and to become models of best practice by default regarding information handling. Useful insights could be drawn from better information that could be used to improve public services.

If designated under FOIA, contractors may be able to rely on exemptions to protect commercial confidentiality, but there will also be an opportunity to review what this means in practice. In January 2018, the Business Services Association indicated that the industry was open to "a reworking and agreement of what is meant by 'commercially confidential'".⁸¹ The PACAC Carillion report also noted the CBI statement that there was little if any information that companies would be unwilling to disclose.⁸² The ICO would also be willing to refresh its existing guidance to help contractors and public authorities.

2.4 Measures to improve contracts are not providing sufficient transparency

In 2015, the ICO suggested a 'soft measures' approach as one solution to the challenge of increasing the transparency of outsourced public services.⁸³ We said that matters could be improved through better contracts, transparency by design, making standard terms more fit for

⁸⁰ Institute for Government. Gavin Freeguard. Gaps in government data. Five things the UK Government should publish. September 2018 p. 4. URL:

<https://www.instituteforgovernment.org.uk/sites/default/files/publications/gaps-govt-data-final.pdf>

⁸¹ Letter from Mark Fox, Chief Executive, Business Services Association to Rt Hon David Lidington MP. 26 January 2018. URL: <http://www.bsa-org.com/wp-content/uploads/2018/03/David-Lidington-Cabinet-Office-26.1.18.pdf>

⁸² House of Commons. Public Administration and Constitutional Affairs Committee. After Carillion: Public sector outsourcing and contracting. Seventh Report of Session 2017-19. 3 July 2018 p.41 URL: <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/748/748.pdf>

⁸³ See note 11.

purpose and legislative change. We believed that these measures could improve transparency but cautioned that we would consider reporting to Parliament if there was “no significant progress”.

In gathering evidence for this report, we revisited our roadmap discussion document of 2015 and considered whether we do now have better contracts. We said that there was scope for improving transparency requirements in standard contract terms, including a requirement for proactive publication of certain information such as the contract itself and performance against KPIs. We advocated earlier consideration of access to information at the start of the contracting process. Despite our recommendations, we have found no evidence to suggest that contracts have significantly improved in the way we suggested they should.⁸⁴

The Model Services Contract (MSC)⁸⁵ is a best practice document published by the Crown Commercial Service (CCS) that public bodies are advised (but not obliged) to use when procuring services valued above £10 million. The first version of the Government’s MSC was published in April 2014. Subsequent developments have resulted in the latest version in May 2016, which includes a clause entitled Transparency and Freedom of Information (the transparency clause).

To assess implementation, we tried to obtain copies of contracts valued above £10 million, published after May 2016, to review whether the transparency clause was used. After rigorous searches across UK public procurement portals that were open and accessible (ie did not require registration or subscription), we established there were no published contract documents that contained the transparency clause.

To assess the take-up of transparency clauses in contracts other than the MSC, we planned to consider a sample of final contracts. This proved to be more difficult than expected. Again, relying on open and accessible portals only, from around 43,000 tenders and contract notices published after May 2016, we identified almost 500 tenders with documents attached. From these, we found 55 final contracts, yielding a published contract rate of only 11%.⁸⁶

Positively, most of the sample contracts did include transparency clauses. However, we have explained that a fundamental problem when dealing

⁸⁴ See Annex 1.

⁸⁵ URL: <https://www.gov.uk/government/publications/model-services-contract>

⁸⁶ See Annex 1.

with requests for information about outsourced services is deciding whether information is held on behalf of a public authority. This can be very difficult to do when contracts do not give the right level of detail. In the 55 contracts we found on open portals, there was no evidence that the parties had specified and agreed what information would be held on behalf of a public authority in the event of an information request.⁸⁷

It is positive that the CO is currently considering the publication of selected KPIs.⁸⁸ However, the Government has not yet improved standard contractual terms to include *requirements* for the proactive publication of information that supports transparency, such as the contract itself and performance against KPIs as we recommended. It is not clear how proposals to publish KPIs would be monitored or enforced. In our view, publishing selected KPIs would not provide the necessary level of accountability. As stated earlier, FOIA and the EIR significantly enhance our democracy because the legislation rebalances power and gives people enforceable rights to access the information they want to see, not only what is made available to them.

The draft National Action Plan for Open Government 2018-2020 (NAP)⁸⁹ includes a Government proposal to improve compliance with guidance about publication of contract documents and to introduce additional metadata fields in Contracts Finder to indicate specific types of contract terms (eg use of a transparency clause).⁹⁰ It states that although government guidance calls for contract documents to be published, few local authorities proactively disclose the text of their contracts and associated procurement data is often provided through third party platforms that do not use the Open Contracting Data Standard (OCDS).⁹¹ The Government says that although there is increasing compliance with the requirement to publish contract opportunities and

⁸⁷ See Annex 1.

⁸⁸ Public Technology.net. Government database to track KPIs of top contracts in post-Carillion shake up. 7 November 2018 URL: <https://www.publictechnology.net/articles/news/government-database-track-kpis-top-contracts-post-carillion-shake>

⁸⁹ UK Open Government Network. Draft for public consultation. UK National Action Plan for Open Government 2018-2020. P. 18 URL: <https://www.opengovernment.org.uk/2018-2020-open-government-action-plans/background-info-for-the-2018-2020-open-government-national-action-plan/public-consultation-on-the-draft-of-the-uk-national-action-plan-for-open-government-2018-2020/>

⁹⁰ As note above P. 22

⁹¹ As note 89. P. 18

awards through Contracts Finder, there remain “data gaps” and limitations.⁹²

The commitments in the draft NAP are also positive, but the limited publication of contract documents and the limited enforcement and monitoring of their contents clearly highlights the inadequacy of using contracts as the primary means of supporting transparency and information access. Inadequate and inaccessible contracts persist despite a range of parties highlighting these defects over a lengthy period of time. Notably, the 2013-2015 NAP included a specific commitment to:

“...take steps to ensure transparency about outsourced services is provided in response to freedom of information requests, by encouraging the use and enforcement of contractual provisions to maintain the levels of transparency provided by the Freedom of Information Act 2000”.⁹³

It is clear that a ‘soft measures’ approach is insufficient and we do not believe that contracts are likely to resolve the problems we now face. If anything, the drive is to make contracts simpler and shorter because the longer and more complex they get, the harder they are to understand and to enforce.⁹⁴ It is the right time to consider another option. FOIA and the EIR are existing, ready-to-use tools that have a role to play in creating the transparency and increased accountability that is urgently needed in public sector outsourcing.

2.5 Proactive transparency initiatives have had limited success

The diverse range of government initiatives to increase transparency over the last decade and new measures being developed to publish contract-related KPIs, improve the publication of contracts, and to enhance Contracts Finder metadata show ongoing positive intent in this area. They should continue and are to be encouraged. So too is the active network of UK based and international groups striving to propose innovative solutions to make government more open.

However, we do not think proactive transparency initiatives have taken us far enough in empowering citizens and providing the right level of

⁹² As note 89. P. 21

⁹³ Cabinet Office. Open Government Partnership UK National Action Plan 2013 to 2015. 27 June 2013. Para 7.2 Commitment 12 URL: <https://www.gov.uk/government/consultations/open-government-partnership-uk-national-action-plan-2013/open-government-partnership-uk-national-action-plan-2013-to-2015>

⁹⁴ Government Digital Service. Blog: Bringing policy and digital together to deliver contracts. URL: <https://gds.blog.gov.uk/2017/11/02/bringing-policy-and-digital-together-to-deliver-contracts/>

accountability. Stakeholders have highlighted the limited success of transparency measures, saying that the public still cannot tell where all the contracts are and who they are with, how they are performing and how they are being managed. While there are some good rules in place, what is particularly notable is the continuing strong reliance on voluntary cooperation and goodwill. Legislative requirements are underpinned by a range of policy commitments about contractual transparency. While that has its place, having proper monitoring and enforcement, where necessary, is crucial.

Contracts Finder is an important part of fulfilling the Government's commitment to transparency.⁹⁵ It allows suppliers to search for tenders and contract awards. The Public Contracts Regulations 2015 (PCR) meant that information about tender opportunities and contract awards was supposed to be available on the Contracts Finder portal (with a few exceptions, eg defence contracts). The Government also made a number of *policy commitments* about the transparency of public contracting data, including publication of the tender and contract documents in full on Contracts Finder. Documents should be attached to the relevant notice and contracts should be attached to award notices. The CCS has published detailed guidance.⁹⁶

As well as the legal requirements to publish covered by the PCR 2015, the Local Government (Transparency Requirements) (England) Regulations 2105 require local authorities to publish details of tenders and contract awards valued over £5,000. There are also policy commitments for greater disclosure set out in the Local Government Transparency Code (the Transparency Code). The Code recommends that local authorities go further than the minimum requirements and publish every invitation to tender on Contracts Finder valued at more than of £500.⁹⁷

⁹⁵ URL: <https://www.gov.uk/contracts-finder>

⁹⁶ Crown Commercial Service. Publication of Central Government Tenders and Contracts. Updated November 2017. URL:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666729/Guidance_Publication_of_New_Central_Government_Tender_documents__and_Contracts_2017__1__1_.docx

⁹⁷ Department for Communities and Local Government. Local Government Transparency Code. February 2015. URL:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408386/150227_PUBLICATION_Final_LGTC_2015.pdf

Further policy commitments appear in the Government's policy note 'The Transparency of Supplier and Government to the Public'.⁹⁸ It says there should be a presumption in favour of disclosing information relating to commercial information and government contracts in most cases. In-scope procuring organisations are instructed to explain transparency requirements to potential suppliers early and set out clearly in tender documents the types of information to be disclosed or that may be exempt.

The Government issued a revised Code of Practice under section 45 of FOIA on 4 July 2018 (the Code).⁹⁹ It advises specifying relevant information that is held on behalf of a public authority by a contractor in an annex or schedule when entering into a contract. It also provides general guidance about contractor cooperation with information access and emphasises the need to ensure that confidentiality is applied appropriately.

The MSC forms a set of model terms and conditions and has been developed for service contracts valued at over £10 million.¹⁰⁰ The latest 2016 version provides that the contractor consents to the authority's publication of the agreement and "transparency reports". An annex about transparency reports includes a box with several separate headings: performance, charges, major subcontractors, and technical and performance management.

Internationally, the Open Government Partnership (OGP) was formed in 2012, with the aim of supporting governments to commit to improving transparency in partnership with civil society. It introduced a set of Open Contracting Global Principles.¹⁰¹ As part of this work, an OCDS was launched in November 2014.¹⁰² This enables disclosure of data and documents at all stages of the contracting process by defining a common data model. The UK Open Government Network (OGN) was established by civil society in response to the UK joining the OGP. It has taken a collaborative approach to develop national action plans on open

⁹⁸ Cabinet Office. Transparency of Suppliers and Government to the Public. 24 March 2015. URL: <https://www.gov.uk/government/publications/transparency-of-suppliers-and-government-to-the-public>

⁹⁹ Cabinet Office. Freedom of Information Code of Practice. 4 July 2018. URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

¹⁰⁰ As note 85.

¹⁰¹ URL: <https://www.open-contracting.org/implement/global-principles/>

¹⁰² URL: <http://standard.open-contracting.org/latest/en/schema/reference/>

government encouraging bold and innovative moves towards greater transparency.¹⁰³

2.5.1 Key concerns about proactive transparency measures

Initiatives designed to support transparency are only ever as good as the data that lies behind them. Where organisations fail to publish procurement information proactively or data is incomplete it limits the overall analytical value of the dataset. In this respect, several stakeholders have raised significant concern about the limitations of Contracts Finder. We heard that although “continuous improvement” was envisaged for Contracts Finder, the current data is poorer than it should be because it is incomplete and badly structured.

We also heard concerns about limited monitoring, enforcement and resource investment in this system, worsened by the lack of political will to tackle the problem. We procured research for this report that highlighted poor compliance rates with legal obligations to publish certain contractual information on Contracts Finder and showed that several Government policy commitments are subject to limited monitoring and enforcement.¹⁰⁴ It may come as a surprise to many that there is still no requirement to publish an actual contract.

Doubt was expressed about whether Contracts Finder was the right system for achieving the high level of end-to-end transparency that was sought because it had been stretched beyond its intended use as a tool for advertising procurement opportunities. It includes the OCDS but only at a basic level and does not include post-contract award information. We also heard there is a confusing landscape of ‘legacy systems’ and it is still too difficult to track what is happening with contracts and to use the data in structured ways. Concern was expressed that the UK is starting to lose ground globally, particularly where countries do not have decades of legacy systems.

Business representatives said they were frustrated about the Government’s inability to be transparent about its data, noting that this harms the reputation of industry. The NAO has said there needs to be greater transparency of suppliers’ performance, costs and revenues noting that “Although Government’s aim is to be transparent, it is not

¹⁰³ URL: <https://www.opengovernment.org.uk/>

¹⁰⁴ See Annex 1.

clear that it has the ability to be. Its ambition and ability to publish transparency information remains hampered by weak information systems that mean contract information, spend data and performance information cannot easily be brought together".¹⁰⁵

The Government's procurement policy is that there should be a presumption in favour of disclosing most commercial information¹⁰⁶, but there seems to be a difference between policy and practice. We were told that not enough contracts are published because of pressure from contractors to redact information. Withholding information unnecessarily for commercial reasons was the subject of a recent 'myth-busting' report by the Open Contracting Partnership (OCP).¹⁰⁷

Some stakeholders said the right incentives to encourage transparency are missing, with contract awards focused largely on value for money. Many contractors concentrate on making sure that the contract works, so transparency may get pushed down the priority scale.

We acknowledge the Government's positive intentions regarding transparency, but some stakeholders saw poor leadership and a lack of ambition. We heard that there needs to be better promotion of the wider benefits of transparency, eg how it can support the market. Stakeholders felt that the pay-off of greater transparency and how big a difference it can make are often poorly communicated. This reduces the time and resources that will be invested in making improvements.

The Code of Practice under section 45 of FOIA (the Code)¹⁰⁸ outlines good practice for public authorities in meeting their obligations under Part I of the legislation. The CO has recently updated it. We welcomed the content that tackles the issues highlighted in this report and the specific acknowledgement of the importance of transparency in outsourced public services to ensure accountability to the user and taxpayer. However, during the consultation we recommended that it could be stronger and make greater reference to:

- the CCS's model services contract, which provides standard clauses relating to FOIA and transparency;

¹⁰⁵ As note 42. Accountability and transparency.

¹⁰⁶ As note 98 p.2

¹⁰⁷ Open Contracting Partnership. Mythbusting Confidentiality in Public Contracting. 2018 URL: <https://www.open-contracting.org/wp-content/uploads/2018/07/OCP18-Mythbusting.pdf>

¹⁰⁸ As note 99.

- the importance of publishing contracts and related information about performance under FOIA publication schemes; and
- it could also express in stronger terms that blanket confidentiality clauses are rarely likely to be acceptable and parts of a contract marked confidential should be narrowly drawn.¹⁰⁹

The CO told us that its Chapter 9 clearly outlines best practice in line with the Government’s policy position on this matter. However, we remain of the view that further strengthening would be appropriate in the ways we described, particularly in light of this report. The Code refers to “broader transparency obligations” without specifying what they are and what requirements arise from them. We consider this was a missed opportunity to draw together elements of procurement policy in a way that is easier for everyone to access and understand.

2.6 Substantial support for change

Concerns about access to information when organisations other than public authorities are involved in delivering public services are not new. In 2008, the PAC called for FOIA to cover more organisations providing public services¹¹⁰, including contractors, a call it reiterated more recently.¹¹¹ In 2012, the Justice Committee was clear that rights to access information should not be undermined by the increased use of private providers to deliver services.¹¹² The number of occasions where similar concerns have been raised in the last decade by various organisations, including the ICO, is striking. It is a testament to the strength of feeling on this issue and points to the urgent need for reform.

In 2018, an IfG discussion paper said accountability in government is failing to keep pace with an increasingly complex public sector.¹¹³ The CFI collaborated with the OGN and published a proposal about the UK’s

¹⁰⁹ ICO response to Consultation on revisions to the FOI s.45 Code of Practice. 6 February 2018. URL: <https://ico.org.uk/media/about-the-ico/consultation-responses/2173181/ico-response-cabinet-office-foia-s45-20180206.pdf>

¹¹⁰ House of Commons. Public Administration Select Committee. Public Services and the Third Sector: Rhetoric and Reality. Eleventh Report of Session 2007-08. 26 June 2008 URL: <https://publications.parliament.uk/pa/cm200708/cmselect/cmpubadm/112/112ii.pdf>

¹¹¹ Public Accounts Committee. Private contractors – Government must get house in order. 14 March 2014 URL: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news/public-services-private-contractors-report/>

¹¹² As note 17. Para. 239

¹¹³ Institute for Government. Accountability in modern government: what are the issues? 23 April 2018. URL: <https://www.instituteforgovernment.org.uk/publications/accountability-modern-government-issues>

2016-18 NAP. It concerned extending FOIA to all public contractors.¹¹⁴ A Private Members' Bill sponsored by Andy Slaughter MP sought to extend FOIA to contractors and other private bodies providing public services.¹¹⁵

Meg Hillier MP, Chair of the PAC said:

"I believe FOIs should be extended to the bits of an organisation that are funded entirely by taxpayers' funding...They are an extension of the government. There are very few of them, they're large companies that seem to mop it up, and have it hidden behind a wall because they're private. Wherever taxpayer money is being spent it should have accountability".¹¹⁶

The PACAC said:

"...we think that the principle that Parliament and the public need to have key information about the delivery of public services is important... The Government should work with the Information Commissioner to ensure that the revisions to the Freedom of Information Act address her concerns".¹¹⁷

The Committee on Standards in Public Life (CSPL) said:

"The lack of reach of the Freedom of Information Act has reached a point where it is out of step with public expectations...it is now essential that the Government confirm their expectations of ethical standards among those who deliver services with public money".¹¹⁸

2.7 Our information access laws are falling behind

Our access to information laws were progressive and ambitious when they were introduced at the turn of the millennium. However, we have started

¹¹⁴ Extend Freedom of Information to all public contractors: A proposal for the UK's 2016-18 OGP National Action Plan. URL: https://www.opengovernment.org.uk/wp-content/uploads/2016/03/Extend-Freedom-of-Information-to-all-public-contractors_A-proposal-for-the-UKs-2016-18-OGP-National-Action-Plan.pdf

¹¹⁵ Freedom of Information (Extension) Bill 2017-19 URL: <https://services.parliament.uk/bills/2017-19/freedomofinformationextension.html>

¹¹⁶ Meg Hillier MP, Chair of the Public Accounts Committee, quoted in Rutter, Tamsin, 'Running the Public Accounts Committee, Whitehall contracting headaches, and what keeps perm secs awake at night', Civil Service World, 21 January 2018 URL: <https://www.civilserviceworld.com/articles/interview/meg-hillier-running-public-accounts-committee-whitehall-contracting-headaches-and>

¹¹⁷ See note 82. P. 42

¹¹⁸ Committee on Standards in Public Life. The Continuing Importance of Ethical Standards in Public Life. May 2018 URL: <https://www.gov.uk/government/publications/the-continuing-importance-of-ethical-standards-for-public-service-providers>

to fall behind our international counterparts, particularly regarding the reach of the legislation. If we fail to act, this trend will continue.

Concern is clearly shared by our Scottish counterparts but they have already taken progressive steps to modernise FOISA. In a similar report to the Scottish Parliament in 2015, the Scottish Information Commissioner advised that powers to extend FOISA had been “woefully underused”.¹¹⁹ In 2016, Ministers concluded that FOISA should be extended to contractors who run privately-managed prisons, providers of secure accommodation for children, grant-aided schools and independent special schools, and Scottish Health Innovations.¹²⁰ A draft order to extend coverage of FOISA to registered social landlords has been confirmed.¹²¹

Our 2015 roadmap discussion document noted growing recognition in countries around the world of the need to extend the reach of access to information laws. In a survey by the Centre for Freedom of Information, a majority of Information Commissioners taking part agreed that there are private bodies or non-government organisations “carrying out public functions or receiving public funds, some of which should be made subject to access to information law”. Another survey noted that in most European countries, private entities are covered, and in “a smaller but steadily growing number of countries, private entities that receive public funds are covered, whether or not they perform public functions”.¹²²

In 2017, we collaborated as part of the 10th ICIC to pass a resolution aimed at tackling the challenge of changing public service delivery models. It highlights the “challenge of scrutinising public expenditure and the performance of services provided by outsourced contractors” and “the impact on important democratic values such as accountability and transparency and the wider pursuit of the public interest”.

Specifically, Commissioners from across the globe committed to improve access to information legislation regarding outsourced services and services delivered by non-public organisations, to promote global

¹¹⁹ Scottish Information Commissioner. News release: Parliament warned that action is needed to protect FOI. 19 January 2015. URL: <http://www.itspublicknowledge.info/home/News/20150119.aspx>

¹²⁰ Consultation on further extension of coverage of the Freedom of Information (Scotland) Act 2002 to more organisations. 12 June 2015. URL: <https://www.gov.scot/Publications/2015/06/5112/0>

¹²¹ Scottish Housing News. Plan to Extend FOI legislation to housing associations from April 2019. 7 December 2017 URL: <https://www.scottishhousingnews.com/article/plan-to-extend-foi-legislation-to-housing-associations-from-april-2019>

¹²² See note 11. P. 14

initiatives that provide standards for open contracting and to share practice.¹²³ This report is part of our contribution to that ongoing international effort.

The following graphic shows that some countries already address the issue of organisations other than public authorities delivering public services more directly in their access to information laws. The graphic includes details of some responses from our international survey circulated by the ICIC Secretariat as part of our research for this report.¹²⁴

¹²³ Information Commissioner's Office. International Conference of Information Commissioners highlights need for greater transparency in contracted-out public services. 22 September 2017. URL: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2017/09/international-conference-of-information-commissioners-highlights-need-for-greater-transparency-in-contracted-out-public-services/>

¹²⁴ See Annex 1.

What do other access to information laws cover?

These laws cover information held by...

Scotland

Culture and leisure trusts, contractors who run privately managed prisons, providers of secure accommodation for children, grant-aided schools and independent special schools (in relation to designated public functions).

New Zealand

Contractors engaged by a public authority in relation to that work and information held by unincorporated bodies established to assist or perform functions for a public sector agency or local authority.

Ireland

A service provider under contract with a FOI body in relation to work relating to the contract.

Hungary

Any person or body with a public service function and any natural or legal person or incorporated business association entering into a financial or business relationship with a sub-system of the central budget.

Mexico

Any individuals, legal entities or unions who receive and use public resources or perform acts of authority of the Federation, the States and the municipalities.

Conclusion

There are many ways to support transparency and accountability but strong access to information laws are key. They are the means through which power is rebalanced in favour of citizens, and they exist to ensure that the state is more directly accountable to the public. Along with other mechanisms, access to information laws create what we all want to see - better public services.

The public sector continues to evolve to encompass a greater range of innovative and complex delivery models, including expansive outsourcing. It is now more critical than ever that the Government recognises the risks if access to information law does not evolve to keep pace with these changes. Currently, our laws do not provide effective transparency and accountability in the context of modern public services.

There is a strong case for designating contractors and a greater number of other organisations that exercise functions of a public nature. This would allow the public to access more information about how those functions are fulfilled. It is clearly in line with Parliament's intentions and the public's expectations. Existing powers provided under FOIA to extend the reach of the legislation have hardly been used.

There is also too much uncertainty about contractual terms and the extent to which information held by contractors is held on behalf of public authorities.

The public must have confidence in those providing services, particularly after the Carillion collapse and the Grenfell Tower fire. The Government must be willing to say to contractors, and the public they serve, that transparency and accountability are an essential part of the deal. The benefits are considerable. They include improved data quality, which improves services, and greater equity for citizens seeking to access information about public services.

It is clear that contracts and voluntary cooperation are not providing the right level of transparency and accountability for citizens. Many contracts are simply not accessible to the public, which in itself means they do not adequately support transparency. The public are still in the dark about where all the contracts are, how they are being managed and about the quality of performance. Contractual terms have not improved enough. In a sample of public sector contracts, we found no evidence that the parties

had specified and agreed what information would be held on behalf of a public authority in the event of an information request.

Proactive transparency initiatives are positive and should be maintained but we have heard substantial stakeholder concern that they have not taken us far enough in empowering citizens. Some good rules are in place, but proper monitoring and the mechanisms and resources to enforce those rules are crucial. Access to information laws are fundamental in supporting, challenging and driving these wider measures forward to make them more successful.

For a long time, many have expressed the view that it is time for change, including select committees, civil society, think-tanks, the CSPL¹²⁵ and the Burns Commission.¹²⁶ It is time to act to keep our access to information laws relevant. If we fail to do that, transparency and accountability will decrease, concerns will grow and we will slip further behind our counterparts who are taking progressive steps to reform their laws.

We urge Parliament and the Government to consider and debate the important issues raised by this report. We would welcome a Parliamentary Inquiry by a select committee. Clearly the issues raised are complex and we recognise that the Government will need to consult the public to consider the next steps more fully. We are committed to supporting the Government in exploring the options presented by this report, which we have outlined in more detail below.

3.0 Recommendations

We have identified several solutions that can make a major difference to the accessibility of information held by organisations other than public authorities exercising functions of a public nature. We want to increase the potential for FOIA and the EIR to deliver transparency and accountability in line with their core objectives.

Our recommendations are divided into two categories: making greater use of existing powers under section 5 of FOIA (secondary legislation) and legislative reform of FOIA and the EIR (primary legislation). Both elements of these reforms are needed, as it would not be practical nor

¹²⁵ As note 118.

¹²⁶ As note 1.

feasible to designate all contractors. So, the amendments to the primary legislation to clarify when information is 'held on behalf' of the public authority offer a solution to clarify rights of access when designation is not in place.

3.1 Greater use of existing powers under section 5 of FOIA - secondary legislation

3.1.1 Designate contractors regarding the public functions they undertake where this would be in the public interest, whether because of the scale, duration or public importance of the contracts

The evidence in this report provides a strong case for the order making powers in section 5 of FOIA to be used to bring certain contractors directly under FOIA. This would enable members of the public to make requests directly to contractors regarding the public functions they undertake. The contractors would also have to comply with proactive disclosure requirements in FOIA.

How would designating contractors work in practice?

Contractors can be designated under FOIA if they are providing a service that is a function of a public authority. There is no single definition of 'public function' for the purposes of FOIA. Many of the relevant factors are similar to those that would be considered when deciding whether any organisation is exercising functions of a public nature (see annex 3).

Public authorities enter into a wide range of contracts but not all of them are about providing a service that is a function of a public authority. It is also important to note that sections 7(5) and 7(6) of FOIA require that section 5 orders must specify public functions are covered. Information that falls outside the specified functions or services will not be covered.

The MOJ said:

"...there is a need to distinguish between services that the authority provides or is expected to provide as part of its functions (eg child

protection), and those services that it commissions to enable or assist it to carry out its day to day activities (eg IT equipment)."¹²⁷

It also said that the appropriateness of coverage should be considered:

"Considerations that might be suitable to be taken into account under this heading include whether the organisation concerned received public funding and whether the benefits of public access to the information held appear to outweigh any negative impacts, for example in terms of additional burdens on resources."¹²⁸

Should there be a threshold?

The Commissioner's proposal of designating key 'public interest' contractors recognises that it would not be feasible nor proportionate to designate all contractors delivering public services under the legislation. However, there is no single solution to identifying which contractors it may be appropriate to designate.

In an MOJ consultation, respondents were asked about the factors that should be taken into account when considering the appropriateness of designation orders. It reported that:

"...respondents gave particular emphasis to the amount of public funding and coverage of comparable organisations. Many considered that organisations in receipt of considerable public funding should be made formally accountable for it and that FOI should be standardised across sectors to enable greater clarity for the public wanting to gain access to information from organisations".¹²⁹

Rather than trying to impose a static threshold, we suggest it would be helpful to consider the amount of public funding an organisation receives as a *guide* to identifying major contractors. This guide should be applied

¹²⁷ Ministry of Justice. Freedom of Information Act 2000: Designation of additional public authorities. Consultation Paper CP 27/07. 25 October 2007. P. 18 URL: <http://ccrinepal.org/files/documents/legislations/13.pdf>

¹²⁸ As above p. 15

¹²⁹ Ministry of Justice. Freedom of Information Act 2000: Designation of additional public authorities. Response to consultation. 16 July 2009. P. 23 URL: http://webarchive.nationalarchives.gov.uk/20091009074807/http://www.justice.gov.uk/consultations/docs/consultation-response-_section5.pdf

with flexibility. It should not act as a strict barrier to contractors being designated if there is a strong alternative public interest in doing so.

The ICO procured independent research to inform the threshold question. A full copy of the results is available in annex 1. We sought to analyse the potential impact of three thresholds; contract value, duration and transaction value and considered the possibility of them working together. We sought to capture as much of the net spend with suppliers as possible without unduly burdening small-to-medium enterprises directly. We considered that one option could be to set a robust threshold (whether based on contract value, duration or transaction value) that captures a high proportion of spending and exempt small and/or medium enterprises as defined by legislation.

There were some significant limitations to the data we used to conduct the research. This is largely because the data that is publicly available lacks sufficient detail or accuracy. Therefore we have not sought to make a prescriptive recommendation about a threshold at this stage. Nonetheless, we have shared the outcome of this research in annex 1. We believe it may provide a useful working framework for the Government to consider this issue more thoroughly.

The IfG's recent report on Government procurement says up to a fifth of procurement spending goes on 'strategic suppliers'.¹³⁰ The IfG note that there are currently 28 of these suppliers – providing services such as facilities management, consultancy and audit, engineering, IT and social care. Carillion was a strategic supplier until it went into liquidation in January 2018. Designation of strategic suppliers of public services should also be a key consideration.

The quality of the published data we were able to access for our research illustrates strikingly the difficulties that the public face in accessing information about outsourced public services. It shows clearly the drawbacks of the failure to make good contracting data available to the public for this kind of analysis.

¹³⁰ As note 6. P. 15

3.1.2 Designate a greater number of other organisations exercising functions of a public nature, and do so more frequently and efficiently

It is in the public interest that our access to information laws can be extended in proportionate ways. This point was made by the Government in response to the Justice Committee's report 'Post Legislative Scrutiny of FOIA' when it expressed concern about the complexity of the mechanisms available to bring new organisations under FOIA. The Government said it intended to consider options for reform to make this "a more efficient and less burdensome process".¹³¹

In annex 3 we have described some of the considerations that may be relevant to deciding whether an organisation exercising functions of a public nature can be designated under section 5. There are clearly some inherent complexities in the process. For example, deciding what 'public function' means can cause difficulties.¹³² However, given that the most recent designation order relating to the NPCC took two years, it is important to examine the issues and to consider options for reform. It is also the case that experience of defining a public function would increase if the power to designate was used more often. The ICO would be willing to work with the Government to explore possible ways to reduce the complexity of adding new organisations to the legislation.

Other than contractors, a range of bodies seems to exercise functions of a public nature that are not covered by FOIA. We have highlighted below a few of the examples that have been the subject of public concern.

Housing associations

In 2011, the Government announced plans to consult on extending FOIA to housing associations, though this did not take place.¹³³ In 2017, after the Grenfell Tower fire, the Commissioner published a blog post encouraging proactive disclosure of fire-safety information. The Commissioner commented that many housing associations are not subject to FOIA, and that this is a "significant gap in the public's right to

¹³¹ As note 30. P 24

¹³² See note 26.

¹³³ Harrogate Informer. Housing Minister Calls for Greater Transparency in Social Housing. 23 June 2011 URL: <https://www.harrogate-news.co.uk/2011/06/23/housing-minister-calls-for-greater-transparency-in-social-housing/>

know".¹³⁴ Only housing associations that are wholly owned by a public authority are covered by FOIA.

Local Safeguarding Children's Boards

A LSCB is a multi-agency body set up in every local authority. Each LSCB has an independent chair who works closely with the local authority's chief executive. The LSCB's role is to coordinate what is done by everyone on the LSCB to safeguard and promote the welfare of children in the area.

A new system of multi-agency safeguarding arrangements will be established by the Children and Social Work Act 2017. The changes relate to the replacement of LSCBs with 'local safeguarding partners' (local authorities, chief officers of police, and clinical commissioning groups).¹³⁵ As substantial reform is underway, now would be a good time to consider ensuring that FOIA covers bodies exercising public functions relating to safeguarding children.

Electoral Registration Officers and Returning Officers

An Electoral Registration Officer (ERO) has a statutory duty to compile and maintain the electoral roll. Returning Officers (ROs) ensure that an election is administered effectively. The RO is personally responsible for the conduct of the local government election.

In 2014, the Political and Constitutional Reform Committee published a report into voter engagement. The Committee concluded strongly that:

"EROs and ROs clearly exercise functions of a public nature and it is in the public interest for them to be required to respond to requests for information in the same way as other public authorities... We recommend that the Government issue a section 5 Order designating EROs and ROs public authorities for the purpose of the Act."¹³⁶

¹³⁴ As note 4.

¹³⁵ URL: <https://www.lgcplus.com/services/children/transition-period-for-child-safeguarding-boards-reform-announced/7023263.article>

¹³⁶ House of Commons Political and Constitutional Reform. Voter Engagement in the UK. Fourth Report of Session 2014-15. 10 November 2014 para. 32 URL: <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/232/23211.htm>

Despite the Government agreeing there was a case for bringing EROs and ROs under FOIA an order has yet to be made.¹³⁷

¹³⁷ House of Commons Political and Constitutional Reform Committee. Voter Engagement in the UK: Government Response to the Committee's Fourth Report of Session 2014-15 URL: <https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1037/1037.pdf>

3.2 Legislative reform of FOIA and the EIR – primary legislation

3.2.1 Consider reforming the EIR to allow organisations exercising functions of a public nature, including contractors, to be designated to increase consistency across the two information access regimes.

The EIR implement the European Council Directive 2003/4/CE (the EC Directive) on public access to environmental information in the UK. The EC Directive's source is an international agreement, the 'Convention of Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (the Aarhus Convention).¹³⁸ The UK's ratification of the Convention will be unaffected by Brexit so any amendments to the EIR will still need to comply with it. However, it is possible to expand the coverage of the EIR without breaching the Convention. Article 3(5) of the Convention says:

"The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention".

A broader and potentially more permissive definition of public authority applies under the EIR but information can still fall beyond its reach. New bodies designated under section 5 FOIA orders are not automatically covered by the EIR. Designation under the EIR is not possible under the current law but organisations exercising functions of a public nature and which hold environmental information are not always caught by its current scope. The extent to which contractors would be covered by the EIR is unclear.

Introducing automatic designation under the EIR would help to provide more certainty and clarity for the public. It would also be consistent with the underlying purpose of the legislation to increase public access to environmental information.

¹³⁸ URL: <http://ec.europa.eu/environment/aarhus/index.htm>

It is in the public interest for access to information laws to be as straightforward as possible. We would like to see greater consistency between FOIA and the EIR, and wider coverage for both laws to be considered by the Government.

3.2.2 Amend section 3 of FOIA and regulation 3 of the EIR (held on behalf of provisions) to give a clearer legislative steer about what information regarding a public sector contract is held for the purposes of the legislation.

Contracts and voluntary cooperation have not provided reasonable clarity about what information is accessible to the public. A clear legislative steer is needed on what information relating to a contract is held for the purposes of the legislation. This would reduce the need to review the terms of individual contracts that are often inaccessible to the public or silent about what information is held on behalf of a public authority.

Amended provisions would instead require an objective analysis of whether requested information related to a public sector contract. We believe that in many instances this would be a reasonably straightforward decision, but we accept that consultation and discussion between public authorities and contractors at the start of the procurement process would remain important to aiding compliance, as would evolving guidance to assist all parties.

3.2.3 Introduce a legal requirement to report on the coverage of the legislation.

More bodies could be brought within the ambit of FOIA in order of priority in a proportionate way. The Commissioner recommends a review process triggered by a periodic report, drawing on the Scottish example. Under section 7A of FOISA (as amended), Scottish Ministers must lay a report before the Scottish Parliament every two years about the exercise of the

section 5 order-making power. To date, two reports have been produced, in 2015¹³⁹ and 2017.¹⁴⁰

We know from engagement with the Scottish Information Commissioner's Office that this mechanism has proved useful and effective in aiding the progressive expansion of FOISA. It is a relatively simple change that the Government could make now. Such a mechanism subjects the state of public service delivery and relevant proactive transparency initiatives to regular scrutiny and analysis, ensuring that it stays on the agenda and that progress is accountable to the public. It also provides a helpful and clear means of engaging with proposals for designation and new policy ideas relevant to this area.

3.3 Government should conduct a comprehensive review of all proactive disclosure provisions regarding contracting.

We recommend that the Government conduct a comprehensive review of all proactive disclosure provisions regarding contracting which affect the public sector. This would include a review of the publication scheme provisions in FOIA, and similar provisions in the EIR, and how they complement other procurement laws and government requirements. This should consider how such provisions are monitored and enforced, and what resources are available.

¹³⁹ Scottish Government. Scottish Government Report on the use of the Section 5 power under the Freedom of Information (Scotland) Act 2002 (as amended). October 2015. URL: http://www.parliament.scot/S4_InfrastructureandCapitalInvestmentCommittee/General%20Documents/20151102SGto_JNreRSLconsultationcom.pdf

¹⁴⁰ Scottish Government Report on the exercise of the Section 5 power under the Freedom of Information (Scotland) Act 2002 (as amended). October 2017. URL: <https://beta.gov.scot/publications/foi-use-of-section-5-2017-report/>

Annex 1: Method

In order to complete this report, the ICO held meetings, one to one telephone interviews with a range of stakeholders and teleconferences with strategic suppliers. The teleconferences with suppliers were facilitated by the CBI. Details are shown in the table below.

Meetings with stakeholders

Name	Organisation
Maurice Frankel Director Katherine Gunderson Research Officer	Campaign for Freedom of Information
Joshua Reddaway Head of Practice (Commercial and Contracting)	National Audit Office
Gavin Freeguard Programme Director, Head of Data and Transparency Nick Davis Programme Director leading work on outsourcing	The Institute for Government
Heather Blake Head of Policy – FOI Andrew Bowen Head of Transparency in Procurement Catherine Bevin Outsourcing Programme	Cabinet Office
Georgia Bruce ICO Lead, Data Protection Policy	

Teleconferences with strategic suppliers and business

Name	Organisation
Richard McCarthy Senior Director	Capita
Andy Milner Chief Executive Officer	Amey
Rupert Soames Chief Executive Officer	Serco
Peter Neden Divisional Chief Executive Officer	G4S

Telephone interviews/conferences with stakeholders

Name	Organisation
Heather Blake Head of Policy – FOI	Cabinet Office
Andrew Bowen Head of Transparency in Procurement	
Pip Lobo Deputy Director of Complex Transactions	
Katie Holder Data Policy	Department for Digital, Culture, Media and Sport – Government Digital Service
Thom Townsend	
Michael Birtwistle Public Services Manager	National Council for Voluntary Organisations
Elizabeth Crowhurst Senior Sector Advisor (Government)	Confederation of British Industry
Andreas Pavlou UK Open Government Network Coordinator	UK Open Government Network Involve Practical Participation

Tim Davies Director – Open government and technology	
Peter Varga Senior Regional Coordinator, Europe	Open Government Partnership
Sarah Hutchinson Head of Policy	Scottish Information Commissioner’s Office
Ian Makgill Managing Director	Ticon UK Ltd trading as Spend Network and Open Opps
Kerry Hallard Chief Executive Officer	Global Sourcing Association
Ally Foat Senior Policy Advisor	Committee for Standards in Public Life
Alison McKenna Chamber President	
Lara Moseley Chamber President’s Personal Assistant	
Andrea Walker Delivery Manager for the General Regulatory Chamber	First-Tier Tribunal (Information Rights)
Sarah Wyeth Team Leader for Information Rights Jurisdiction, General Regulatory Chamber	
Nisha Patel , the Judicial Office Support Team	Ministry of Justice
Valerie Hope EIR Policy Adviser	Department for the Environment, Food and Rural Affairs

Procured research

We procured independent research provided by Spend Network in collaboration with freelance researcher and journalist Lucas Amin. The research report is included at the end of this document.



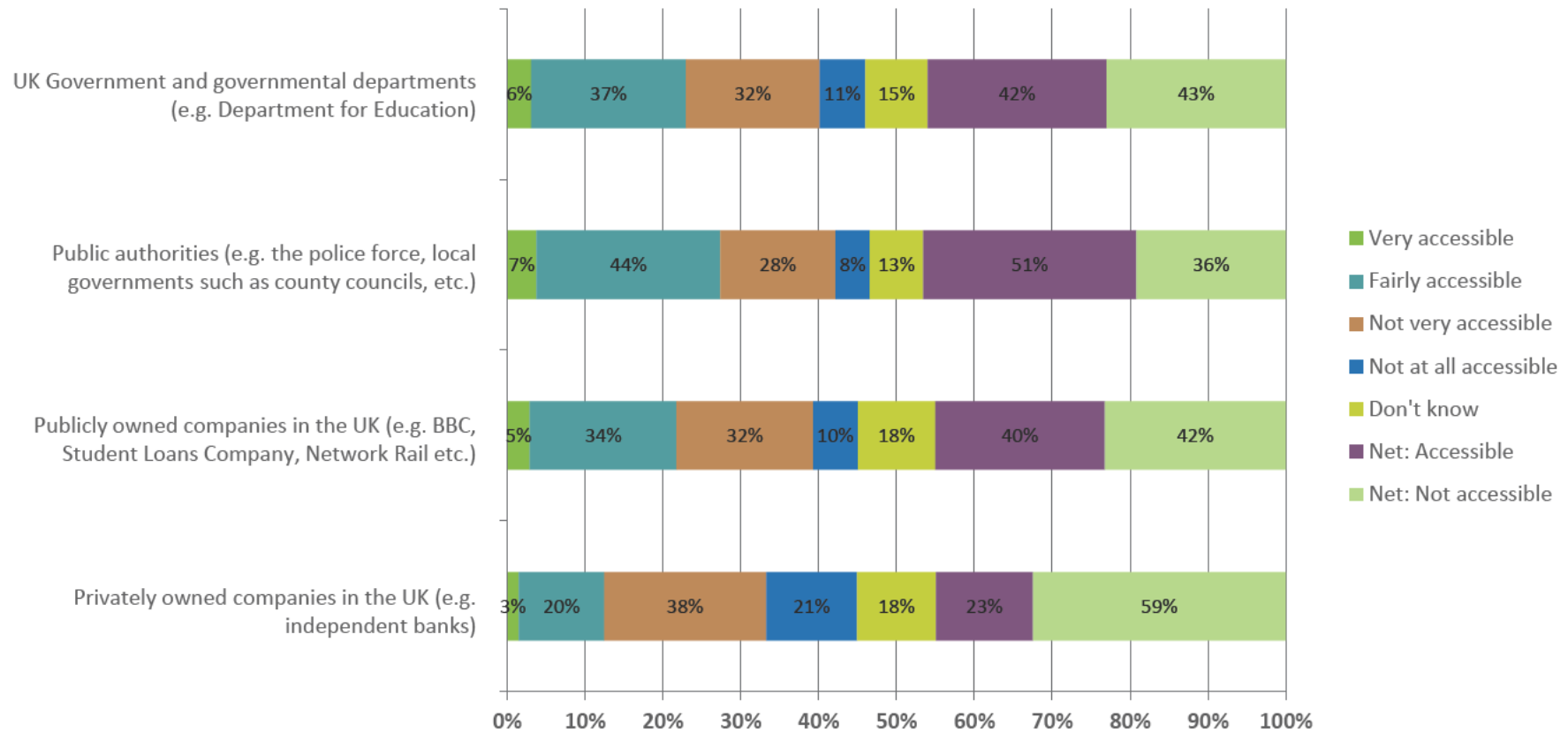
Freedom of Information

Conducted by YouGov on behalf of ICO

Fieldwork Dates: 9th - 10th October 2017

Freedom of Information

ECF_Q1. In general, how accessible, if at all, do you think information about the activities of the following organisations is to members of the public? (Please select the option that best applies on each row)

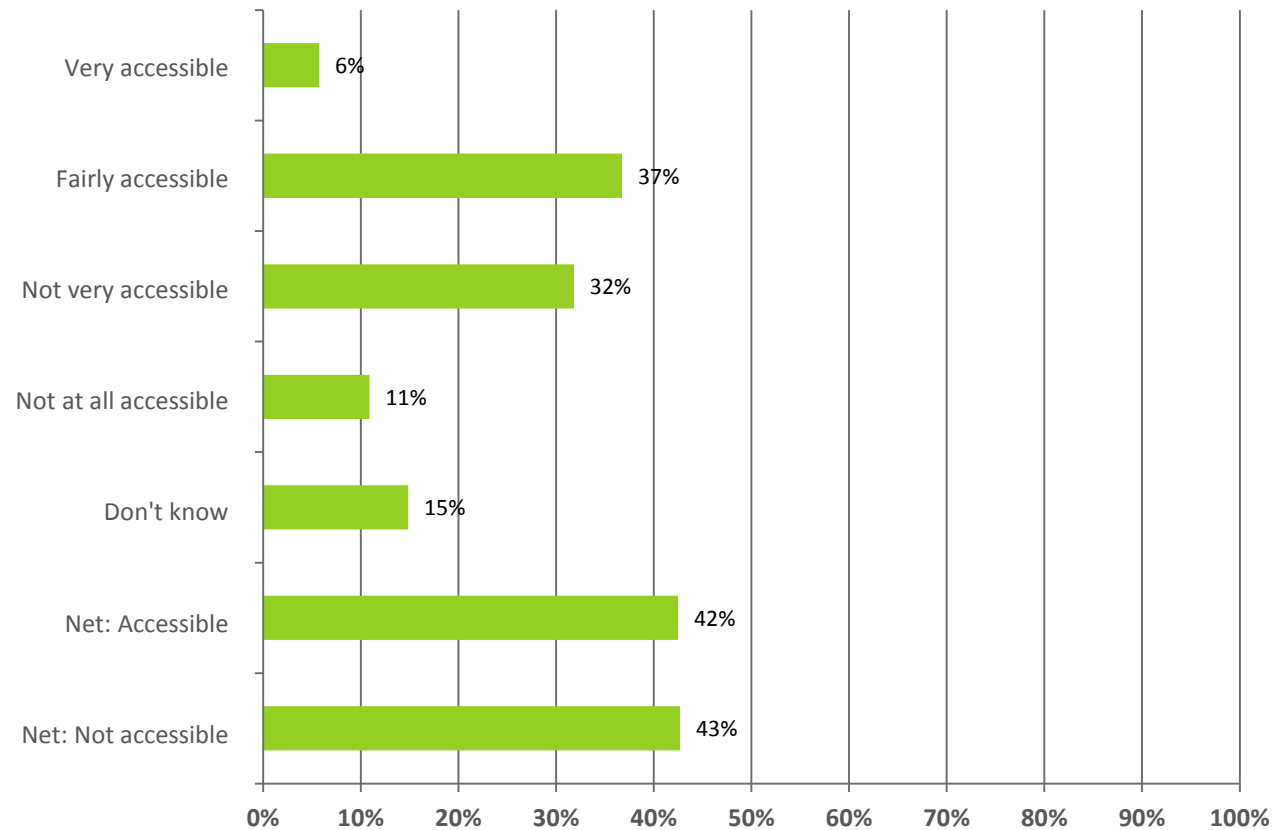


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q1_1. In general, how accessible, if at all, do you think information about the activities of the following organisations is to members of the public? (Please select the option that best applies on each row)

- UK Government and governmental departments (e.g. Department for Education)

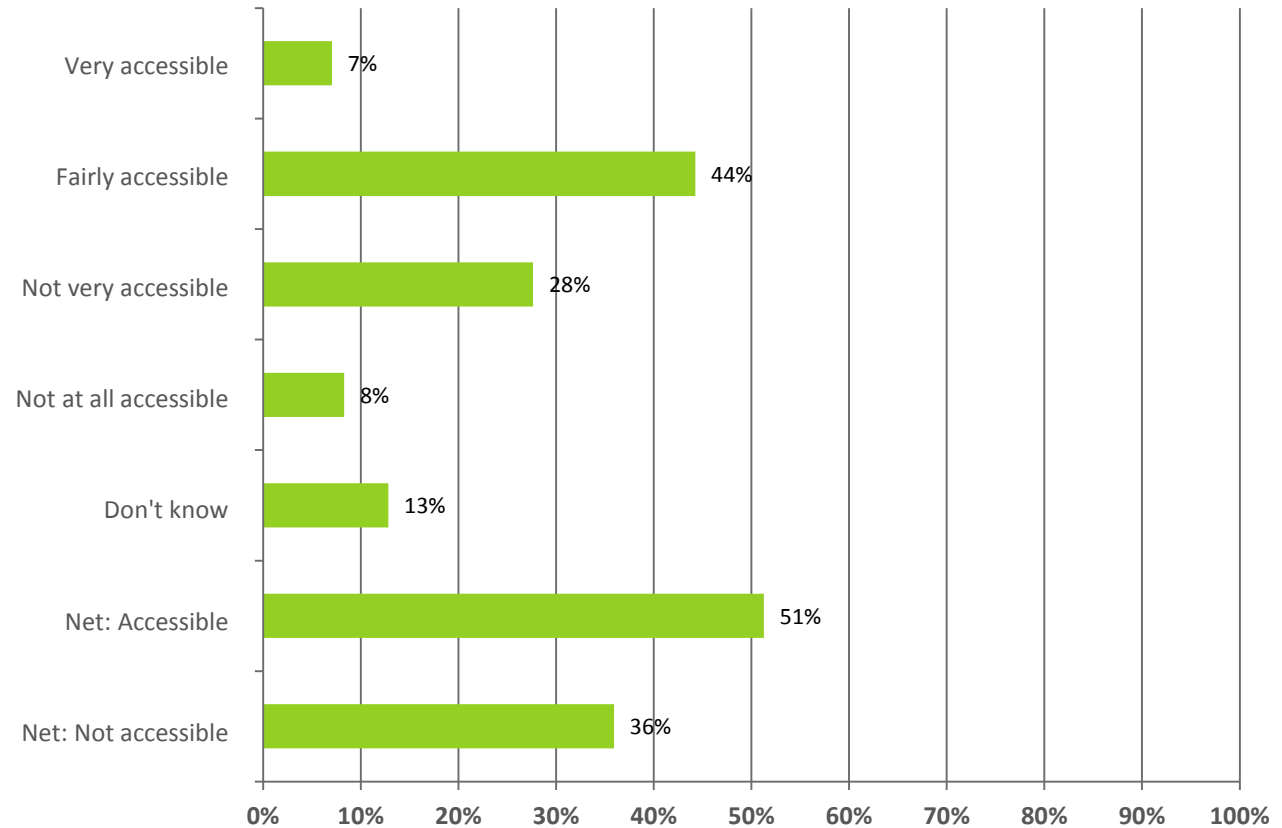


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q1_2. In general, how accessible, if at all, do you think information about the activities of the following organisations is to members of the public? (Please select the option that best applies on each row)

- Public authorities (e.g. the police force, local governments such as county councils, etc.)



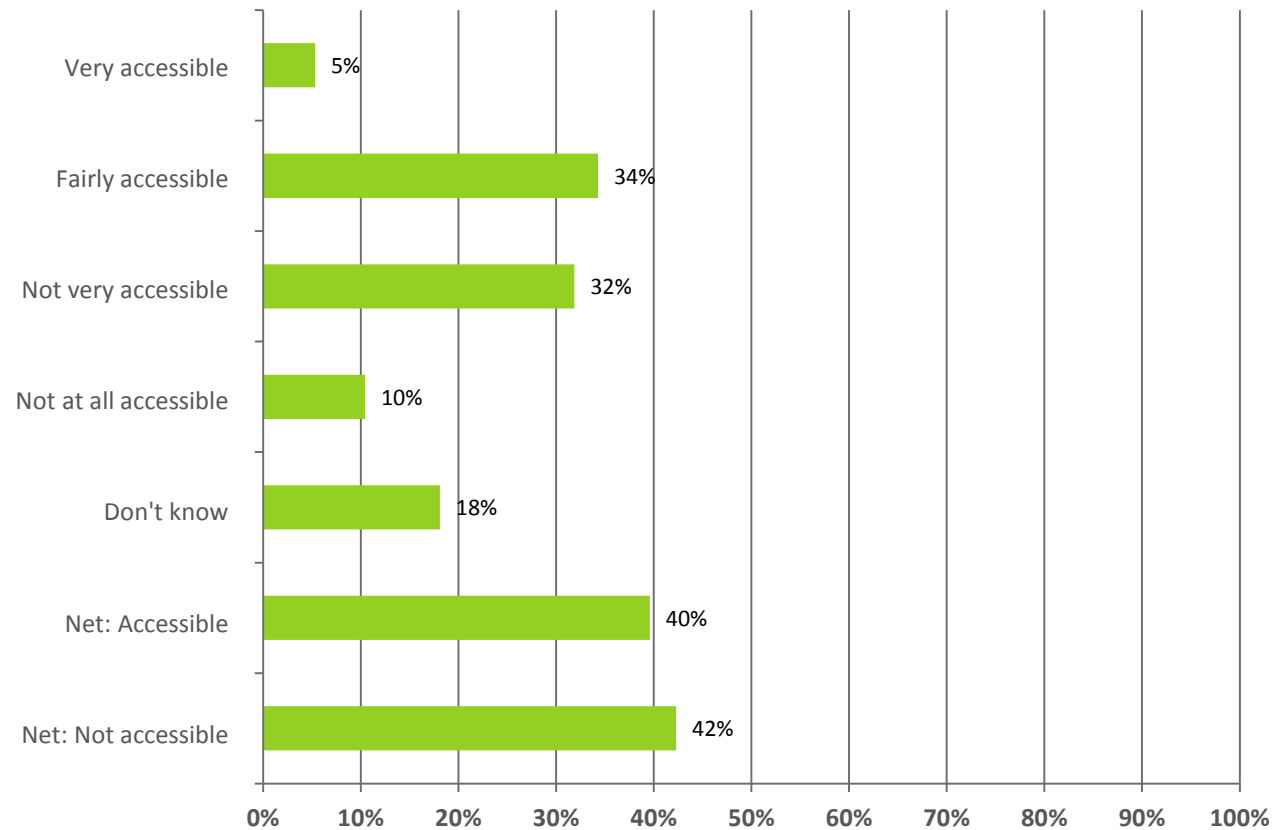
Unweighted base: All GB adults (2035)



Freedom of Information

ecf_q1_3. In general, how accessible, if at all, do you think information about the activities of the following organisations is to members of the public? (Please select the option that best applies on each row)

- Publicly owned companies in the UK (e.g. BBC, Student Loans Company, Network Rail etc.)

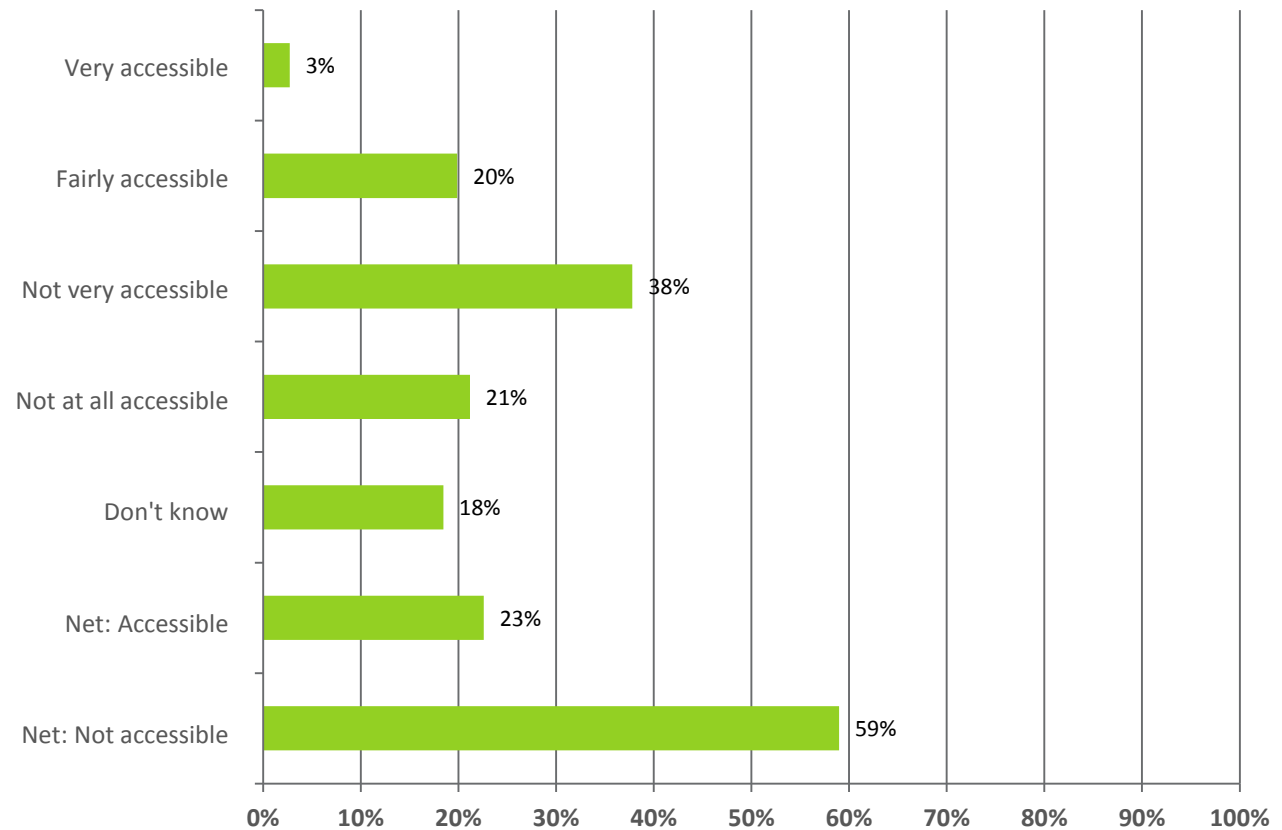


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q1_4. In general, how accessible, if at all, do you think information about the activities of the following organisations is to members of the public? (Please select the option that best applies on each row)

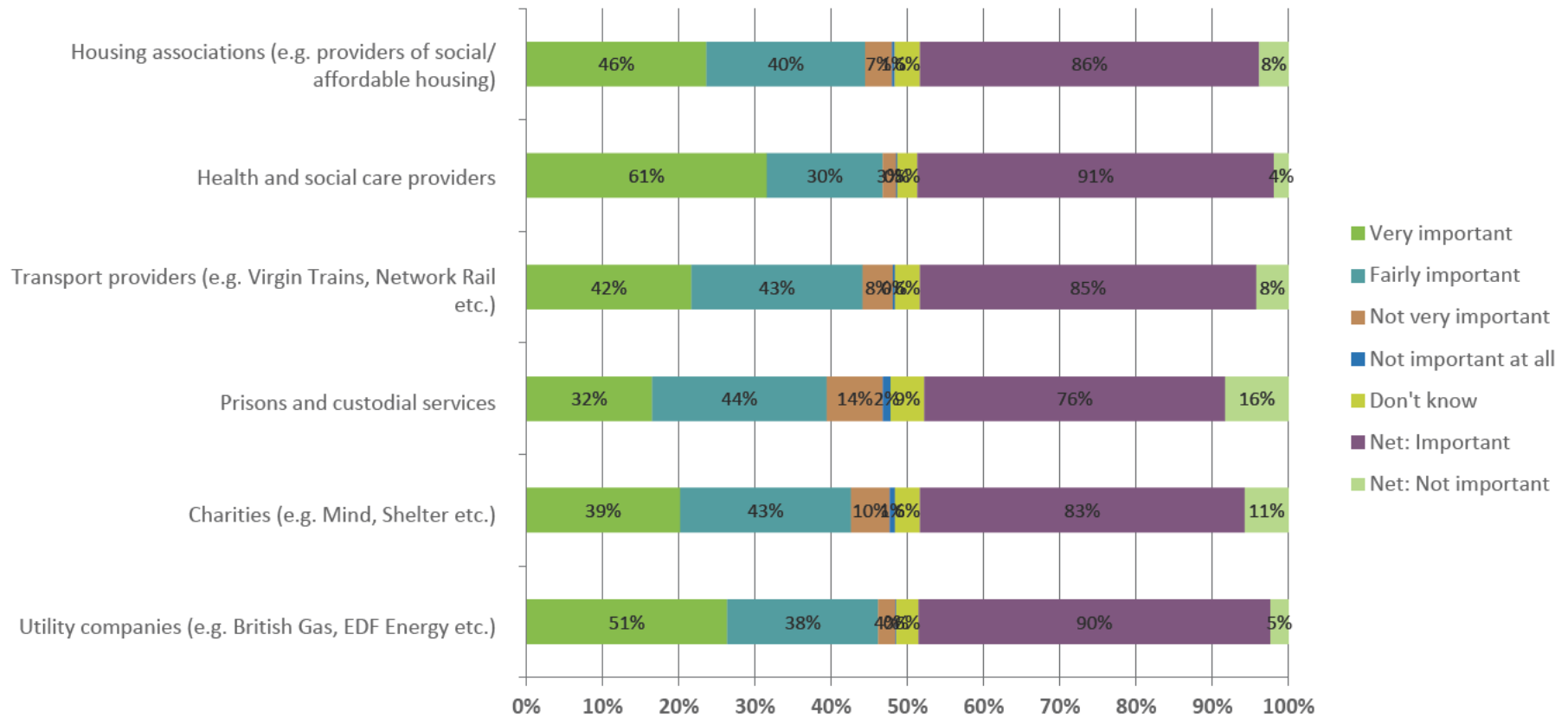
- Privately owned companies in the UK (e.g. independent banks)



Unweighted base: All GB adults (2035)

Freedom of Information

ECF_Q2. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

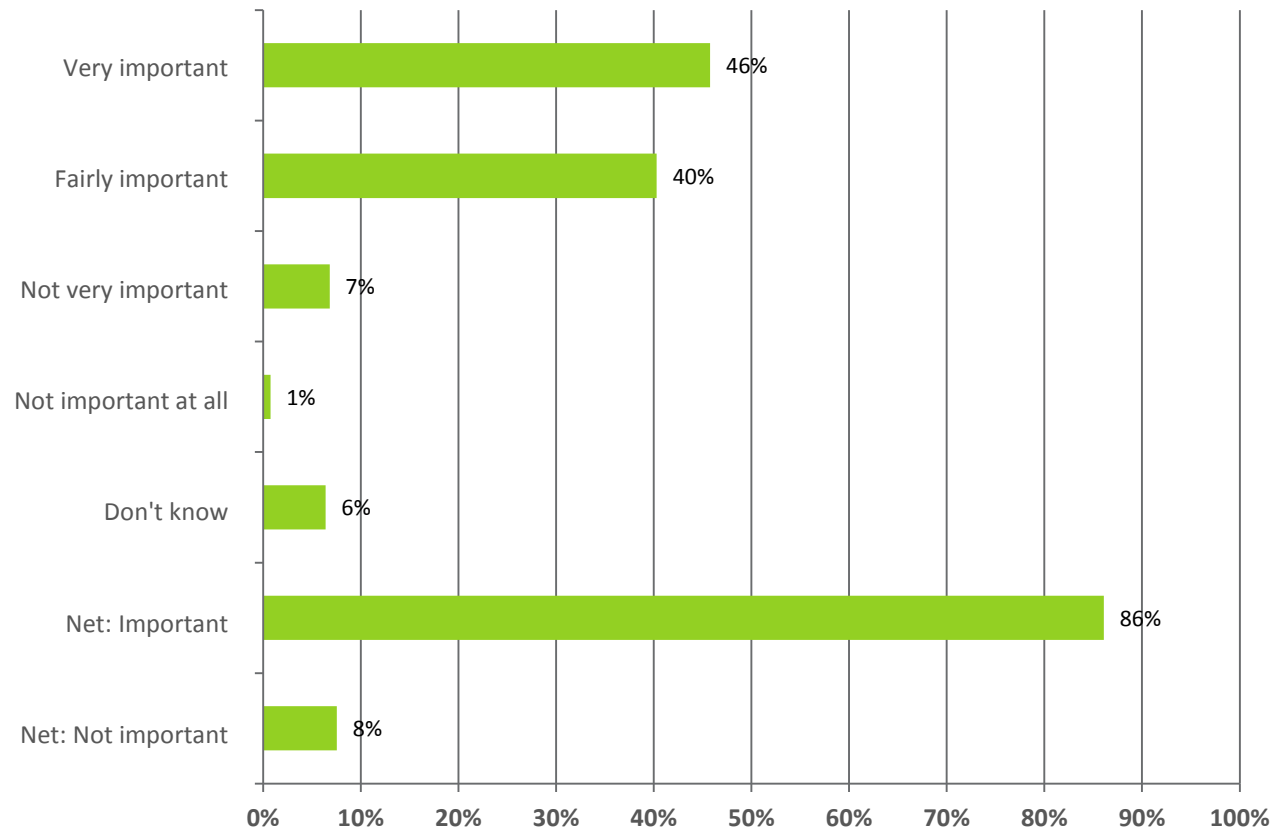


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q2_1. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

- Housing associations (e.g. providers of social/ affordable housing)

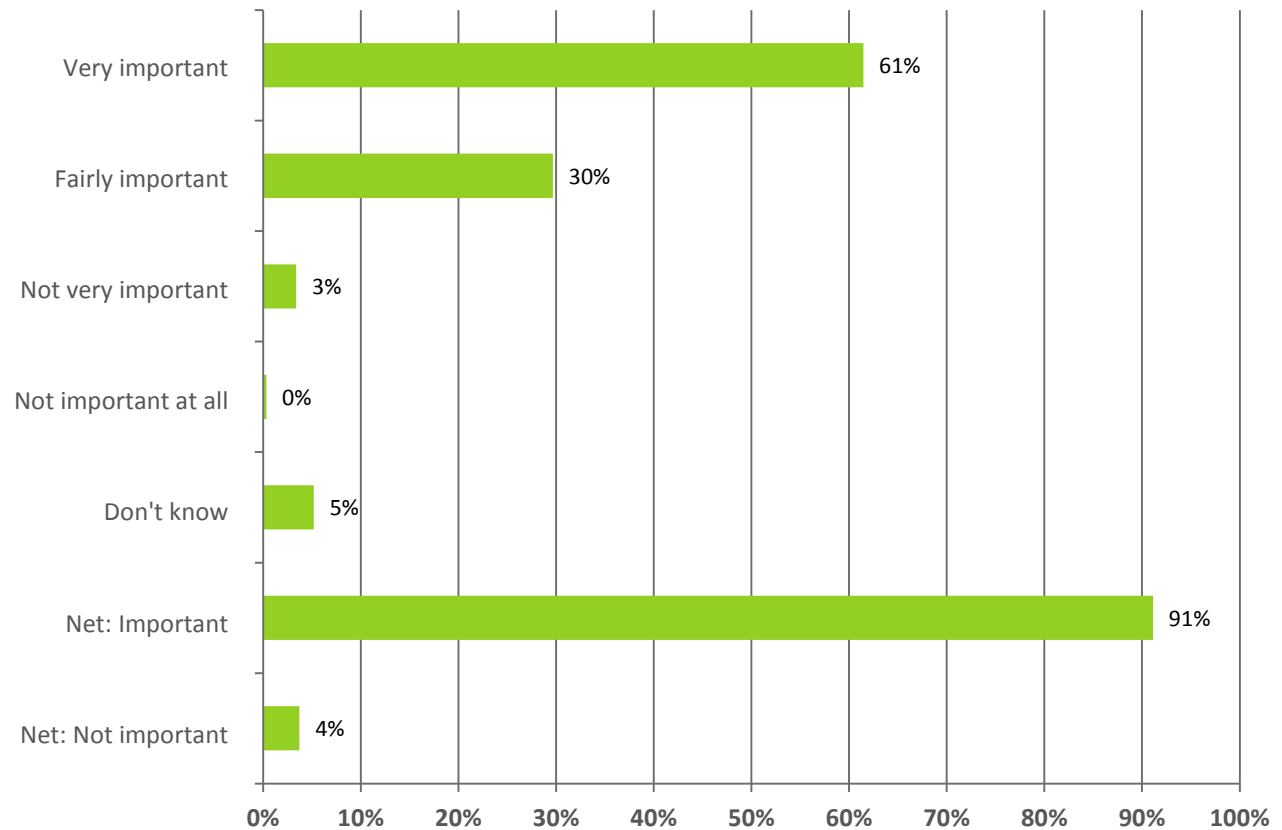


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q2_2. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

- Health and social care providers

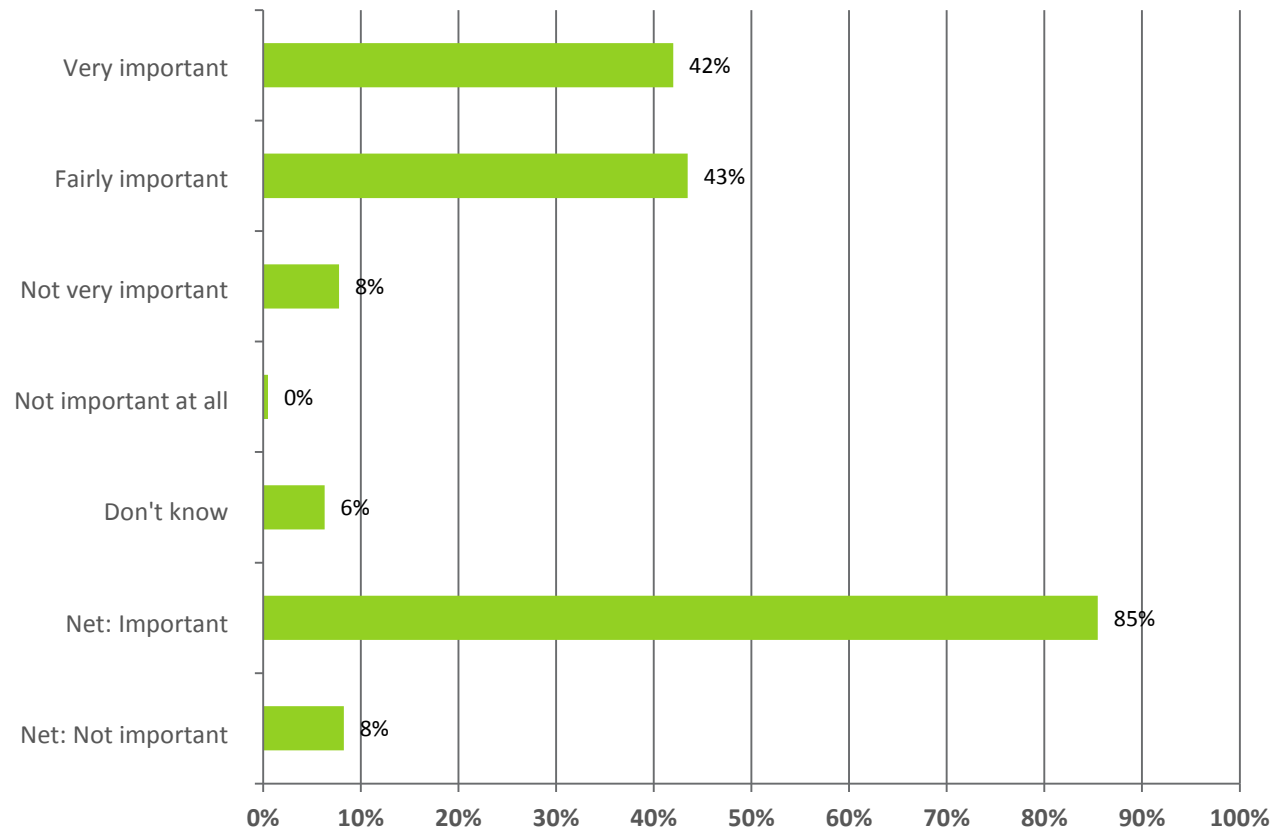


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q2_3. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

- Transport providers (e.g. Virgin Trains, Network Rail etc.)

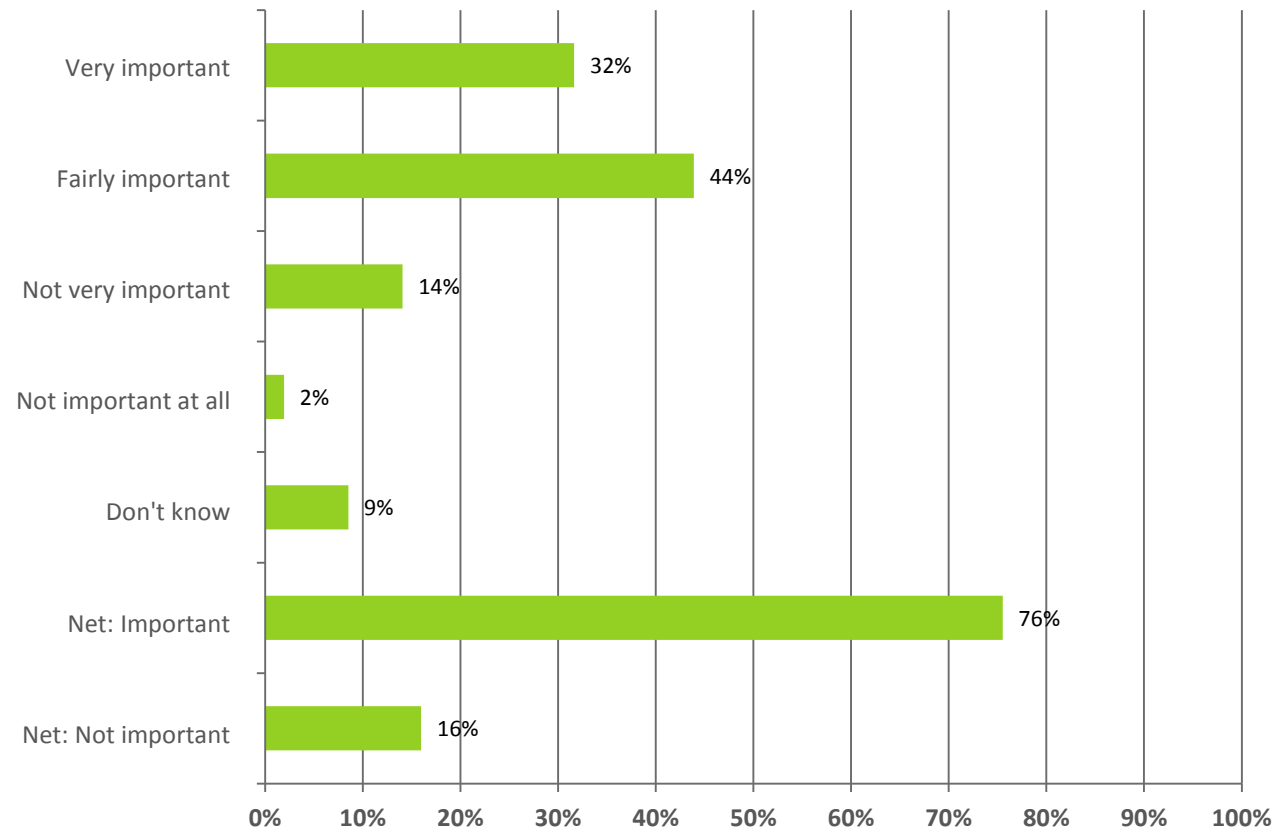


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q2_4. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

- Prisons and custodial services

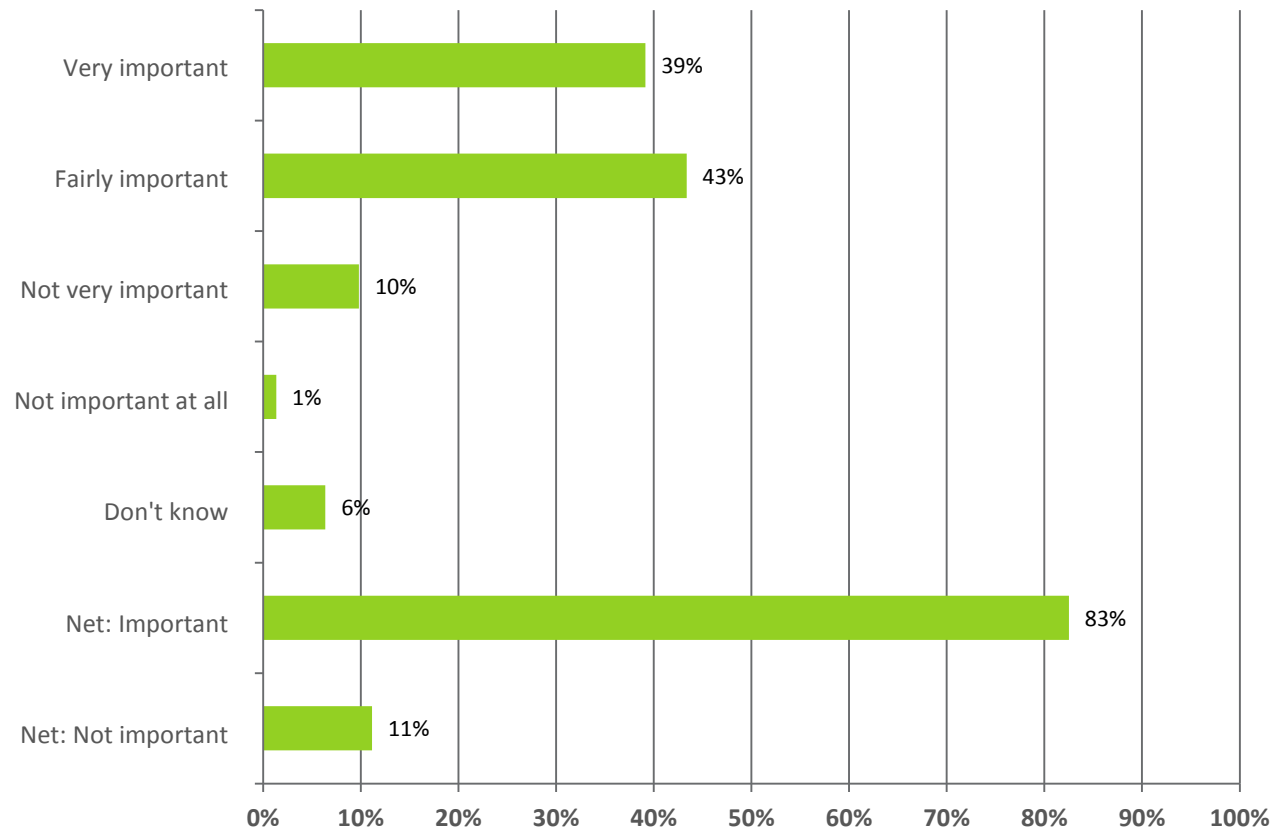


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q2_5. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

- Charities (e.g. Mind, Shelter etc.)

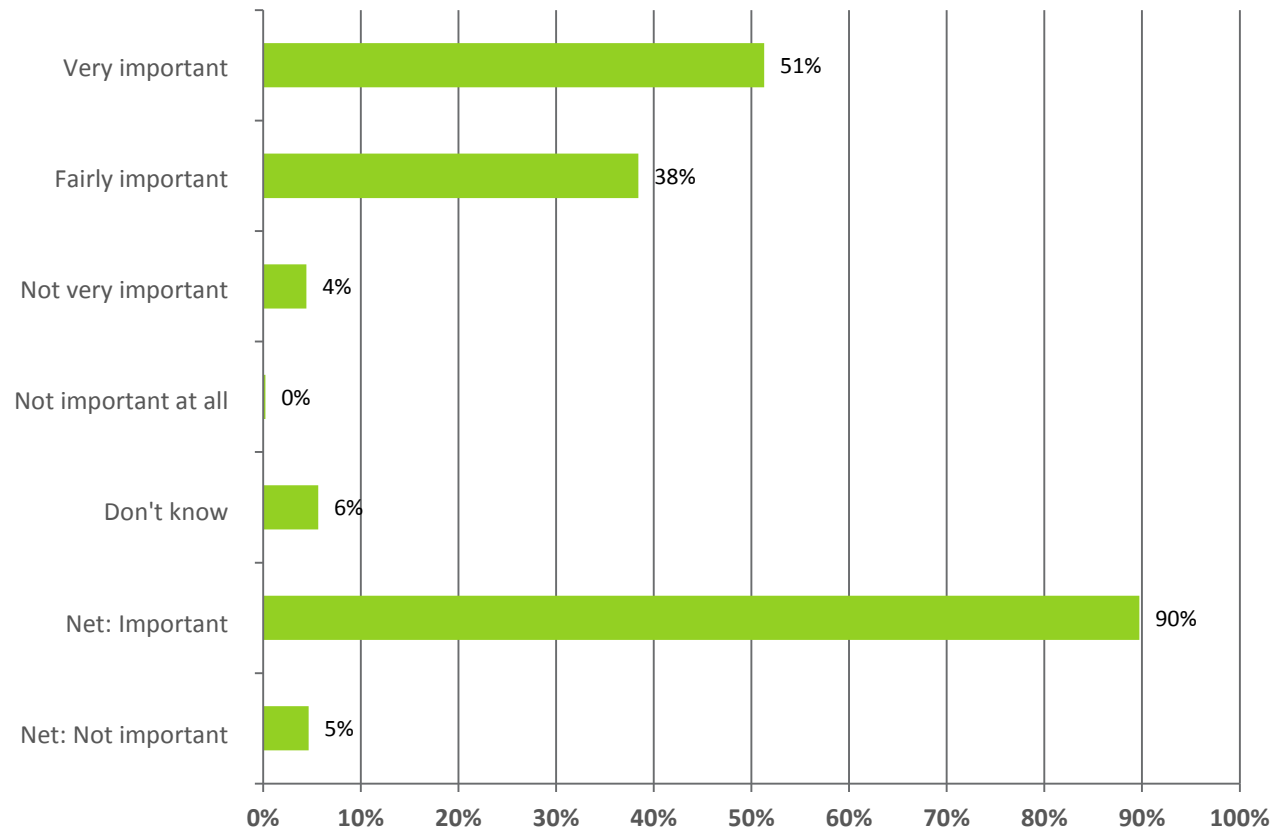


Unweighted base: All GB adults (2035)

Freedom of Information

ecf_q2_6. In general, how important, if at all, do you think it is that members of the public are able to access information regarding the public services provided by each of the following organisations? (Please select the option that best applies on each row)

- Utility companies (e.g. British Gas, EDF Energy etc.)

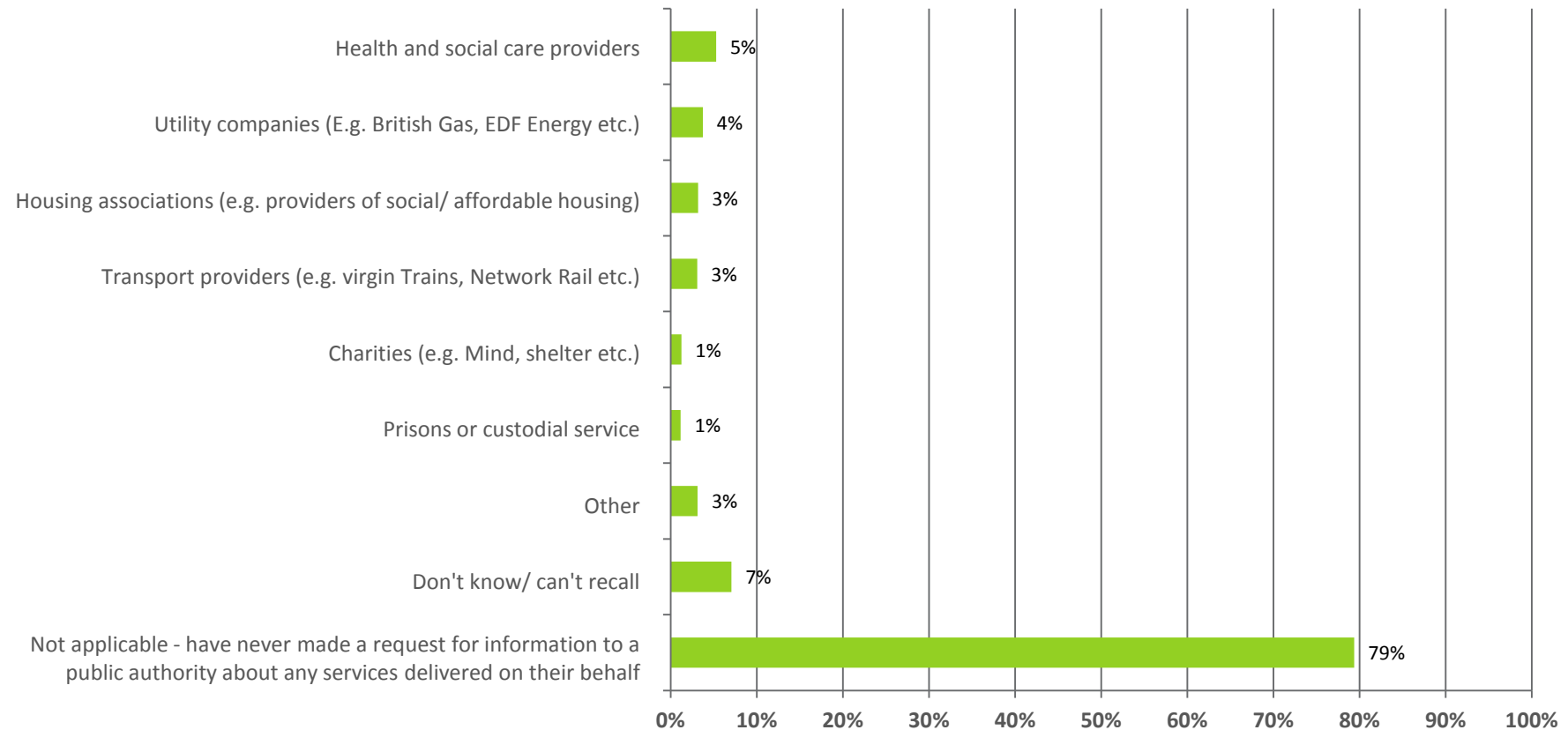


Unweighted base: All GB adults (2035)

Freedom of Information

ECF_Q3. The following question is concerned with the Freedom of Information Act in the UK. Under the Freedom of Information Act you have a right to request any recorded information held by a public authority, such as a Government department, local council or state school.

Have you EVER requested information from a public authority, about a service which you think was delivered on their behalf by any of the following types of organisations? (Please select all that apply. If you have never made a request for information to a public authority about any services delivered on their behalf, please select the "Not applicable" option)

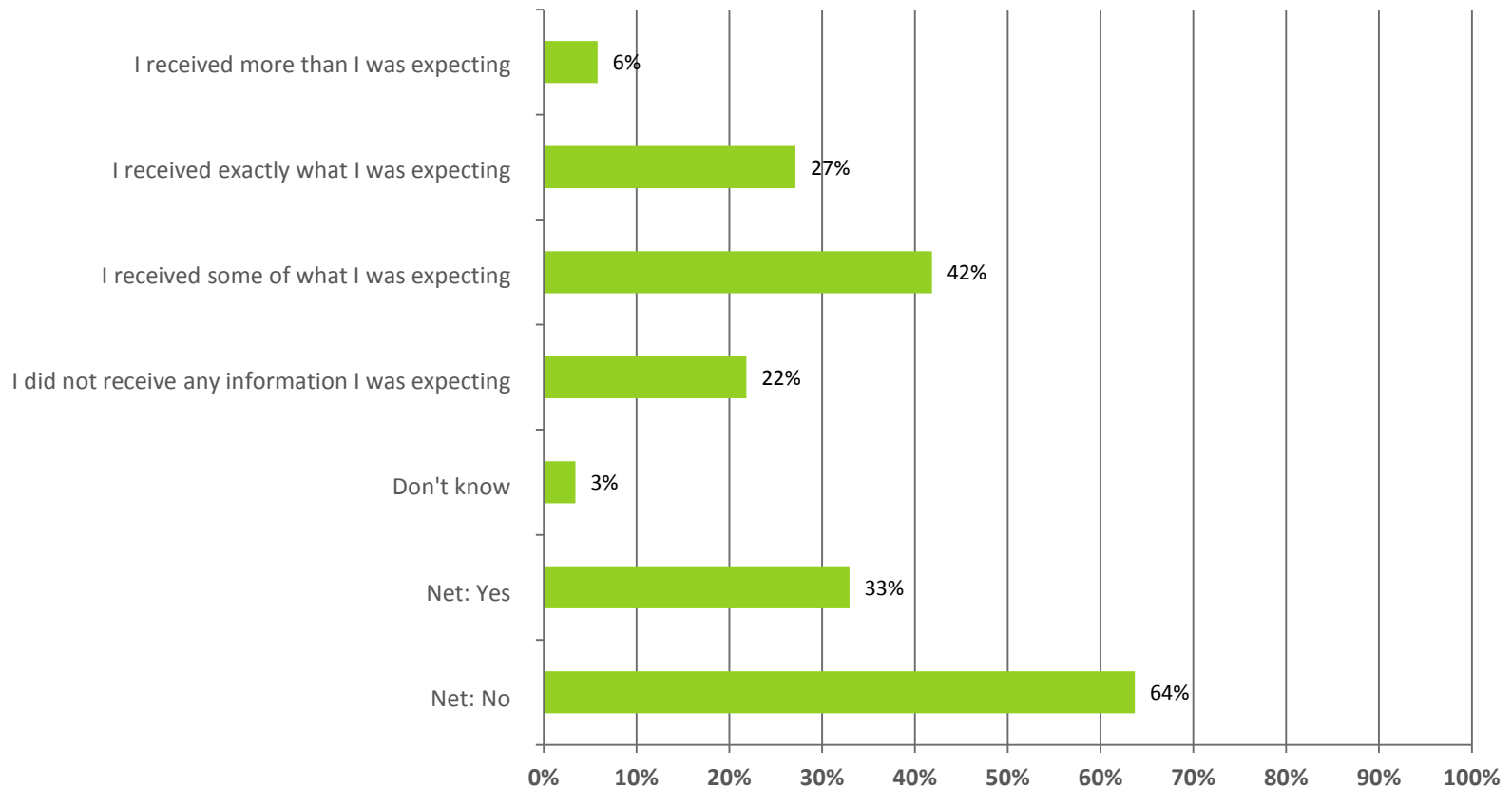


Unweighted base: All GB adults (2035)

Freedom of Information

ECF_Q4. You previously mentioned that you have made a request for information to a public authority about the services provided on their behalf in the past. If you have previously made more than one request, please think about your most recent request for information...

After putting in the request, how much, if any of the information you were expecting did you receive? (Please select the option that best applies)



Unweighted base: All GB adults who have previously put in a request for information (269)

International Conference of Information Commissioners (ICIC)

The ICIC Secretariat, hosted by the ICO, undertook a survey in which respondents were asked about the coverage of bodies with public functions or contractors in access to information law.

Desk-based research

We also reviewed legislation, casework, relevant literature and government policy.

Annex 2: Case studies

Outsourced public services

Rochford District Council ¹⁴¹

A member of the public requested information about a defunct family swim scheme offered by a local leisure centre. Rochford District Council's (the council) leisure facilities were outsourced to Fusion Lifestyle, a registered charity. The council said it had no involvement in the day to day management of the leisure centre. The requester expressed incredulity, stating:

"The leisure centre is operated in partnership with [the council]. It is therefore not credible or respectable for [the council] to have no information as to how its partnership asset is run by the operator as a local authority amenity. It has a duty to be involved in and to know about how its private sector operator is behaving in this respect."

The Commissioner concluded that the information was not held on behalf of the council taking into account that under the contract Fusion Lifestyle is required to provide certain core activities and is responsible for how such activities are delivered, rather than the council.

Ministry of Justice ¹⁴²

A request was made to the Ministry of Justice (MOJ) for information about the cost of providing Sky television to a particular prison that is run by a private contractor. Specifically the requester wanted to know the number of Sky channels prisoners have access to, and the number of cells in the prison that have telephones. The MOJ said it did not hold the information and it was not held on its behalf by its contractor. The Commissioner decided that the information was outside the scope of what the MOJ would be expected to hold to ensure that the contractor is providing a suitable service. These matters are dealt with according to the contractor's discretion.

¹⁴¹ URL: https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624832/fs_50625254.pdf

¹⁴² URL: https://ico.org.uk/media/action-weve-taken/decision-notices/2012/711874/fs_50419938.pdf

Chief Constable of Avon and Somerset Constabulary ¹⁴³

Information about qualifications held by staff seconded by the constabulary to Southwest One (SW1) was requested.

SW1 is a joint venture between IBM and three public authorities – Somerset County Council, Taunton Deane Borough Council and Avon and Somerset Constabulary (ASC). It carried out administrative, IT and human resources tasks for ASC under contract. The seconded staff were ASC employees but were under SW1's direction and control.

The Commissioner examined relevant parts of the contract between ASC and SW1 and found that the training and certification of staff was carried out by SW1 for its purposes in delivering the contract. However, there was no evidence of any contractual or other obligation on SW1 to give ASC information to allow it to verify the qualifications obtained by staff. The contract required SW1 to give ASC certain information to enable it to meet its FOIA obligations, but this did not include the information requested in this case. The Commissioner ruled that the information was not held on behalf of ASC.

London Borough of Barnet ¹⁴⁴

A request was made for a technical construction file (TCF) for bus lane cameras. The Commissioner established that bus-lane enforcement was part of local authorities' civil parking enforcement powers. The CCTV systems used for it must be certified by the Vehicle Certification Agency and the application for certification has to include the TCF.

In this case, the system's manufacturer of the system, Senco Systems Ltd, made the application for certification and a contractor, Civica, operated the bus-lane cameras on behalf of the council. The contract between the council and Civica obliged the contractor to give the council certain documents, but this did not include the TCF. The Commissioner concluded that there was no business reason for the council to hold the TCF itself, so the information fell outside the scope of FOIA.

¹⁴³ URL: https://ico.org.uk/media/action-weve-taken/decision-notices/2013/817616/fs_50463474.pdf

¹⁴⁴ URL: https://ico.org.uk/media/action-weve-taken/decision-notices/2013/874130/fs_50478617.pdf

Epping Forest District Council ¹⁴⁵

A request was submitted for information about gender equality. Gracelands (a contractor) did much of the council's property maintenance work. The Commissioner noted that the contract between the parties included a clause saying that Gracelands should comply with the council's equal opportunities policies and procedures.

The Commissioner ruled that the requested information regarding the number of male and female heating engineers and plumbers was not held on behalf of the council because it did not require this for its own business purposes.

Examples cited by the Campaign for Freedom of Information ¹⁴⁶

- The number of complaints from the public against court security officers provided by G4S and the number of officers charged with offences.
- The number of prison staff at Her Majesty's Prison (HMP) Birmingham and the number of attacks in prison held by G4S.
- The ratio of prison officers to prisoners at HMP Altcourse, managed by G4S.
- Information about rehabilitation projects at HMP Bronzefield run by Sodexo.
- The value of penalty fares issued on the London Overground and Docklands Light Railway by private sector inspectors.
- The costs of TV licensing prosecutions taken by Capita and not the BBC.
- Whistle-blowing policies applying to Virgin Care staff providing NHS services.
- The numbers of parking tickets issued, then cancelled on appeal, by Islington traffic wardens offered Argos points as incentives to issue tickets.

Bodies exercising functions of a public nature that are not directly covered by FOIA or EIR

¹⁴⁵ URL: <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013994/fs50650568.pdf>

¹⁴⁶ As note 52.

Metropolitan Housing Trust Limited ¹⁴⁷

A request was made to Metropolitan Housing Trust Limited (MHTL) about landscaping for a specific development. The Commissioner ruled that affordable housing and care and support services are services provided in the public interest, and noted that the housing trust receives social housing grants that are a form of 'public funding'. However, the MHTL had no special legal powers to carry out its services. MHTL also said it was not under the control of a public authority. It said it operates as an independent charitable organisation. Although it explained that in some areas, it had successfully bid for contracts with local authorities to provide care and support services, local authorities did not have any control over how it provided those services to customers. The Commissioner concluded that MHTL was not covered by the EIR.

Brighton and Hove City Council ¹⁴⁸

Information was requested from Brighton and Hove City Council (the council) about the dissolution of a company called Seaside Community Futures (SCF), an independent charity. SCF was a sister company of Brighton and Hove Seaside Community Housing (BHSC). BHSC is a 'local delivery vehicle' set up by the council. It is a not-for-profit, charitable company whose goal is raising investment to help improve council tenants' homes.

The Commissioner concluded that the information was not held for FOIA purposes. She recognised the requester's frustration in this case since "BHSC may be carrying out functions which previously were carried out by the council, but is not subject to the FOIA". She added that she could "only make decisions based on the legislation as it currently stands" and noted that "the information from the council is detached further still as SCF is a company set up by board members of BHSCF and BHSC has gone to some lengths to ensure that SCF is a legally separate entity".

¹⁴⁷ URL: <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014425/fs50655881.pdf>

¹⁴⁸ URL: <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/1625666/fs50638884.pdf>

Kensington and Chelsea Tenant Management Organisation

This case concerned a request for a report about the emergency lighting system in Grenfell Tower. Kensington and Chelsea Tenant Management Organisation (KCTMO) refused on the basis that it is not a public authority for FOIA purposes. KCTMO is not wholly owned by the council because only tenants could apply to be members. The relationship between the TMO and the council is governed by a management agreement pursuant to section 27 of the Housing Act 1985. The Commissioner found that the TMO was not a public authority under FOIA.

London Borough of Tower Hamlets¹⁴⁹

Information was sought from the London Borough of Tower Hamlets (the council) about the declaration of election results, the storage of ballot boxes and suspected fraudulent ballot papers. The Commissioner ruled that this information was not held by the council because information held by the Returning Officer was not held on its behalf.

Stoke-on-Trent Safeguarding Board¹⁵⁰

A request was submitted for minutes of meetings of the Stoke-on-Trent Safeguarding Board and of any sub-committee meetings attended by Stoke-on-Trent City Council representatives to the board. The council said this information was not held for FOIA purposes and the Commissioner agreed with that position, noting that, "There is a wider trend towards openness and transparency which the Commissioner naturally welcomes. However, this does not mean that he can make organisations or information subject to the requirements of the FOIA...That remains a matter for Parliament."

¹⁴⁹ URL: https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1043262/fs_50549048.pdf

¹⁵⁰ URL: https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432942/fs_50566663.pdf

Edward Williams v Information Commissioner ¹⁵¹

London Councils had formed a joint committee with Transport for London to appoint parking adjudicators and provide administrative support and facilities through London Tribunals. Mr Williams requested a list of all training manuals, guidance, advisory circulars etc. issued to parking adjudicators sitting at London Tribunals. The request was refused by the London Councils on the basis that the information was not held on its behalf by London Tribunals.

The Commissioner agreed, finding that London Councils had no business need for the information. On appeal, the First-Tier Tribunal overturned this. It said that the information would form part of the support function provided by London Tribunals for the adjudicators and that information held by the support service, London Tribunals, was held by London Councils. It referred to London Tribunals as acting like a “department” of London Councils.

Examples cited by the Campaign for Freedom of Information ¹⁵²

- Information about the cause of a fire in a housing association flat.
- Whether potentially toxic lead pipes were used for the water supply to a property.
- The amount of fly-tipped waste and litter collected from a housing association’s estates.
- The number of repossession orders served since the ‘spare room subsidy’ came into force, and the number of those tenants who had no arrears before that date.
- The policy that permitted an association to pack up an evicted tenants possessions and confidential documents instead of allowing him to collect them.
- The number of properties adapted for disabled people.
- The number of asylum seekers housed.
- The number of properties empty for more than six weeks.

¹⁵¹ URL:

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2156/Williams,%20Edwards%20-%20EA.2017.0099%20\(04.02.18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2156/Williams,%20Edwards%20-%20EA.2017.0099%20(04.02.18).pdf)

¹⁵² As note 52.

- The electricity bill that led a tenant to be charged £1,200 to cover the costs of six communal light bulbs.

Annex 3: Bodies exercising functions of a public nature

Relevant factors to consider may include the following:

- How far the organisation is publicly funded?
- How far the organisation's activities are underpinned by statute or whether it operates under the authority of the government or of another part of the public sector?
- Whether the organisation exercises extensive or monopolistic powers, for example, by regulating entry to a trade, profession or sport or whether its source of power is derived from more than voluntary submission to its jurisdiction?
- Whether the organisation seeks to achieve some collective public benefit and is accepted by the public as having authority to do so?
- Whether the organisation participates in a significant way in the social affairs of the nation, pursuant to the public interest?
- In the case of a regulatory organisation, whether, but for its existence, the government would inevitably have intervened to regulate the activity?¹⁵³

Factors that may help to decide whether it is appropriate to designate a body performing functions of a public nature:

- A balance needs to be struck to ensure that the advantages of openness are considered alongside the potential impact on the organisations to be covered.
- It is important to balance the potential benefits of increased information access against the impact on the delivery of public services, on businesses and on the voluntary and community sector. Any decisions on section 5 orders will need to be made on a case-by-case basis in the context of the overall policy objectives.
- Any review needs to take account of FOI costs and the potential effect on the cost of provision of services in the future.
- FOIA requirements could have particular implications for smaller organisations as they may have less capacity to absorb extra costs.
- The Government is committed to supporting the voluntary and community sector in providing public services and reducing unnecessary burdens, in particular on small businesses, and so does not wish to regulate unnecessarily.

¹⁵³ As note 127. P.15

- The potential impact should be discussed in consultation with the suggested organisations or their representatives and analysed in an impact assessment.¹⁵⁴

The Government also suggested the following factors may be relevant:

- The amount of public funding.
- How far the function is seen as a core function of the state.
- FOIA coverage of relevant organisations in the same sector.
- The nature of the organisation.
- The size of the organisation.
- Any effect on competition.
- The level of existing regulation.¹⁵⁵

¹⁵⁴ As above. p. 11

¹⁵⁵ As above. p.16

Annex 4: Glossary

Acronym or term	Meaning
Aarhus Convention	Convention on Access to Information, public participation in decision-making and access to justice in environmental matters. Adopted by the UK on 25 June 1998.
ACPO	Association of Chief Police Officers
ATI	Access to information
Burns Commission	Independent Commission on Freedom of Information
CBI	Confederation of British Industry
CCS	Crown Commercial Service, an executive agency sponsored by the Cabinet Office
CFOI	Campaign for Freedom of Information
CIC	Community interest company
CO	Cabinet Office
Code	Code of Practice issued under section 45 of FOIA providing guidance to public authorities on the discharge of their functions and responsibilities under Part I (Access to information held by public authorities).
Commissioner	The UK Information Commissioner, Elizabeth Denham
Commissioning	The terms 'commissioning' and 'procuring' are often used interchangeably but they are different. Commissioning means establishing the needs of a population and then buying services to meet those needs. See below for procurement.
CSPL	Committee on Standards in Public Life
DCMS	Department for Digital, Culture, Media and Sport
Designation	A term used to describe bringing new bodies under the scope of the FOIA.
DPA 2018	Data Protection Act 2018
EIR	Environmental Information Regulations 2004
FOIA	Freedom of Information Act 2000
FOISA	Freedom of Information (Scotland) Act 2002
FTT	First-Tier Tribunal (Information Rights)
GDPR	General Data Protection Regulations

HMP	Her Majesty's Prison
ICO	Information Commissioner's Office
ICIC	International Conference of Information Commissioners
IFG	Institute for Government
Insourcing	A business practice in which work that would otherwise have been contracted out is performed in house.
IPSA	Independent Parliamentary Standards Authority
KPI	Key performance indicator
LLP	limited liability partnership
LSCB	Local Safeguarding Children's Boards
MOJ	Ministry of Justice
MOT	Ministry of Transport
MSC	Model services contract
NAO	National Audit Office
NAP	National Action Plan
NHS	National Health Service
NPCC	National Police Chiefs Council
OCDS	Open Contracting Data Standard
OCP	Open Contracting Partnership
ODA	Olympic Delivery Authority
OGN	UK Open Government Network
Outsourcing	Obtaining goods or a service by contract from an outside supplier
PAC	Public Accounts Committee
PACAC	Public Administration and Constitutional Affairs Committee
PCR	Public Contract Regulations 2015
PECR	The Privacy and Electronic Communications Regulations 2003
PFI	Private finance initiative
POFA	Protection of Freedoms Act 2012
Procurement	Buying services from third parties as part of a legally binding contract. See above for commissioning.

RHP	Richmond Housing Partnership
Transparency Code	Local Government Transparency Code

Assessing the transparency gap in public procurement.

A report for The Information
Commissioner.

21/09/2018



Executive summary

The transparency gap is a well-known and longstanding problem. Hundreds of billions of public pounds are spent every year across government on public services - yet there is no attendant right of public access to information about them. Prior to this report, however, very little was known about the substance of the challenge.

Using several datasets on public contracting and spending, Spend Network has been able to shed some much needed light on the issue. We hope that this short report, and the full datasets provided in the annex, can start a new chapter of the conversation within the ICO and among policymakers on how to close the transparency gap effectively.

We must also, however, acknowledge some limitations of the study. Despite being able to call on 120m lines of data, where the data has been made available much of it is published in disparate, and inconsistent sources. We are particularly mindful of the poor contracting award notice data, which is both incomplete and often lacks crucial information such as contract values and contract end dates.

There is also a limitation on the insight that the data, as it is currently structured, can provide. We cannot know if the spending data is for the provision of public services while new contracting practices see the blurring of lines between capital, goods and service expenditure. Spend Network has used its knowledge and experience of both the data and the market to provide the best insights we can within these limitations.

What this report covers

Section one provides a high level overview of the procurement market in central and local government and the NHS, and profiles key buyers and suppliers in the major categories of spending. It shows that, while the transparency gap covers a range of services, a small cluster of spending categories and suppliers account for a great deal of the deficit. The transparency gap is not smoothly or consistently shaped. Our data suggests that, rather, it may be a series of narrow, but deep blind spots.

Yet there are limits to the insights we can draw from this. The principal one - and perhaps the most pressing one when discussing the designation of contractors under FOIA - is that no organisation in the UK really understands the role of subcontractors in outsourcing.

The collapse of Carillion has reportedly left an estimated 30,000 subcontractors in its supply chain owed money. However, as part of section two explains, while government spending and contract awards are concentrated among suppliers, there is a gap in both public and official understanding about how public money is distributed in a contractor's supply chain. There is limited knowledge of which companies deliver which aspects of services, which ones hold relevant information, and whether they should be subject to FOIA.

Section two also describes how the use of "alternative delivery models" for public services have widened the transparency gap in ways our data may not fully account for over the past decade. For example, the commercial activities of local authorities is obscured from public view by the use of joint ventures with the

private sector and trading companies. Meanwhile, NHS reforms have put CCGs in charge of commissioning but failed to make them transparent.

Section three explores the merits and drawbacks of using three types of threshold to designate contractors under FOIA. Our analysis suggests that imposing a contract duration threshold of five years would capture 4.8 percent of contracts by volume but 27.8 percent by value. We discuss other options and propose that a combination of thresholds - common in other areas of company law - may be appropriate.

In section four we proposed to assess the uptake of the transparency clause in the Crown Commercial Service's (CCS) Model Services Contract. This proved impossible since very few ex-ante contract documents are published and Spend Network has been unable to gather those that are published. Furthermore, the CCS does not monitor implementation of the clause. Instead Spend Network attempted to gather as many contract documents as possible (see methodology) and subsequently analysed 55 of them. However this sample was of limited use.

Finally in section five, we used tendering data to identify purchasing consortia issuing tenders that were not subject to FOIA. The method involves some approximation but it clearly shows that at least three types of FOIA-exempt organisation are using public tendering procedures. These are: Housing Associations, purchasing consortia, and companies.

The case for designating further types of organisation in close proximity to the public sector is also made in the section two literature review.

Recommendations

The designation of contractors under FOIA is a complex issue with far reaching consequences. It is important to get it right and as such we believe that further research and debate on the transparency gap is required before drawing any conclusions. Spend Network recommends that the ICO:

1. Consult with government and the UK Open Government Network on ways to improve the low quality of contracting data, including contract award notices and contract documents.

A lack of quality, comprehensive information about public contracting hinders both this analysis and the public understanding of outsourcing. Closing this open-data transparency gap is a necessary step in closing the FOIA-based transparency gap. One option should be to consider the widespread adoption of the Open Contracting Data Standard to central and local government bodies, and the NHS including CCGs).

2. Conduct a survey of information rights departments to explore how many requests are received about contractors.

It has proved impossible to assess the uptake of transparency clauses in public sector contracting. Another approach would be to see if the system works *in practice* by surveying a sample of bodies about the number of requests received about contractor-held information and their outcomes.

3. Continue to explore the threshold question, including the deployment of a combination threshold, for designating contractors under FOIA.

A combination threshold would permit some flexibility to ensure, for example, that a revenue threshold does not disproportionately burden Small and Medium Enterprises (SMEs) while still capturing specific contracts that are of significant public interest. Threshold research should also consider how to establish a monitoring function for spending and transactions.

4. Consult with the Crown Commercial Service (CCS) to understand what knowledge and statistics it can share regarding subcontractors.

Public money and service delivery is distributed across large and complex supply chains. Learning more about this process is crucial to setting effective thresholds that actually advance the public’s right to know. This year the CCS introduced a requirement for large contractors to tender certain subcontracts but an independent assessment of the effectiveness of this policy is required.

Acronyms used

Table 0.1 - Table of acronyms

Acronym	Full name
CCG	Clinical Commissioning Group
CCS	Crown Commercial Service
CIC	Community interest company
DBEIS	Department of Business, Energy and Industrial Strategy
DCMS	Department for Culture Media and Sport

DFE	Department for Education
DFID	Department for International Development
DFT	Department for Transport
DHSC	Department of Health and Social care
DWP	Department for Work and Pensions
ESSU	European Services Strategy Unit
FOIA	Freedom of Information Act
HACA	Homes and Communities Agency
ICO	Information Commissioner's Office
LATC	Local Authority Trading Company
MOD	Ministry of Defence
NAO	National Audit Office
NFT	NHS Foundation Trust
NHS	National Health Service
NHS BSA	NHS Business Services Authority
NHST	NHS Trust
PbR	Payment By Results

PFI	Private Finance Initiative
PHB	Personal Health Budget
SIB	Social Impact Bond

Market overview

The ICO asked Spend Network:

“To illustrate and map what key parts of the modern public sector landscape look like, focusing on the volume and nature of services outsourced by the public sector and private organisations delivering services of a public nature.

This should focus on the most significant aspects of delivery and key areas or sectors where there is a particular risk of a transparency gap regarding public access to information.”

This section first uses buyer and sector specific supplier data to present a high level overview of procurement in central and local government and the NHS. It then draws on data from the top 1,000 public sector suppliers to profile key suppliers in the top 5 categories of spending across government. The aim of this section is to briefly illustrate the major contours of the UK market for public sector outsourcing. The full datasets, included in the annex, provide granular detail.

Both the buyer and supplier datasets cover a four and a half year period beginning October 2013 and ending March 2018. It is important to note, however, that because we used a subset of the data for our supplier analysis, the total figures for this analysis are significantly less than those of the buyer analysis, which include spend with all suppliers as well as governmental transfers.

Spend Network has presented annual average spends throughout this section - as opposed to year by year breakdowns - because there has been no significant annual variation. The data shows the size of the transparency gap in various categories of government, but it does not show any discernible growth trend.

Central government

Central government spent an average of £107 billion a year on the purchase of goods and services during the period analysed. The spend was concentrated in a few key areas - with 75.2 percent spending in just five categories - and 98.4 percent of spending in 15. Table 1.1 shows the 15 categories with the greatest annual spending by category in £millions, and as a percentage of the total spend.

Table 1.1 - Annual average spend by category in central government

Category	Annual spend	% of total spend
Works - Construction, Repair & Maintenance	24489	22.4
Facilities & Management Services (F&MS)	20265	18.6
Education	17978	16.5
ICT	10220	9.4
Consultancy	9074	8.3
Financial Services	5972	5.5
Healthcare	5521	5.1
Mail Services	3872	3.5
Passenger Transport	2717	2.5
Human Resources	1778	1.6
Utilities	1737	1.6
Housing Management	1495	1.4

Legal Services	1086	1
Arts & Leisure Services	566	0.5
Vehicle Management	496	0.5
Total (15 categories)	107266	98.4

This spending category data gives an important insight into the size of the transparency gaps across central government. Yet it is not a complete picture. The ICO asked Spend Network to focus on public services, however, disambiguating the procurement of goods and services is not straightforward.

For example, in the Works category it is common for government to procure 'build and manage' contracts where, for example, a contractor builds a school / hospital and then runs the services, allowing for consistent revenue from the supplier and allowing the buyer to spread costs over time.

The distinction between goods and services is not always clear and the use of categories alone cannot identify whether or not public services are contained within the spending. However, certain sectors, such as Facilities and Management Services (F&MS), Education, Consultancy, Healthcare, Passenger Transport, Housing Management and Arts and Leisure Services are likely to be more service dominated, and therefore of greater priority to the ICO. The transparency gap in these sectors alone affects £52.9 billion of public money (as shown in the table above).

Key buyers in central government

The purchasing of goods and services is highly concentrated within central government. Figure 1.1 shows the annual average spend of the ten highest spending bodies. These ten government buyers account for 87 percent of total spending.

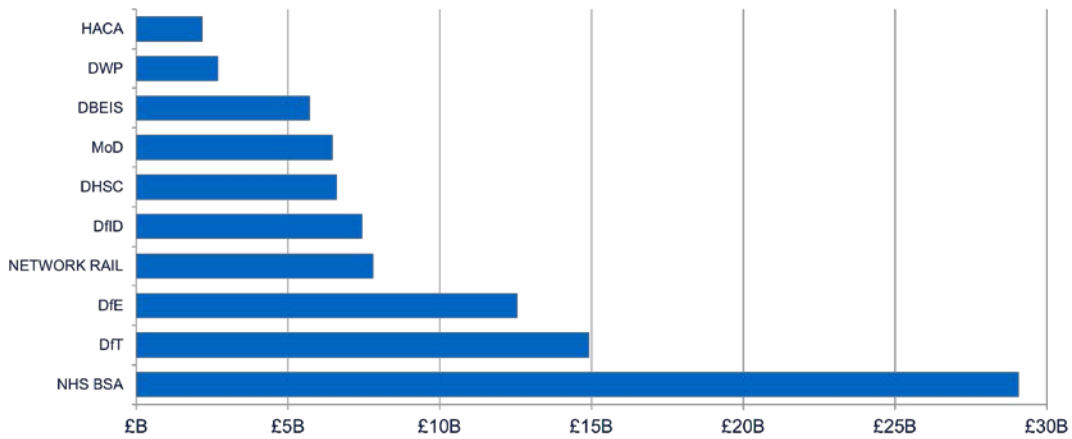


Figure 1.1 - Top 10 buyers in central government by annual spend

Key suppliers to central government

Figure 1.2 shows the 20 companies with the largest average annual income from central government. These 20 contractors together received 38 percent of central government's procurement spend. These companies are relatively high profile and will be familiar to most readers. Some large companies, however, such as G4S, are not in the top 20 due to their corporate structure, which divides operations and revenue across multiple legal entities.

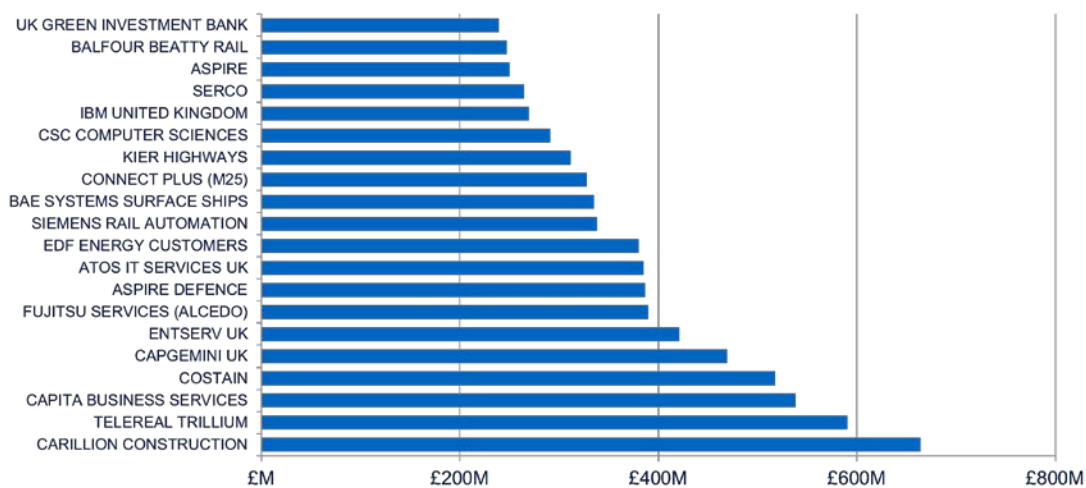


Figure 1.2 - Top 20 suppliers to central government by annual spend

Local government

Local government spent an average of £58 billion a year on procurement (with a total of £261 billion over the four and a half year period). As with central government, the majority of this purchasing is contained in just a few categories. Table 1.2 shows the 15 categories with the greatest annual spending by category in £millions, and as a percentage of the total spend.

Table 1.2 - Annual average spend by category in local government

Category	Annual spend	% of total spend
Works - Construction, Repair & Maintenance (WCR&M)	£ 11,034	19
Facilities & Management Services (F&MS)	£ 7,748	13.3
Social Community Care Supplies & Services - Adult	£ 6,957	12
Education	£ 6,749	11.6
Passenger Transport	£ 4,353	7.5
Healthcare	£ 2,715	4.7
Financial Services	£ 2,460	4.2
Environmental Services	£ 2,392	4.1

Housing Management	£ 2,022	3.5
ICT	£ 1,973	3.4
Human Resources	£ 1,497	2.6
Social Community Care Supplies & Services	£ 1,243	2.1
Consultancy	£ 1,201	2.1
Vehicle Management	£ 929	1.6
Utilities	£ 824	1.4
Building Construction Materials	£ 793	1.4
Total (15 categories)	£ 54,890	94.5

As with central government the data cannot be easily disambiguated to show separate totals for goods and services.

The data shows that local government spends £7 billion on social care, £4.3 billion on passenger transport, £2.3 billion on environmental services and £2 billion on housing management annually. These local services affect people's everyday lives and, while less noteworthy in value than Works and F&MS, may generate a greater amount of public concern and debate.

Key buyers in local government

Transport for London (TfL) is by far the largest spender at the local government level with an average annual spend of £5.8 billion (10% of all spending). Figure 1.3 shows the next ten largest local government buyers, all councils, which account for 17.1% of all local spending.

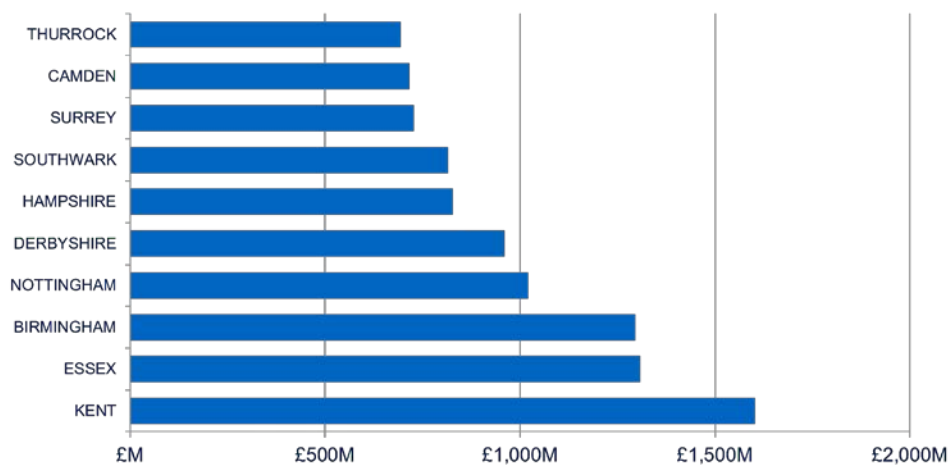


Figure 1.3 - Top 10 buyers in local government by annual spend

Key suppliers to local government

20 companies won 31.9 percent of business with local government bodies over the studied period. They are drawn from a range of the top categories listed above. Figure 1.4 shows the annual average income of the top suppliers to local government.

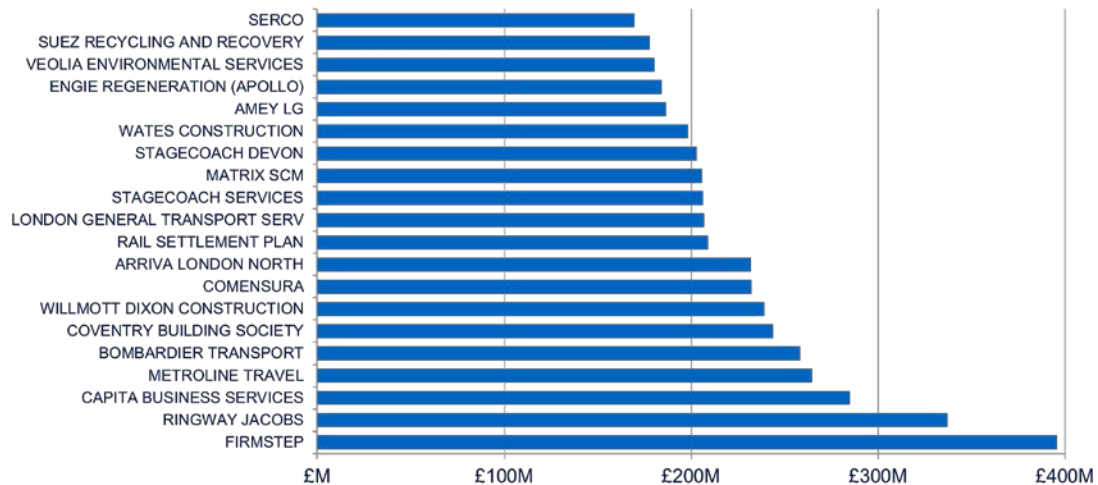


Figure 1.4 - Top 20 suppliers to local government by annual spend

The NHS

Spend Network's NHS buyer data covers NHS Foundation Trust spending worth a total of £36.6 billion (at an average of £8 billion a year). It should be noted that other centralised NHS bodies (including the Business Services Authority) are classified as central government bodies.

The data does not include CCG spending because CCGs are exempt from NHS spending transparency requirements. There are no public statistics on the total amount that CCGs spend with external suppliers, so we cannot know the precise impact of this gap in the data.

Table 1.3 shows the 15 categories with the greatest annual spending by category in £millions, and as a percentage of the total spend.

Table 1.3 - Annual average spend by category in the NHS

Category	Annual spend	% of total spend
Healthcare	£ 2,257,278,435	27.7
Facilities & Management Services	£ 1,516,929,695	18.6
Works - Construction, Repair & Maintenance	£ 1,379,664,402	16.9
Human Resources	£ 544,556,490	6.7
Information Communication Technology	£ 420,443,783	5.2
Education	£ 371,655,814	4.6
Social Community Care Supplies & Services - Adult	£ 343,153,068	4.2
Consultancy	£ 312,901,465	3.8
Financial Services	£ 245,242,672	3
Utilities	£ 198,317,759	2.4

Catering	£	78,965,491	1
Building Construction Materials	£	74,844,395	0.9
Passenger Transport	£	58,524,411	0.7
Environmental Services	£	57,417,377	0.7
Legal Services	£	55,685,594	0.7
Mail Services	£	52,332,016	0.6
Total	£	7,967,912,867	97.79

Healthcare and the 'usual suspects' - Works and F&MS - account for more than 60 percent of NHS spending. Other significant categories include HR - to coordinate flexible hiring and deployment of staff across the service - as well as social care and education.

Key buyers

Ten Foundation Trusts were responsible for 31.7 percent of spending with contractors.

Figure 1.5 shows the respective spending of these trusts.

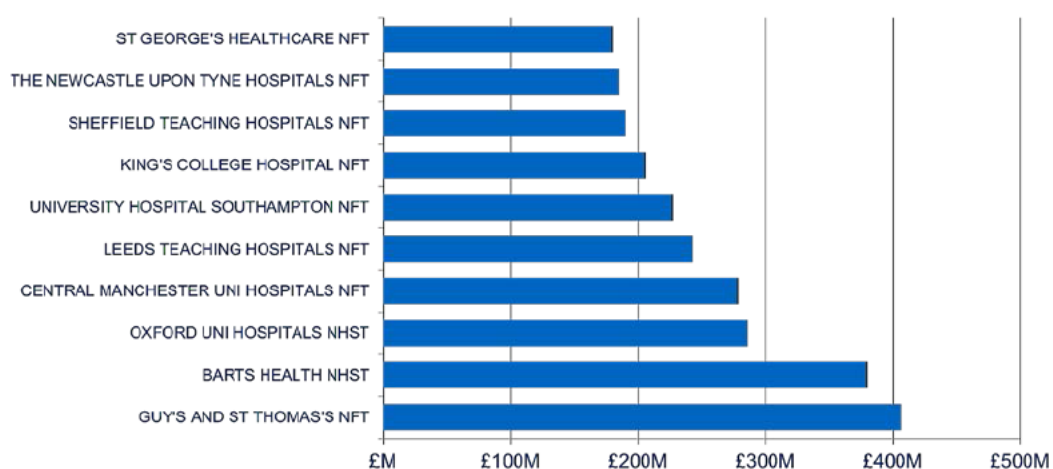


Figure 1.5 - Top 10 buyers in the NHS by annual spend

Key suppliers

NHS Professionals, the market leading NHS recruitment company, is the top supplier to NHS Foundation Trusts. Pharmaceutical companies and medical technology companies make up a significant proportion of the remaining top 20. Figure 1.6 shows these companies and their annual average revenue earned from NHS Foundation Trusts.

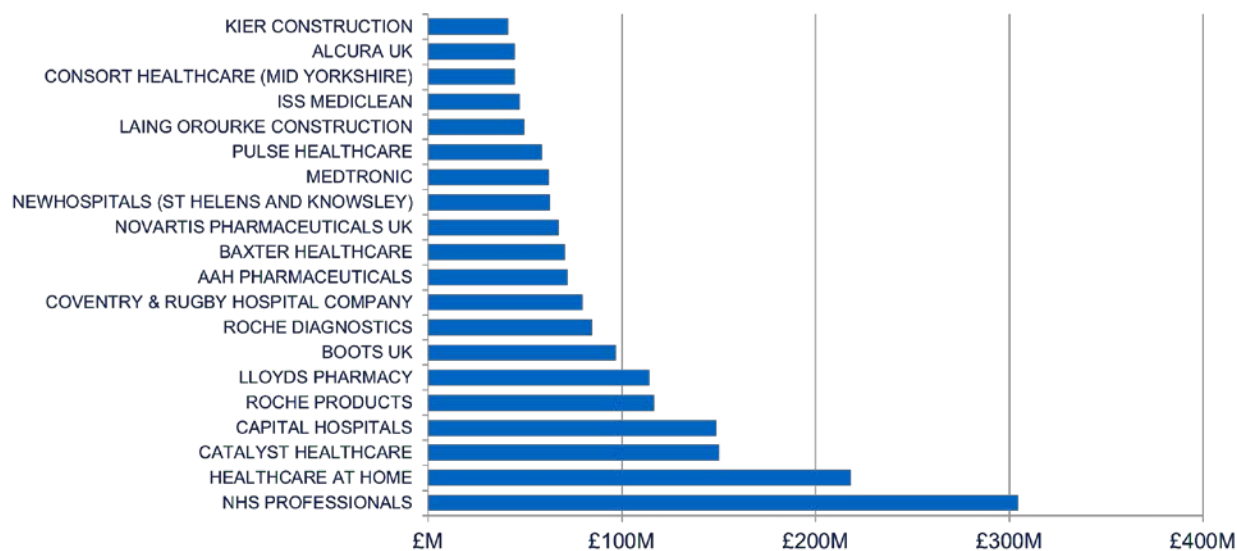


Figure 1.6 - Top 20 suppliers to the NHS by annual spend

Key suppliers in top categories

This section of the report uses data on the top 1,000 suppliers to profile the top 20 suppliers in the top five categories of spending across central and local government and the NHS combined. These five categories account for 65 percent of the £52.5 billion total spend and, as the data shows, spending is concentrated on the larger suppliers within them.

This data is indicative however as categories are a generalised tool to cover 110 million lines of data. Poor quality source data, a lack of identifiers in the data and the need to use machine learning to apply categories, means that there is limited ability to refine categories, to make them more precise or to ascribe the correct category in the first instance. Moreover, many contracts can span several categories at once in order to provide savings through economies of scale, having a one-stop shop provider. For instance, a construction company might win a design & build contract on a building which also has maintenance and facilities management services bolted on following completion.

In the two largest categories, Works and F&MS, more than one third of revenue is earned by 20 suppliers. Figure 1.7 shows the top 20 suppliers in Works (which accounted for 38.4% of all supply value in this category).

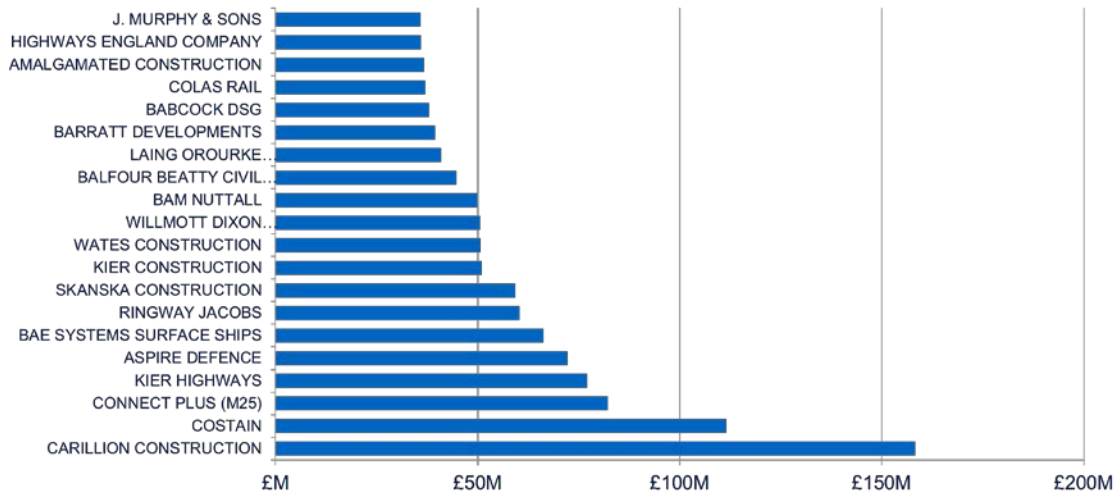


Figure 1.7 - Top 20 suppliers in Works category by annual spend

Figure 1.8 shows the top 20 suppliers in F&MS (which accounted for 37.8% of all supply value in this category).

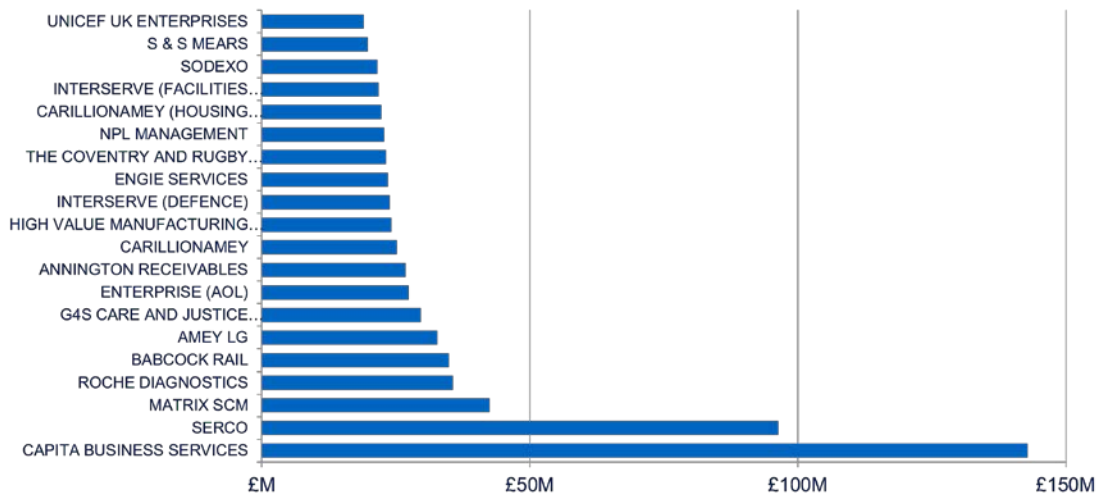


Figure 1.8 - Top 20 suppliers in Facilities and Management Services category by annual spend

In the third, fourth and fifth largest categories, between two thirds and three quarters of all revenue is earned by 20 suppliers. Figure 1.9 shows the top 20 suppliers in Passenger Transport (which account for 75.4% of all supply by value in this category)

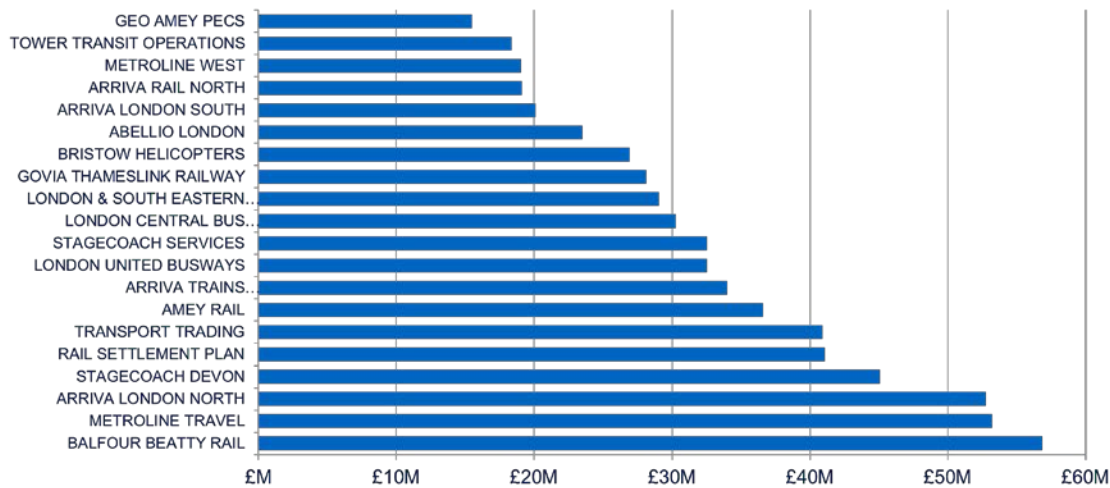


Figure 1.9 - Top 20 suppliers in Passenger Transport category by annual spend

Figure 1.10 shows the top 20 suppliers in Consultancy (which account for 72.3% of all supply by value in this category)

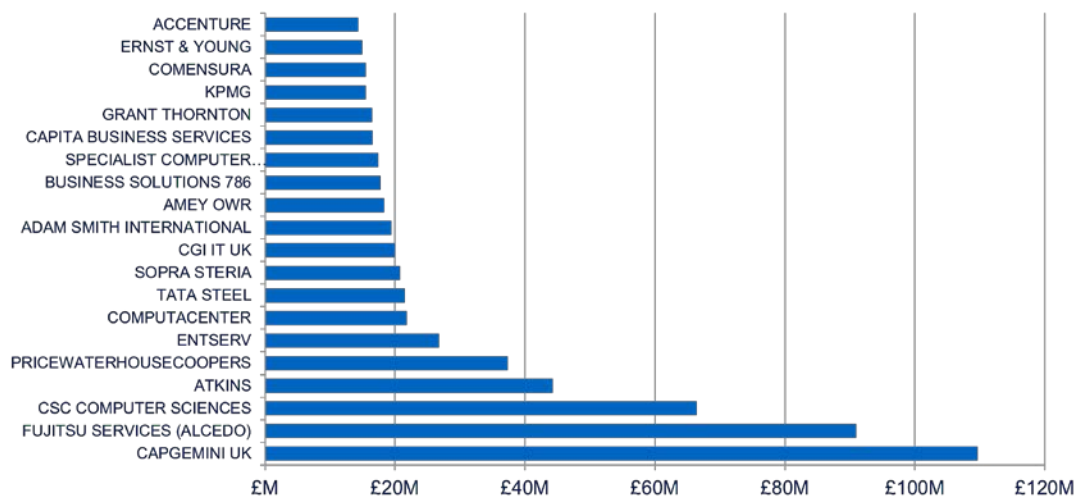


Figure 1.10 - Top 20 suppliers in Consultancy category by annual spend

Figure 1.11 shows the top 20 suppliers in ICT (which account for 69% of all supply by value in this category)

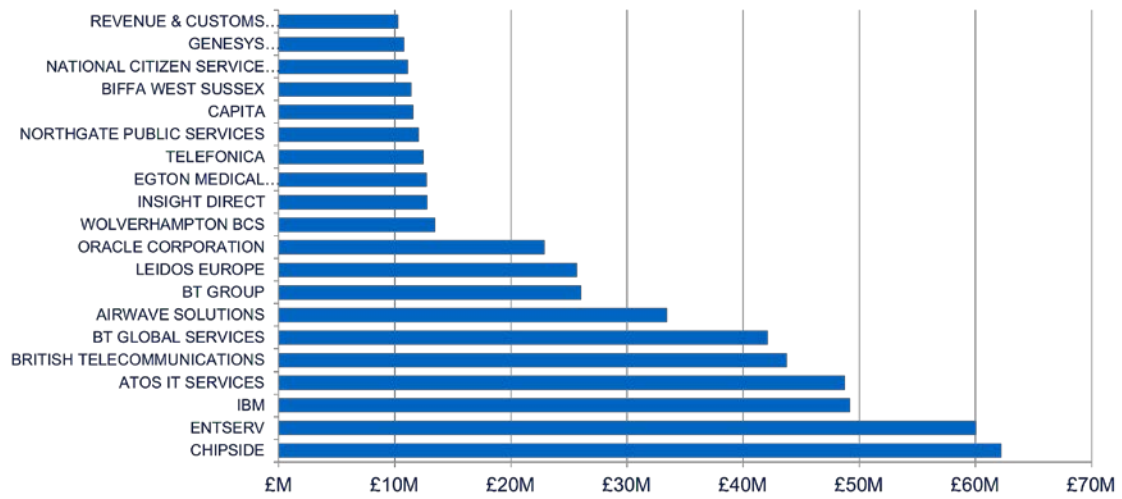


Figure 1.11 - Top 20 suppliers in ICT category by annual spend

Alternative delivery models

The ICO asked Spend Network:

To explore how public service delivery has changed over the last 10 years with the increasing use of the private sector to deliver public services and the evolution of more complex or innovative delivery models.

To achieve this, Spend Network conducted a literature review to assess how “alternative delivery models”, a broad term which captures everything that is not traditional in-house provision or orthodox outsourcing, have widened the transparency gap over the past decade.

A lack of central, public data on alternative delivery models means that a rigorous analysis of their prevalence is beyond the scope of this report. Instead we focus on major trends in central and local government and the NHS, and briefly consider other relevant transparency gap issues (such as PFI and academies). Where relevant, some of the challenges for restoring transparency under FOIA to these outsourced services are considered.

Many of the delivery models described below have been the subject of inquiries and criticism by parliamentary and research organisations. This may be read as evidence of the need to close the transparency gap and (re)introduce greater transparency into public service. For the sake of brevity, however, this research will not reproduce those criticisms or make value judgements about the merits of different models. The following sources were consulted to produce this literature review:

A Short Guide to Commercial Relationships, National Audit Office. 2017.

After Carillion: Public Sector Outsourcing and Contracting, Public Administration and Constitutional Affairs Committee. 2018.

Alternative delivery models explained (web), Department for Culture, Media and Sport. 2017.

Bring Housing Associations and Public Service Contractors under FOI, Campaign for Freedom of Information. 2017.

Commercial Councils: the rise of entrepreneurialism in local government, Localis. 2015.

Department of Health and Social Care Annual Report and Accounts 2017-2018, Department of Health and Social Care. 2018.

Evaluation of the Social Impact Bond Trailblazers in Health and Social Care, London School of Hygiene and Tropical Medicine.

The Financial Commodification of Public Infrastructure, European Services Strategy Unit. 2016.

Independent Commission on Freedom of Information Report, FOI Commission. 2016.

Making Public Service Markets Work, Institute for Government. 2013.

Open Public Services Progress Report 2014, Cabinet Office. 2014.

Outcome-based Payment Schemes: Government's Use of Payment by Results, National Audit Office. 2015.

Outsourcing Public Services, New Economics Foundation and Trades Union Congress.

Payment by Results: Analytical framework for Decision-makers, National Audit Office. 2015.

PFI and PF2, National Audit Office. 2018.

Procurement Policy Note 01/18: Supply Chain Visibility (web), Crown Commercial Service. 2018.

Public Service Mutuals: State of the Sector 2018, Social Enterprise UK. 2018.

Start a public service mutual, (web), Department for Culture, Media and Sport.

Transformation Rehabilitation, National Audit Office. 2016.

Transparency in outsourcing: a Roadmap, Information Commissioner's Office. 2015.

The Work Programme, National Audit Office. 2014.

Work Programme Evaluation: Operation of the Commissioning Model, Finance and Programme Delivery, the Centre for Economic and Social Inclusion, the National Institute

of Economic and Social Research, the Institute for Employment Studies and the Social Policy Research Unit at the University of York. 2014.

Central government and cross cutting trends

Payment by Results

The use of payment-by-results (PbR) commissioning in key sectors such as employment, probation and social services is one of the central legacies of the Coalition government's public services programme. PbR contracts specify desired outcomes and then link some or all of the payment of suppliers to their performance in respect of those outcomes.

Beyond linking payment to performance, there are two more key features which are common (but not exclusive) to PbR contracting. Firstly, the commissioning body does relatively little in terms of programme design and monitoring, and instead gives the supplier a high degree of freedom to achieve outcomes in whichever way it deems best. This is known as minimum service prescription or 'black box commissioning'. Secondly, the commissioning body often awards high-value and longer-term contracts to a 'prime contractor', which then subcontracts some or all of the contract to other suppliers with relevant expertise. When the government uses prime contractors, it relies heavily on private companies to manage long and complex supply chains of private, voluntary and public sector organisations.

In theory, PbR shifts the responsibility of designing effective programmes to service providers, who are given greater freedom to innovate, and it is cost-effective for the

state because at least some payment is linked to performance, which reduces waste¹⁵⁶. Yet reviews of several flagship PbR policies have generally not found clear evidence of these benefits in practice.¹⁵⁷

The Work Programme is a good example of PbR contracting. The policy, which ran from 2011 to 2017, aimed to help long term unemployed people back into work and linked the payment of suppliers to sustained outcomes. In most cases, suppliers were paid after they secured a client continuous employment for six months.¹⁵⁸ The programme allocated £3.3 billion in 40 contracts to 18 prime provider organisations. An estimated 80 percent of the total contract value was linked to payment by results- with the remaining 20 percent provided upfront to assist with setup costs¹⁵⁹.

¹⁵⁶ <https://www.nao.org.uk/wp-content/uploads/2015/06/Payment-by-results-analytical-framework-for-decision-makers.pdf>

¹⁵⁷ See for example the inquiry by the Public Accounts Committee on the Troubled Families Programme (2016) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news-parliament-2015/troubled-families-report-published-16-17/>, the 2018 Justice Committee on Transformation Rehabilitation <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2017/transforming-rehabilitation-17-19/>, the University of Manchester's review of the Drugs and Alcohol Recovery Payment by Results Pilot Programme http://research.bmh.manchester.ac.uk/epidemiology/NDEC/research/publications/PbRDR_Final_Report.pdf, the multi-stakeholder, comprehensive review of the Work Programme <https://www.gov.uk/government/publications/work-programme-evaluation-operation-of-the-commissioning-model-finance-and-programme-delivery>, or the Institute for Government's Making Public Service Markets Work https://www.instituteforgovernment.org.uk/sites/default/files/publications/Making_public_service_markets_work_final_0.pdf.

¹⁵⁸ Further incentives were used to put emphasis on long term outcomes, such as a sustainment fee (paid every four weeks the client remains in employment following the six month period) and larger payments to tackle more difficult cases.

¹⁵⁹ <https://www.nao.org.uk/wp-content/uploads/2014/07/The-work-programme.pdf>

The 18 prime providers in the Work Programme worked with approximately 800 subcontractors (as of March 2014), according to a joint study by the Centre for Economic and Social Inclusion, the National Institute of Economic and Social Research, the Institute for Employment Studies and the Social Policy Research Unit at the University of York conducted on behalf of the Department for Work and Pensions. The study found that 46 percent of subcontractors were privately operated, 40 percent were voluntary, community or social enterprise organisations, while 14 percent were from the public sector.¹⁶⁰ It also found that some prime contractors, including Serco and G4S, acted as “prime managing agents” and subcontracted 100 percent of service delivery¹⁶¹.

PbR is used in wide range of sectors – although the extent to which outcomes are linked to payments varies significantly. Take for example Transforming Rehabilitation, in which “Community Rehabilitation Companies” - consortia of larger prime contractors with smaller and voluntary organisations - are delivering probation services. The project is worth £3.7 billion yet only between three and ten percent of total payments will be linked to outcomes¹⁶².

There is no public data or comprehensive reporting on the scale of PbR commissioning, which makes it impossible to assess the uptake of PbR in the wider context of outsourced services. The Cabinet Office’s final report on its Open Public Services

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/425301/rr8_93-report.pdf

¹⁶¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/425301/rr8_93-report.pdf

¹⁶² <https://www.nao.org.uk/wp-content/uploads/2016/04/Transforming-rehabilitation.pdf>

programme, which drove PbR, describes active schemes across health, employment, drug recovery, housing, immigration and services for troubled families.¹⁶³

The trend towards prime contractor and black box commissioning means that outsourced services are increasingly delivered by supply chains - not individual contractors. Yet information about the design, implementation and monitoring of these supply chain services is held by private contractors. This introduces both complexity and opacity about where information is 'held' and which contractors should be subject to FOIA. Designating contract signatories under the FOIA may not necessarily close the transparency gap - it may be necessary to designate subcontractors. However, there is no public data on the contracting arrangements between prime contractors and their suppliers¹⁶⁴, which makes it harder to determine an appropriate threshold based on public sector data.

Social Impact Bonds

Social Impact Bonds (SIBs) are PbR schemes in which public service commissioners work with private and/or third sector partners who provide both upfront investment and the delivery of the service. The investors are then paid a premium linked to the outcomes of the programme. For example, a project called Positive Families Partnership was jointly commissioned in 2018 by five London boroughs (Sutton, Tower Hamlets, Bexley, Merton and Newham). It aims to prevent 350 young people in "at-risk families" from being taken

¹⁶³ <https://www.gov.uk/government/publications/open-public-services-2014-progress-report/open-public-services-2014>

¹⁶⁴ As of April 2018, prime contractors who hold a contract worth more than £5m per annum are required to post tender and award notices on Contracts Finder relating to subcontracting opportunities worth £100,000 or more. It is too early to assess whether they are complying with this requirement. The Crown Commercial Service (CCS) collects data on prime contractor supply chains but does not publish this information due to perceived issues around commercial confidentiality.

<https://www.gov.uk/government/publications/procurement-policy-note-0118-supply-chain-visibility>

into care (an expensive procedure for councils with negative outcomes for young people's education and future prospects).

£4.5m in upfront capital for the Positive Families Partnership is provided by Bridges Fund Management, a private venture focused on "sustainable and impact investment" with further support provided by the Big Lottery Fund. The councils are obliged to pay Bridges Fund Management £214 per week for every child that is not in care over a four year period - with a maximum total payable of £10m.

The initiative aims to use "family support therapies" to "identify and address the trigger points for problematic behaviour"¹⁶⁵ and will contract three specialist organisations to deliver these services; a social enterprise incorporated in 2015, a charity which has "been building stronger families since 1869"¹⁶⁶ and the South West London & St George's Mental Health NHS Trust. There is no public information on the contracting arrangements between the parties.

SIBs have received lots of press but the sums involved are relatively small. There are 40 SIB schemes in the UK (of 108 worldwide), which have collectively raised £40.3m in capital, according to Social Finance, the organisation which developed the SIB model¹⁶⁷.

PFI and PF2

The use of Private Finance Initiative (PFI) projects to outsource services has declined since 2008, however, the taxpayer will still pay almost £200 billion for services (at approximately £10 billion per year) under existing arrangements.

¹⁶⁵ <https://www.socialfinance.org.uk/projects/positive-families-partnership>

¹⁶⁶ <http://fpmcic.com/visionmissionvalues.php>

¹⁶⁷ <http://sibdatabase.socialfinance.org.uk/>

In PFI schemes, a public sector body contracts a consortium of private companies, via an incorporated Special Purpose Vehicle (SPV), to finance, build and maintain an infrastructural asset, such as a road, hospital or school. Rather than raising capital for investment, the public body tenders a contract and then makes an annual payment to the successful bidder for the duration of the contract, which is usually between 20 and 30 years.

The initiative was introduced by the 1992-1997 Conservative government and usage of the scheme expanded under New Labour. The initiative later attracted significant public and parliamentary criticism and was redesigned as the (highly similar¹⁶⁸) PF2 under the Coalition government. There are 715 PFI and PF2 projects in operation according Treasury data, which currently cost the taxpayer more than £10 billion per year.¹⁶⁹

Since PF2 was introduced in 2012 only six projects have been tendered - while just one (in Northern Ireland) is currently in procurement (compared to 32 in 2007 alone)¹⁷⁰. Despite this slowdown in commissioning, the taxpayer will still pay at least £199 billion to honour existing contracts, some of which run into the 2040s, according to the National Audit Office¹⁷¹.

Closing the PFI transparency gap requires additional thought, because the use of contract values as a threshold to designate PFI suppliers under FOIA would need to be retrospective to be effective. Using transaction data (on future spending) may be more appropriate in this instance.

¹⁶⁸ <https://www.nao.org.uk/wp-content/uploads/2018/01/PFI-and-PF2.pdf>

¹⁶⁹ <https://www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2017-summary-data>

¹⁷⁰ <https://www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2017-summary-data>

¹⁷¹ <https://www.nao.org.uk/wp-content/uploads/2018/01/PFI-and-PF2.pdf>

A growing trend in maturing PFI/PF2 projects is for companies to sell their equity in the SPV. This frequently happens once the construction of the asset - the riskiest phase of the project - is complete and project debt can be refinanced. The total value of PFI equity transactions was £12bn between 1998 and 2012, but had reached £17.1bn by 2016 - a 42.5% increase in less than four years, according to the European Services Strategy Unit (ESSU).¹⁷²

The main buyers of PFI equity are infrastructure funds, many of which are registered outside the UK in offshore locations such as Jersey, Guernsey and Luxembourg. ESSU research states that (as of 2016) nine infrastructure funds, all of which were registered offshore, owned a majority stake (50-100 percent) in 334 of the UK's PFI projects (45 percent of all projects)¹⁷³.

Given that PFI equity is now owned offshore, there may be issues around where information is 'held' for the purpose of FOIA - as well as jurisdictional compliance issues. The ICO may wish to consider whether a corporation headquartered in Jersey could be subject to the FOIA 2000.

Public Service Mutuals

Public service mutuals, according to the government, "are organisations that have left the public sector but continue delivering public services" and in which "employees play a significant role in their operation."¹⁷⁴ The Coalition government created support for

¹⁷² <https://www.european-services-strategy.org.uk/wp-content/uploads/2017/01/financial-commodification-public-infrastructure.pdf>

¹⁷³ <https://www.european-services-strategy.org.uk/wp-content/uploads/2017/01/financial-commodification-public-infrastructure.pdf> p21

¹⁷⁴ <https://www.gov.uk/government/get-involved/take-part/start-a-public-service-mutual>

mutuals through the Right to Provide which gave public sector workers “a right to take over and run services themselves as an employee-led mutual.”¹⁷⁵

One example is East Coast Community Care CIC, a social enterprise in which 77 percent of its 350 staff are also shareholders. The organisation, incorporated in 2011, provides NHS community health services across Norfolk and Suffolk. The organisation turned over £37m in 2016-17 and has 70,000 registered service users.¹⁷⁶

According to a 2018 report by Social Enterprise UK for DCMS, an estimated 115 public service mutuals have ‘spun out’ since 2011. The estimated combined turnover of the 115 mutuals is a £1.6 billion, with turnover ranging from £200k to £100m+.¹⁷⁷ 76 percent of the mutuals’ income comes from trading with the public sector, with another seven percent generated through government grants.¹⁷⁸ Thus, around four-fifths of their estimated £1.6 billion income is funded through taxation.

These mutuals work in healthcare, social care and education, among other sectors. A mutual is not a legal form and more than half of those surveyed by Social Enterprise UK were incorporated as Community Interest Companies.

¹⁷⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/215662/dh_128174.pdf

¹⁷⁶ <http://www.ecch.org/media/16308/ecch-annual-report-2016-17-final.pdf>

¹⁷⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715302/Partnerships_for_Better_Public_Services_2018.pdf

¹⁷⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722052/Public_Service_Mutuals_-_State_of_the_Sector_April_2018.pdf

Local bodies

Local authorities are partnering with the private sector in efforts to reduce costs while retaining some control over the governance of outsourced services. Meanwhile, councils are delivering public services on both a for-profit and not-for-profit basis through trading companies. In both cases, the transparency of the public pound is diminished.

While both models predate the Coalition government, it is acknowledged that use of these models increased after years of austerity policies. Tracking the growth of local government alternative delivery models precisely is difficult - and outside the scope of this report - because central government does not maintain public data or records. The examples provided below are illustrative of wider trends. Local authorities also can and do use PbR, PFI and public service mutuals, which are described in the section above.

Joint ventures

Joint ventures are partnerships between a public body and other public, private or third sector bodies, which can be incorporated in a range of forms (such as Limited Company by Shares, Limited Company by Guarantee, or Limited Liability Partnership). There is no central, public data available on joint ventures at the national level, however, the results of a local government survey suggest they are widely used. The think tank Localis reported in 2016 that: "A majority of councils (57%) operate a joint venture with the private sector", according to results from a survey of 150 "key local government figures – including chief executives, leaders, cabinet members and chief finance officers"¹⁷⁹.

Many joint ventures are Companies Limited by Shares held by a single council and a large private company. For example, in 2013 Staffordshire County Council and Capita formed a company called Entrust Support Services Limited, which is 51 percent held by

¹⁷⁹ <http://www.localis.org.uk/wp-content/uploads/2016/02/Localis-Commercial-Councils-FINAL.pdf>

Capita and 49 percent by the council¹⁸⁰. Entrust provides “school to school support services” for 700 schools and as part of the deal approximately 4,000 council employees were transferred to the joint venture¹⁸¹. The contract is 20 years long and expected to generate £85m per annum in revenue - a total of £1.7 billion¹⁸².

Joint ventures can include multiple public and private sector parties. For example, Southwest One Limited, a joint venture between Somerset County Council, Taunton Deane Borough Council, Avon and Somerset Police, which together held 25 percent of shares, and the contractor IBM, which held the remaining 75 percent, provided ICT, customer contact and other back office services¹⁸³. The ten year contract, signed in 2007, was reported to be worth £535 million, although Somerset County Council terminated its contract a year before it expired¹⁸⁴.

There are also examples of explicitly for-profit joint ventures, such as the Inglis Consortium, a Limited Liability Partnership composed of two private companies and the London Borough of Barnet. The LLP aims to build and sell more than 2000 houses on brownfield sites in Barnet - with the borough entitled to 13.9 percent of future profits.¹⁸⁵

¹⁸⁰ <https://beta.companieshouse.gov.uk/company/04440463/filing-history>

¹⁸¹ <https://www.bbc.co.uk/news/uk-england-stoke-staffordshire-20604842>

¹⁸² <https://www.computerworlduk.com/it-vendors/capita-closes-in-on-17bn-deal-with-staffordshire-county-council-3413542/>

¹⁸³ <https://beta.companieshouse.gov.uk/company/06373780/filing-history>

¹⁸⁴ <https://www.bbc.co.uk/news/uk-england-somerset-35039696>

¹⁸⁵ <https://beta.companieshouse.gov.uk/company/OC361803>

Local Authority Trading Companies

Local Authority Trading Companies (LATCs) are companies which are wholly owned by a local authority but have the freedom to trade as a commercial company (provided by the Local Government Act 2003 and the Localism Act 2011). Research by the think tank Localis suggests LATCs are widely in use: "More than half of councils (58%) own a trading company, and at the rate it is increasing, full coverage by 2020 is a possibility"¹⁸⁶.

LATCs are prevalent in the social care sector. A report in the Guardian states: "It is estimated that about 20 social care LATCs are now trading in England and Scotland, with many more in the pipeline."¹⁸⁷ Notable examples of larger social care LATCs include Norse Group and Essex Cares Limited, which are owned by Norfolk County Council and Essex County Council respectively. In 2015, Dorset, Bournemouth and Poole councils created the Tricuro group of companies, which they collectively own, to provide adult social care services to the county of Dorset. In 2017-18 Tricuro turned over £41.4m.

LATCs come in different shapes and sizes. In 2015, Knowsley Metropolitan Borough Council created a limited company by guarantee called Volair. It has a 15 year contract to operate the council's leisure facilities on a "not for profit basis" - on which future surpluses are reinvested in the community - and reported a turnover of £5.3m in its first year of trading¹⁸⁸.

¹⁸⁶ <http://www.localis.org.uk/wp-content/uploads/2016/02/Localis-Commercial-Councils-FINAL.pdf>

¹⁸⁷ <https://www.theguardian.com/social-care-network/2015/oct/14/could-local-authority-trading-companies-save-social-care>

¹⁸⁸ <https://beta.companieshouse.gov.uk/company/09910942/filing-history>

Academies

Academies were introduced by the Blair government as a tool to improve failing schools in England. The Coalition and May Governments increased the conversion of schools to academies dramatically. Academies receive funding directly from central government and are operated by charitable trusts. There were 203 academies in 2010, but today 32 percent of all 21,950 primary, secondary, special, and pupil referral unit schools are now academies, which represents a huge shift of service provision out of the public sector.¹⁸⁹ The government made academies subject to FOIA by virtue of the Academies Act 2010, which is a notable example of the expansion of FOIA to bodies delivering services outside of the traditional public sector.

3. Health and social care

More than £10 billion per year is now spent on non-NHS providers of healthcare. The use of private contractors began under New Labour and significantly increased during and after the Coalition government.

Table 2.1 shows annual spending across the Department of Health and Social Care and the NHS on non-NHS bodies.

Table 2.1 - Annual spending by Department of Health and Social Care and NHS on non-NHS bodies

Body	2014-15 (£m)	2015-16 (£m)	2016-17 (£m)	2017-18 (£m)
Independent Sector Providers	8067	8722	9007	8765
Voluntary Sector	527	641	757	1564
Local Authorities	1774	2869	2909	2737
Devolved Administrations	no data	no data	73	43

¹⁸⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666871/Ofsted_Annual_Report_2016-17_Accessible.pdf#page=31

Total spend on non-NHS bodies	10367	12232	12746	13109
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Sources: Table 36, Department of Health and Social Care annual report and accounts 2017-18¹⁹⁰ and Table 10, Department of Health annual report and accounts 2015-16¹⁹¹

The majority of NHS spending is now commissioned by Clinical Commissioning Groups (CCGs) and local authorities following sweeping reforms to the NHS. The Health and Social Care Act 2012 localised responsibility for commissioning and introduced greater competition into the delivery of services. 195 CCGs, composed of local GPs and other health professionals, now have primary responsibility for commissioning health services that meet "reasonable local needs". Collectively CCGs are responsible for about two thirds of the DHSC's £120 billion budget.

Despite this responsibility, CCGs are exempt from the requirements to publish data on their transactions, so there is no way to monitor their spend with external organisations. However, according to the DoH accounts spent £63.1 billion of their £81.3 billion budget with NHS Foundation Trusts in 2017-18¹⁹².

The Care Act 2014 established the Better Care Fund, which requires local authorities and CCGs to pool some of their budgets to deliver integrated care. In 2017-18 these organisations pooled a total of £7.3 billion¹⁹³ and this figure is expected to grow in the

¹⁹⁰ <https://www.gov.uk/government/publications/dhsc-annual-report-and-accounts-2017-to-2018>

¹⁹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539602/DH_Annual_Report_Web.pdf

¹⁹² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728780/Department_of_Health_Annual_Report_Accounts_Web_Accessible_NEW.pdf

¹⁹³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728780/Department_of_Health_Annual_Report_Accounts_Web_Accessible_NEW.pdf

coming years. This money is spent individually via local authorities and CCGs, which are mandated to work together.¹⁹⁴

Local authorities are also now responsible for providing or commissioning a range of services including alcohol and drug misuse services, public health services for children and young people aged 5-19, public mental health services, and a range of local initiatives to promote healthy lifestyles¹⁹⁵.

Personal Health Budgets

In 2007 the government introduced the personal health budget: a sum of money allocated directly by a local authority to an adult with residential social care needs. The personal health budget can be managed by the local authority, a third party, or directly by the recipient. In the latter direct payment model, public money flows from the local authority to the service recipient who then spends it with their provider of choice - from the public, private or third sector. To monitor Personal Health Budget spending local authorities will need to compile statistics on the use of direct payments with suppliers but there appears to be no central policy on whether and how to do this.

The Care Act 2014 expanded the use of personal health budgets by mandating local authorities to provide personal health budgets to all eligible adults with both residential and community care needs¹⁹⁶. As of April 2018, more than 23,000 people were receiving personal health budgets, and although there is no public data on the costs of the scheme, the provision of weekly professional care is not cheap. The government intends

¹⁹⁴ <https://www.kingsfund.org.uk/publications/health-wellbeing-boards-explained>

¹⁹⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216712/dh_131901.pdf

¹⁹⁶ <https://www.nao.org.uk/wp-content/uploads/2016/03/Personalised-commissioning-in-adult-social-care-update.pdf>

to expand PHBs further. They are contained within the Five Year Forward View¹⁹⁷ - while a government consultation which proposed expanding personal health budgets to up to 350,000 people closed in June this year¹⁹⁸. It is feasible that a significant amount of public funding for social care will be spent through direct payments in the near future.

Conclusion

Public service delivery has grown more complex and more reliant on groups of private companies working in supply chains. This introduces opacity about where information is held and raises questions about which subcontractors should be considered for designation under FOIA. While PFI commissioning has slowed, existing liabilities create a transparency gap worth more than £10 billion per year.

At the local level, the lines between public and private sector service delivery have blurred as local authorities enter joint ventures with private companies and some start to trade on for-profit and not-for-profit bases. However, this growing area of quasi-commercial activity is removed from public scrutiny offered by the FOIA.

The transparency of NHS commissioning has been reduced by the creation of CCGs, and the lack of transparency around their spending, while the use of Personal Health Budgets, changes the basis on which subsidised social care is provided. These changes make it impossible to effectively track how public money is being spent on healthcare.

¹⁹⁷ <https://www.england.nhs.uk/wp-content/uploads/2017/03/NEXT-STEPS-ON-THE-NHS-FIVE-YEAR-FORWARD-VIEW.pdf>

¹⁹⁸ <https://consultations.dh.gov.uk/commissioning-integration-and-transformation/extending-rights-to-personalised-budgets/>

Threshold analysis

The ICO asked Spend Network:

"To identify a possible appropriate monetary threshold for designation of government contractors and any other alternative or complementary methods that may be appropriate for identifying contractors for designation under the legislation."

Spend Network analysed the potential impact of three thresholds

Contract value

Contract duration

Transaction value

Contract value

Under this threshold the signatories of contracts which have a value greater than a specified limit would be designated as public authorities under s5 FOIA 2000.

To explore the use of contract value as a threshold, Spend Network analysed a sample of 156,359 contract notices published since 2014 that were gathered from over 3,000 different publishers, and published in more than 70 different sources, including contracting portals and open data returns published by public bodies.

Spend Network identified 121,230 contracts that were published, with a value, and this data was divided into five thresholds as follows:

Table 3.1 - Contracts by value threshold

	Total contracts	Total %	Cumulative count	Cumulative %	Total spend	Contract value
>10,000,000	5,695	4.7%	5,695	4.7%	£ 1,054,280,630,148	48.8%
5,000,000 - 10,000,000	3,258	2.7%	8,953	7.4%	£ 23,692,043,402	1.1%
1,000,000 - 5,000,000	13,207	10.9%	22,160	18.3%	£ 30,270,106,409	1.4%
500,000 - 1,000,000	9,032	7.5%	31,192	25.7%	£ 6,677,283,267	0.3%
<500,000	90,038	74.3%	121,230	100.0%	£ 1,044,580,419,370	48.4%
total	121,230	100%			£ 2,159,500,482,595. 95	100%

The data suggests that contracts worth more than £10m account for 4.7 percent of the account by volume but 48.8 percent by value. Concerns remain about the quality of this data, EU procurement rules require buyers who exceed contract values by 20% or more to re-tender their contracts, so there is a powerful incentive to over value contracts and thereby avoid the prospect of retendering.

2. Contract duration

Under this threshold the signatories of contracts which exceed a specified duration would be designated as public authorities under s5 FOIA 2000.

Spend Network used the same sample of 156,359 contracts to explore contract duration. In this case, just 79,810 (51%) contracts were published with enough information to

determine the length of the contract. We grouped the contracts that had valid duration values into 11 bands.

Table 3.2 shows the distribution of these contracts by their length and value.

Table 3.2 - Distribution of contracts by length and value

	total contracts	total %	cumulative count	cumulative %	total spend	contract value
10+	467	0.6%	467	0.6%	£ 96,680,301,156	16.1%
8yrs - 9yrs	333	0.4%	800	1.0%	£ 9,137,617,666	1.5%
7yrs - 8yrs	182	0.2%	982	1.2%	£ 3,081,522,478	0.5%
6yrs - 7yrs	316	0.4%	1298	1.6%	£ 6,685,321,660	1.1%
5yrs - 6yrs	915	1.1%	2213	2.8%	£ 20,765,127,197	3.5%
4yrs - 5yrs	1691	2.1%	3904	4.9%	£ 30,827,706,816	5.1%
3yrs - 4yrs	5348	6.7%	9252	11.6%	£ 42,769,492,028	7.1%
2yrs - 3yrs	8126	10.2%	17378	21.8%	£ 251,473,685,047	42.0%
1yrs - 2yrs	24680	30.9%	42058	52.7%	£ 123,752,061,373	20.7%

< 1yrs	37750	47.3%	79808	100.0%	£ 13,542,537,546	2.3%
total	79808	100%			£ 598,715,372,966.58	100%

The data suggests that contracts which are 2-3 years in length account for 10 percent of the total by volume but 42.0 percent by value. A threshold of five years would capture 4.8 percent of contracts by volume but 27.8 percent by value. A threshold of two years would capture 21.8 percent of contracts by volume but 77 percent by value.

3. Transaction value

Under this threshold government suppliers who receive revenue above a specified level would be designated as public authorities under s5 FOIA 2000.

To study this threshold, Spend Network used a sample of the 1,000 largest suppliers to government (excluding large, publicly owned companies) for the period October 2013 to March 2018. The data accounts for a total of £130.4 billion of spending at an average of £28.9 billion per year [JH5]. We grouped the 1,000 suppliers into eight bands based on their average annual income.

In the top band, of £100m and above, is a group of 62 large companies such as Capita, Carillion and Capgemini that collectively process more than half of all spending in the sample. In the lowest band, of £2.5m and below, earnings were just 2% of the cumulative value in the highest band. In the lowest band, there were 147 businesses in a wide range of sectors including recruitment, real estate and social care.

Table 3.3 shows the distribution of suppliers and their average annual revenues by band over the full period.

Table 3.3 - Distribution of suppliers and their average annual revenues by band

Band	Supplier count	Cumulative supplier count	Cumulative supplier count %	Average annual revenue in band	Revenue in band %	Cumulative revenue in band (%)
>100,000,000	62	62	6.2	£ 14,724,127,066	50.8	50.8
75,000,000 - 100,000,000	25	87	8.7	£ 2,202,979,502	7.6	58.4
50,000,000 - 75,000,000	44	131	13.1	£ 2,701,185,696	9.3	67.7
25,000,000 - 50,000,000	107	238	23.8	£ 3,888,859,184	13.4	81.1
10,000,000 - 25,000,000	185	423	42.3	£ 3,001,793,434	10.4	91.5
5,000,000 - 10,000,000	181	604	60.4	£ 1,282,993,559	4.4	95.9
2,500,000 - 5,000,000	249	853	85.3	£ 900,955,885	3.1	99
<2,500,000	147	1000	100	£ 290,353,733	1	100
Total	1000	-	-	£ 28,993,248,058 .44	100	-

Setting a threshold at £10m and above would affect 42.3 percent of companies and capture 91.5 percent of transactions by value. It would also place almost no additional

burden on small companies, which are defined in the Companies Act as having less than £10.2m in revenue.

SMEs

In determining an appropriate threshold, the ICO needs to capture as much of government's net spend with suppliers as possible, without unduly burdening SMEs.

The Companies Act 2006 defines small and medium businesses as those with annual revenue of less than £10.2m and £36m respectively (while also evaluating balance sheet and staffing criteria)[1].

One option could be to set a robust threshold (whether based on contract value, duration of transactions) that captures a high proportion of government spending, and then simply exempt small and/or medium businesses.

Central government direct and indirect spending with SMEs is monitored and would provide a statistical basis to assess the size of the 'SME transparency gap' that would be created through exemption.

There would be a number of issues to consider, however, including that of subsidiaries. In Spend Network's data on the 1000 top supplies, for example, there are numerous companies that earn under the small business revenue threshold but that belong to larger corporate groups. Examples include E.ON Energy Solutions Ltd, Carillion Services Ltd and Reed Employment Ltd.

Effect of spend thresholds

Spend Network added a sector analysis of top suppliers, ordered by spend and volume of contracts in Tables 3.4 and 3.5 below. These tables show not only who the key players are but who the likely target for requests for information are likely to be and whether or not these suppliers are delivering services on behalf of the public. For instance, local government service providers are more likely to provide frontline public services, and are more likely to trigger FOI requests from citizens.

Spend Network Suppliers with an annual spend in excess of £300m by sector:

Table 3.4 - Suppliers with average annual spend over £300m by sector, by value

Supplier name	Central Government	Local Government	NHS	Devolved Government	Public Corps	Grand Total
CARILLION CONSTRUCTION LIMITED	£804,110,673	£97,430,472	£21	£34,244,814		£935,785,981
TELEREAL TRILLIUM LIMITED	£793,354,889	£601,163			£20,303	£793,976,355
COSTAIN LIMITED	£582,286,698	£85,233,635		£45,591,359		£713,111,692
SERCO LIMITED	£392,749,780	£230,507,313	£31,106,491		£42,330,889	£696,694,473
ENTSERV UK LIMITED	£659,908,752	£5,082,904	£2,831,980			£667,823,636
ATOS IT SERVICES UK LIMITED	£513,267,554	£3,528,105	£1,436,602	£38,281,551	£23,060,352	£579,574,164
CAPGEMINI UK PLC	£520,030,920	£26,801,112	£85,953	£11,668,169	£462,857	£559,049,011

FUJITSU SERVICES (ALCEDO) LIMITED	£486,677,922	£34,143,795	£15,070		£457,638	£521,294,424
ASPIRE DEFENCE LIMITED	£495,371,009					£495,371,009
IBM UNITED KINGDOM LIMITED	£418,503,089	£33,625,619	£196,240	£34,258	£2,092,954	£454,452,161
KIER HIGHWAYS LIMITED	£379,522,724	£72,596,462				£452,119,185
CSC COMPUTER SCIENCES LIMITED	£399,398,439	£8,339,533	£27,990,363			£435,728,335
EDF ENERGY CUSTOMERS PLC	£406,733,909	£6,202,512	£11,139,824		£2,265,552	£426,341,795
FIRMSTEP LTD	£18,916	£381,426,800				£381,445,716
RINGWAY JACOBS LIMITED	£69,543	£370,756,047				£370,825,590
ATKINS LIMITED	£263,767,778	£94,825,176	£265,384	£211,055	£359,665	£359,429,058
BALFOUR BEATTY RAIL LIMITED	£283,827,622	£75,000,342				£358,827,964

WILLMOTT DIXON CONSTRUCTIO N LIMITED	£13,118,162	£331,586,681	£7,136,820			£351,841,663
BRITISH ENERGY DIRECT LIMITED	£349,353,121					£349,353,121
BAE SYSTEMS SURFACE SHIPS LIMITED	£347,587,975	£171,429				£347,759,404
COMENSURA LIMITED	£1,040,942	£338,188,385	£5,101,090			£344,330,417
NHS PROFESSIONAL S LIMITED			£330,315,713			£330,315,713
BT GROUP PLC	£322,810,202	£7,333,557				£330,143,759
KIER CONSTRUCTIO N LIMITED	£68,292,485	£205,613,631	£49,905,930		£10,370	£323,822,415
SKANSKA CONSTRUCTIO N UK LIMITED	£163,304,937	£156,953,415				£320,258,352
BAM NUTTALL LIMITED	£272,735,873	£38,673,117		£4,333,911		£315,742,902

Table 3.5 - Suppliers with average annual spend over £300m by sector, by volume

Supplier	Central Govt customers	Local Govt	NHS	Devolved Govt	Public Corps	SUM of customers
CARILLION CONSTRUCTION LIMITED	11	57	1	1		70
TELEREAL TRILLIUM LIMITED	13	10			1	24
COSTAIN LIMITED	9	17		1		27
SERCO LIMITED	27	130	18		3	178
ENTSERV UK LIMITED	12	4	9			25
ATOS IT SERVICES UK LIMITED	34	44	11	2	4	95
CAPGEMINI UK PLC	23	24	3	1	1	52
FUJITSU SERVICES (ALCEDO) LIMITED	28	32	2		2	64
ASPIRE DEFENCE LIMITED	1					1
IBM UNITED KINGDOM LIMITED	40	112	7	1	5	165
KIER HIGHWAYS LIMITED	2	19				21

CSC COMPUTER SCIENCES LIMITED	14	39	87			140
EDF ENERGY CUSTOMERS PLC	9	72	18		3	102
FIRMSTEP LTD	3	51				54
RINGWAY JACOBS LIMITED	1	25				26
ATKINS LIMITED	33	142	6	1	1	183
BALFOUR BEATTY RAIL LIMITED	3	3				6
WILLMOTT DIXON CONSTRUCTION LIMITED	6	89	4			99
BRITISH ENERGY DIRECT LIMITED	1					1
BAE SYSTEMS SURFACE SHIPS LIMITED	5	1				6
COMENSURA LIMITED	2	72	2			76
NHS PROFESSIONALS LIMITED			31			31
BT GROUP PLC	2	10				12

KIER CONSTRUCTION LIMITED	14	86	29		1	130
SKANSKA CONSTRUCTION UK LIMITED	3	26				29
BAM NUTTALL LIMITED	9	40		1		50

Limitations of the data

Although we have been able to use Spend Network's extensive data set, we remain concerned that the published data lacks either sufficient detail or sufficient accuracy to be wholly confident of where a threshold for inclusion in FOIA should apply.

Both the spend data and the contract data have been linked to Companies House records by Spend Network on a 'best efforts' basis. Subsequently it is likely that not all possible matches have been made and that some suppliers have been in receipt of more payments or contracts.

We are particularly concerned about the quality of the contract data, the majority of which lacks data on either duration or value. We are also concerned that there is a strong incentive for buyers to inflate the value of their published contracts, as this data is used as the baseline measurement from which overspending is calculated. Under EU legislation, should a buyer exceed the value of a contract by 10% then the buyer must publish a notice stating that the budget has been exceeded to the EU tendering portal TED (<https://ted.europa.eu>). Should the buyer exceed the value of the contract by 20% then it is necessary for the contract to be retendered.

The threat to re-tender a contract likely influences buyers to publish inaccurate data. This is particularly true of framework contracts that are made available to large numbers of

buyers and where it can be very difficult to project the likely use of the framework during its lifetime.

It is important to note that whilst the poor data impacts the report, the quality of the published data, specifically the contract data, provides a good illustration of the transparency gap in action. With so little viable data on contracting it is hard to know precisely where the transparency gap exists and subsequently how to ensure that FOI provision is maintained.

Conclusion

It is possible that some combination of thresholds may be used to designate suppliers under FOIA. For example, where a supplier maintains an average revenue above a certain threshold, calculated over the preceding three or more years, and/or a supplier holds contracts above a certain value or over a certain duration.

This option to apply multiple thresholds is common for suppliers. For instance Companies House applies multiple thresholds to the requirement to submit full or abbreviated accounts. In the same way, applying a threshold on the average volume of revenue for suppliers, as well as on contracts above a certain value or duration threshold, would allow for a sophisticated mechanism by which a threshold is applied.

The largest suppliers, would be captured, even if they do not have contracts in excess of the threshold, but some providers, who may have a large contract with one public body, but may not have a particularly significant portfolio of contracts across the Government would also be captured on a contract by contract basis.

Some care needs to be taken to manage the threshold in the use of framework contracts, deploying it only on the agreements with individual buyers following a further competition under the framework.

However, a multiple threshold strategy can only be adopted if there is a significant improvement in the publishing of contract data. At the current time, it is hard to rely on the published values of contracts, very few contracts let underneath frameworks are published, especially by the wider public sector. Successful publishing of these contracts will need to link back to the original framework contract, so that the whole purpose and nature of a contract can be known.

[https://www.legislation.gov.uk/ukpga/2006/46/section/465;](https://www.legislation.gov.uk/ukpga/2006/46/section/465)

<https://www.legislation.gov.uk/ukpga/2006/46/part/15/chapter/1/crossheading/companies-subject-to-the-small-companies-regime>

Transparency clause analysis

The ICO asked Spend Network:

"To assess the take up and success of standard transparency clauses in contracts, and how well this is working in practice to help the public to access information about contracts with the public sector.

This should include illustrations of a range of contracts, both local and central government, illustrating good and bad transparency practices. Again, this need not be exhaustive but it should help the Commissioner evidence that the "light touch" approach advocated in the 2015 discussion "roadmap" document has not worked effectively enough."

Spend Network proposed to analyse a sample of 60 relevant contracts to assess whether and to what extent standard transparency clauses have been adopted, particularly after the introduction of the government Model Services Contract.

The Model Services Contract

The Model Services Contract (MSC) is a best practice document published by the Crown Commercial Service (CCS), which public bodies are advised but not obliged to use when procuring services with a value of above £10m. In May 2016 a clause, titled Transparency and Freedom of Information (henceforth the 'transparency clause') was added to the MSC.

To assess implementation, Spend Network first attempted to obtain contracts with a value of above £10m and review whether the transparency clause was used. After conducting rigorous searches across UK public procurement portals we established that there are no published contract documents that contained the 'transparency clause'. These specifications were: open and accessible contracts that did not require registration or a procurement portal and/or subscription to the tender of value above £10m, published after May 2016.

We then consulted the CCS, which confirmed it does not monitor the usage or implementation of the MSC. As proposed, Spend Network consulted informally with relevant contacts in government, research organisations, and public law experts. Without exception, none of these people had worked with or heard of an organisation using the MSC.

Spend Network has determined there is no evidence on which to review the success or failure of the MSC. We informed the ICO of this in late August 2018.

Wider practices of transparency in procurement portals

To assess the take up and success of other transparency clauses in contracts, Spend Network gathered a sample of contracts and other documents associated with tendering from three procurement portals: Contracts Finder, Due North and G-cloud.

To obtain our sample of contracts, we gathered documents in any case when there was a url link to a document attached to the open portal at the time we looked at it. We converted any document we found into pdf that was not already in this format and manually sorted them into six categories:

Final contracts

Sample/template contracts

Terms and conditions

Copyright and Intellectual Property documents including Non-Disclosure Agreements
Specifications and requirements

Procurement process documents (e.g. Invitations to Tender, Pre-Qualification Questions,
adverts and award letters)

From circa 43,000 tenders and contract notices published after May 2016, we identified almost 500 tenders with documents. From these 500, we found 55 final contracts, yielding a contract publish rate of 11.16%.

At first glance, this appears remarkably low. However the rationale behind our methodology was to assess the data through the lens of transparency, looking at publicly available data. This means that we obtained readily available documents accessible without the need to log into portals, link to another portal and/or subscribe to content.

That we could not find final, signed contracts that are openly accessible does not mean these do not exist. Inevitably there would be other documents available if we were logged in; contract documents from specification to final award notices are often published behind logins and/or a subscription ('register interest') in order to access the documents.

Therefore the data at our disposal is not collectively exhaustive, not meant to be collectively exhaustive and should not be treated as such. The purpose of the analysis for this question is not to assess whether contracts are published but to assess, for publicly available information, how transparent the data is. The issue our analysis seeks to address is to assess the ease with which a lay member of the public can, through publicly available information, identify whether a contract is subject to FOI or similar open information clauses such as the MSC. If a member of the public needs to register for one or more portals and/or subscribe then this is not considered to be ease of access for the purpose of our study.

Web portals for procurement documents often require a) registration and/or b) subscription. Without one or even both, documents are not available for users to see. Given the inherent scope of our research, these documents are not included in our analysis. This is why the sample size is reduced from 43,000 to 55.

Assessing transparency in contracting

Spend Network then manually inspected these 55 final contracts with the aim of observing the use of different transparency and Freedom of Information Act clauses, as well as the use of restrictive clauses such as those concerned with intellectual property and copyright.

There is no systematic publishing of the agreed contract documents in the public sector, despite guidance to the contrary. What data we found were proposed contracts and not actual agreed contracts. The sample we created was extremely small and not representative but instead, it reflected the proactive transparency bias of the publishing organisations. Moreover, many contracts are published in a redacted format which makes it difficult to understand the deal in full context.

Spend Network proceeded to inspect the contract documents to explore their research value. However, it soon emerged that an analysis of the documents could not be depended upon as a robust source for research. The large majority of them are Call Off Contracts published by the Crown Commercial Service (CCS), and therefore not representative of any wider trends, while a substantial number were also published by the MoD. Both sets of documents included clauses on FOIA and transparency, but did not include the MSC.

Spend Network identified a handful of examples of proposed DEFRA, DfID and the DfE contracts using the FOIA clauses. These have been reproduced below with full contracts in the annex. Interestingly, both DfID and DfE used clauses that extend FOIA to cover

subcontractors. There are instances where public bodies did not use a FOIA clause, including the DfE (in a different contract) and Cambridge University.

However, from the small sample of those contract documents that Spend Network was able to analyse, there appears to be no indication of the existence of a signed and ratified agreement wherein the parties specified that information would be held on behalf of a public authority in the event of a Freedom of Information request. The absence of any examples of these or the MSC, alongside a very small sample showing inconsistent use of FOIA principles makes it impossible to know if the MSC is in use.

We would conclude that it is extremely likely that it is not in use. Nonetheless, an inherent contradiction exists: entities are encouraged to put a transparency clause within the contract yet, as previously noted, there is no systematic publishing of contract documents, so even if the MSC were in extensive use, it would be impossible to determine where it was being used. As such, it would be an open clause in a closed system, effectively defeating the purpose of having an open clause in the first instance.

Purchasing entity analysis

The ICO asked Spend Network:

"To identify key organisations other than contractors that are not covered by the FOIA, the EIR or both but which nevertheless may carry out work that may be described as a "public function"."

After further consultation with the ICO, Spend Network explored whether there was evidence of buyers that were not covered by FOIA which were providing public services.

To investigate Spend Network analysed a list of 19,943 names of entities that had published a total of 1,139,044 tenders using one of the UK's tender portals in the last four years.

Using matching algorithms Spend Network were able to cluster this down to 17,159 names. We then classified a sample of 481,726 (42%) of these tenders using a system of rules based classification (e.g. all bodies with NHS in the name were classified as Health) and manual classification.

Row Labels	Tenders published
Local Government	270,805
Education	38,390

Health	37,966
Central	36,647
Companies	29,928
Housing	20,226
Devolved	19,566
Purchasing	12,812
Unclassifiable	12,171
Utilities	1,801
Emergency	1,414
Grand Total	481,726

Table 5.1 Total numbers of tenders published by sector.

During this classification process Spend Network looked at the nature of the buyers and sought to identify whether their operations were covered by the FOIA.

Our analysis identified three groups of buyers that were currently exempted from FOIA legislation: Housing Associations, Companies (excluding publicly owned corporations) such as Babcock and purchasing consortia such as YPO Administrative Solutions Ltd.

These three groups represent 5.6% of the total number of tenders let by public bodies, with the Companies category representing the largest volume of published tenders,

some 2.6% of the total number of tenders. Housing Associations represented 1.4% of the total volume of tenders, and are clearly providers of public services, despite becoming private companies or charitable trusts (and often both).

Housing Associations were the most easily identifiable group, for instance Fusion21 had published nearly 900 tenders in the previous three years. A review is needed with regards to whether FOIA ought to apply to these organisations, since they provide a public service, handle public money and many were once part of local government.

Purchasing consortia are a small group that fulfil a distinct role in procurement, most are set up as companies with a joint ownership structure based on the authorities that are members of the consortium. We identified a lack of clarity over purchasing consortia. ESPO for instance was found, through WhatDoTheyKnow.com, to be FOIA accessible. However, others such as UK Shared Services, YPO Administrative Solutions and Black County Business Ltd. were listed on their website as being publicly owned and therefore, in theory, to be FOIA accessible but there is no evidence on WhatDoTheyKnow.com of any receipt of FOI requests in spite of their involvement in tenders. South East Consortium Ltd is listed as a not-for-profit organisation meaning that its status as a public/private entity and thus its status under FOIA is unclear. A procurement consultancy is also listed (Litmus Partnership Ltd) but it is unclear from the data and research what their status is: whether the tenders they have been involved in are duplicates of public organisations under FOIA's remit or they have been solely involved in handling public money.

Other entities where there was uncertainty about whether FOIA 2000 applied to the organisation appeared to be limited companies owned by universities. Whilst universities may also have external revenue streams such as research or consulting, clarity is needed to understand the exact status of these enterprises.

With regards to organisations that are not public authorities and which will not therefore be covered by the FOIA, the EIR or both, the picture is complex. There are two reasons

for this: we cannot know which legal entity might be deployed to deliver services. For instance University College London is a university that appears to have several businesses, a hospital, a teaching hospital and a charity; so when a contract is let or awarded to "UCL Ltd" it may be provided to an organisation that is a publicly owned company and should therefore be subject to FOIA, but it is not possible to know the precise legal status of the organisation and whether or not FOIA is applicable. For private companies, the picture is more complicated still: their organisation structure can be much more complex than Companies House might show.

Second, FOIA's remit is very narrow. An organisation might be providing a public or quasi public service, but in order for it to fall under FOIA, an organisation needs to be checked to ensure that it is a public authority in line with the criteria outlined in Sections 3 and 6 of the FOIA 2000. This process of verification can be complex as the legal status of different legal entities is not immediately available and sometimes yields inconclusive results. For instance, it is not possible to know whether a company is owned by a public entity from Companies House data.

Since 2018 companies with contracts that exceed £5m in value that subcontract more than £100,000 of that contract are required to publish opportunities and contract award notices to Contracts Finder.¹⁹⁹ It is not possible to know whether these contracts can all be defined as the provision of public services but it seems likely that much of this work is for the provision of a public service.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698482/PP_N_0118_Contract_Condition_for_Subcontracting_Supply_chain_spend_on_CF_final_docx.pdf

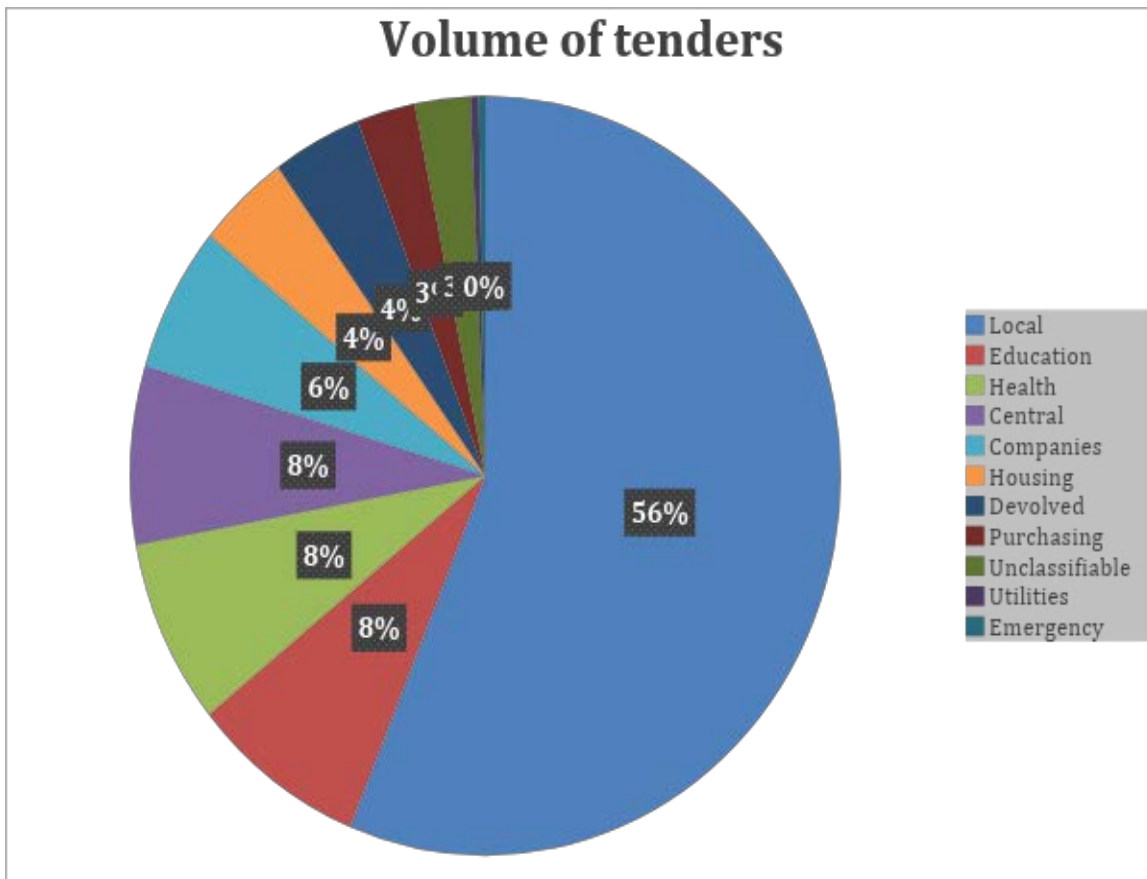


Fig 5.1- Volume of tenders by buyer type

Spend Network recognise that this analytical approach is not a perfect approach to identifying gaps in the application of the FOIA, for instance, the tender data is insufficiently robust to extract the proposed value of any subsequent contract. Equally, because the data is poorly structured it was hard for Spend Network to classify the data, despite large amounts of manual classification work being done, we were only able to categorise 42% of the total data.

Despite these concerns, Spend Network believe that this data does provide a useful proxy for procurement activity and clearly demonstrates that there are bodies providing services on behalf of the public sector that are not currently covered by the FOIA. It does not, however, allow us to quantify the scale of the challenge, or to clearly identify a list of bodies, or groups of bodies that are definitively exempt from FOIA 2000.

Challenges:

Thus the research shows that there is a transparency gap when it comes to FOIA remit, and certainly in the case of Housing Associations, this gap is both emphatic and clear. However, in other cases the challenge is systemic and less clear, owing to the inability to link each purchaser to a legal record and to be able to determine what or who owns each entity.

Our attempt to tightly define where there is a transparency gap was complicated by two reasons: first there are no formal identifiers for all the organisations that buy goods and services, in large part because there is only a nascent set of registers of public organisations²⁰⁰, which is not used in procurement publication, nor are they backed up by legal documentation, and statute governing the creation of public entities.

Second, although an analysis of Companies House is possible, precise accuracy with regards to the legal status and even the existence of organisations eludes scrutiny. Even high profile organisations can have numerous entities that span across public service functions, such as University College London, but it isn't easy to know who owns these companies, in particular whether they are wholly owned by a public body, and thereby subject to FOIA.

Therefore can be no canonical list of bodies that are subject to FOIA 2000, either as a comprehensive register of entities, or as a list that uses characteristics of other registries to compile a working list of entities that are subject to FOIA.

Conclusion:

Spend Network's analysis of the data clearly shows that public tendering by bodies not covered by FOI is taking place, in the case of Housing Associations, it is irrefutable that

²⁰⁰ <https://www.registers.service.gov.uk>

these contracts are for the provision of public services. In the case of Purchasing Consortia, there is a strong argument to say that these organisations are also providing a public service, however, they do not provide a service to the public and so it could be argued that the need for transparency is less pressing. Finally, in the case of companies that undertake tenders, it is likely that much of this work is for the provision of public services.

However, Spend Network cannot quantify those gaps. Without better data on publicly owned companies and on the legal status of public entities, it is not possible to build a canonical, exhaustive list of organisations that are subject to FOIA.

Recommendations:

There is a transparency gap, in some cases it is clear that it exists, but in many cases, it is not always clear who exactly the organisations are because the data quality is poor. These issues can, to an extent, be addressed. To do so, it is recommended for the national registers to be implemented and used in contracting data and, for each government entity from departmental level downwards, to publish a full, open and accessible chart of the legal status of all of the entities owned by each public body, as some organisations possess substantial subsidiaries whose relationship with FOI are not clear.

Data and Methodology

The Data

Transactions: Monthly spend statements

We collected monthly spend statements from publishers in central and local government as well as the NHS. Due to the scale of the data and some of the quality of the early spend files, we selected a time period of four and half years for the total spend analysis, as this gives the most amount of accurate data that can be processed. The data includes details of individual payments to beneficiaries. In line with the transparency requirements, our analysis covers:

For local government - transactions over £500

For central government and NHS - transactions over £25,000

Some central government and NHS authorities publish spend below the £25,000 threshold at their discretion. We include this where available. To manage this extensive dataset we restricted our analysis to the top 1,000 largest suppliers.

Tenders: Tender notices from across the UK public sector

This analysis uses open data published on tenders. Spend Network gathered data from a wide range of public tender portals, including Contracts Finder, TED and regional portals for local government, NHS and education. We gathered data from over 100 portals in the UK. Our tender data extends for the last four years and contains 9,500,445 tender notice records from the UK.

Contracts: Contract award notices from across the UK public sector

This analysis uses open data on contract awards, as published on public sector portals including Contracts Finder, TED and the London Tenders Portal. During this process we also gathered the tender specifications and proposed contract terms published by buyers where available.

Categorisation

We categorise the transaction data using a series of algorithms based on four step process as follows:

- identify if any categorisation data is available at source;
- manually classify records based on the nature of supply (e.g. Schools are listed as Education);
- take data links to Companies House data and use the published SIC codes and;
- use machine learning to project classifications based on existing learning data.

We use the Proclass²⁰¹ classification system, a procurement classification owned and developed by local government that is increasingly being used in central government. The tender and contract data categorisation uses the Common Procurement Vocabulary codes²⁰² (CPV).

²⁰¹ <http://proclass.org.uk>

²⁰² <https://simap.ted.europa.eu/cpv>

Issues with the data

Transaction data quality

This analysis used open data as published by public authorities in the UK and so is limited by the data that can be accessed. Sometimes the factors affecting value and volume are not recorded in the data.

Reasons for these variations in volume and value can include one off needs, annualised payments, and buying out of contract. Within the NHS, only Trusts, SHAs and PCTs are covered by the requirement to publish data on transactions. CCGs are not specifically covered and very few publish any data.

The £25,000 threshold for central government and NHS means that many low value transactions are not included in their spend data.

Our transaction data for 2018 is still incomplete. We have included data up to March 2018. However, there are some notable omissions. The Home Office has published no 2018 data. We have referred this to the Information Commissioner.

Contract data quality

Contract data is often missing data fields including buyer names, supplier names, dates, values and categories. This is due to issues in the source data. Data publishers often do not publish robust contract data despite the requirement to do so.

For each piece of analysis, we have used what is available and excluded zero or blank values (null values). The result of this is the data between metrics is not comparable, but is the best possible reflection of what is available.

Even when present, the contract value data can be unreliable. This is because values are often inflated by data publishers to avoid the appearance of overspend. We are particularly concerned about the quality of the contract data, the majority of which lacks data on either duration or value. We are also concerned that there is a strong incentive for buyers to inflate the value of their published contracts, as this data is used as the baseline measurement from which overspending is calculated. Under EU legislation, should a buyer exceed the value of a contract by 10% then the buyer must publish a notice stating that the budget has been exceeded to the EU tendering portal TED (<https://ted.europa.eu>). Should the buyer exceed the value of the contract by 20% then it is necessary for the contract to be retendered.

The threat to retender a contract likely influences buyers to publish inaccurate data, this is particularly true of framework contracts, that are made available to large numbers of buyers and where it can be very difficult to project the likely use of the framework during its lifetime.

The 2014 contract data is far lower in both volume and value than in other years. This anomaly is because Tenders Electronic Daily, the European Union public procurement journal, was still publishing to an old data standard that could not be effectively parsed to extract contract values and end dates.

Methodologies

Transaction Analysis

The data on suppliers has been analysed in two ways, firstly we've gathered the top 1,000 companies when conducting transaction analysis without contracts, this is partly to make the scale of the data manageable, as there are over 1m unique supplier references in the database. Our second analysis extracts the top 40 suppliers in top 40 categories by value. Again this is to help make the data manageable, and to aggregate the data into efficient groupings. The suppliers are identified as entities external to the public sector with whom expenditure has been recorded. We have manually checked the data to exclude public sector bodies, redactions, and other unnamed or misnamed suppliers (e.g. 'various').

The way these checks and filters have been applied means that there may be some spend missing, e.g. spend with redacted suppliers. We do not look at groupings of companies, so some subsidiary data may be missing.

The data on buyers is monthly for all categories for 374 buyers spread across central government, local government, the NHS, devolved government and public corporations.

This means the top categories for buyers and suppliers differ and totals between buyer and supplier data are not comparable. The data covers the period October 2013 to March 2018.

Using this data, we tracked the volume and value of transactions over time, the largest suppliers, buyers, and categories, and the most popular buyers and suppliers by sector.

Contract Analysis

For individual pieces of analysis on values, dates, buyers, suppliers, supplier types and categories we could only use the information published and excluded all contracts that did not contain the relevant data. The number of contracts analysed for each chart is noted on the relevant slide. This means totals between slides are not comparable.

We have manually checked the contract data to clean records on buyer names and supplier names. We have made improvements to the quality of the data, but some minor inconsistencies remain.

We have also found the proportion of contracts going to SMEs and the top SME buyers and suppliers.

Tender Analysis

This analysis shows the top buyers by volume of contracts. Tender value data is unreliable due to value ranges and missing data and so was not used.

The buyer names have been checked to assess whether or not the buyer is subject to FOI. We then analysed the top buyers by volume of tender and the changes in tender volume over time.

Threshold Analysis

We assessed the impact of including suppliers or contracts over certain thresholds in the FOIA, showing:

The number of suppliers that would be subject to FOI if thresholds were applied by the value of spend from public sector bodies

The number and value of contracts subject to FOI if thresholds were based on contract durations or values.

The three types of threshold we analysed were:

Suppliers with highest transaction values

Contracts with longest durations

Contracts with highest values

Transaction value thresholds

The data covers the top 1,000 suppliers to government by value between October 2013 and March 2018. Based on these 4.5 years of data. The final charts show the percentage of these top suppliers would be covered by FOIA if these different value brackets were adopted.

Contract duration thresholds

We gathered data on 129,706 contract award notices gathered from over 3,000 different publishers, and published in more than 70 different sources, including contracting portals and open data returns published by public bodies.

We created brackets based on contract durations. These charts show the percentage of contracts that would be covered by different duration brackets.

Issues

Not all contracts have dates – we can only calculate durations for the ones with both start and end dates. At other times, start date and end dates are the same so duration is zero. In both cases, the duration is shown as a null value.

Not all durations are positive – in eight cases publishers have entered end dates that are before start dates. These files are not included in either chart.

The chart shows the thresholds for the 79,808 contracts with duration values that are not null.

Contract value thresholds

We gathered data on 129,706 contract award notices gathered from over 3,000 different publishers, and published in more than 70 different sources, including contracting portals and open data returns published by public bodies.

We created brackets based on contract values. These charts show the percentage of contracts that would be covered by different duration brackets.

Issues:

Not all contracts have values – some have values of 0 or no data ('null values')

There is an incentive for buyers to publish very high values (particularly for frameworks) that do not reflect the reality of the contract to avoid the appearance of overspend
Framework valuations are at best broad estimates, few are based on real evidence and the obvious desire not to overspend leads to some wild valuations.

Contract Transparency Clauses

The Model Agreements are template contracts created by the Government Legal Service. They include model terms that can be used by public bodies when creating contracts²⁰³.

We used openly published tender specification and proposed contracts published by government to provide a sample of documents that could be examined. We sorted the documents into six categories:

Final contracts

Sample/template contracts

Terms and conditions

²⁰³

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731710/Model_Services_Contract_v1.04_E_W_1_.pdf

Copyright and Intellectual Property documents

Specifications and requirements

Procurement process documents (e.g. Invitations to Tender, Pre-Qualification Questions, adverts and award letters)

Each document was searched for evidence of the use of the Model Agreements clause and other references to either transparency or Freedom of Information.

The search terms we used:

'Transparency and Freedom of Information' (clause title)

'the Transparency Reports;' (sample of clause text)

Transparency

Freedom of Information

Copyright

Intellectual Property

A positive result from the search was found when, on checking the source document, the complete clause was included. We have also noted when variations on the clause are included in these documents.

While documents that did not include the clause cannot be considered positive results, references to transparency and Freedom of Information in these documents show the degree to which these topics are considered during contracting.

Annex 1 – Data not on Contracts Finder

Tenders

Tenders on English public procurement portals, listed by whether the tender has been published on Contracts Finder or not:

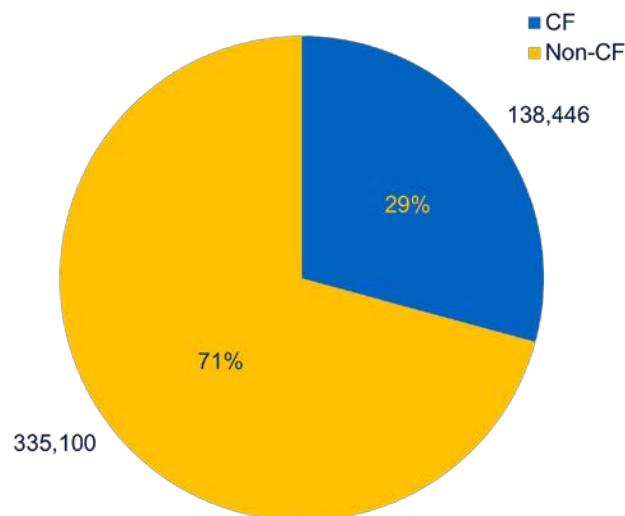


Figure 6.1 - Number and percentage of total tenders published on English public procurement portals that are published in Contracts Finder

Note: per The Public Contracts Regulations 2015, some sectors are not included in the requirement to comply with procurement regulations established within the Statute. These include but are not limited to: certain tenders for defence and

healthcare subject to the threshold established within the Statute. However even sectors that can be excluded can publish their tenders if the publisher deems the tender not to be sensitive, as a search for Ministry of Defence tenders on Contracts Finder would attest.

Contracts

Proportion of tenders of Contracts Finder that do not have an accompanying award notice 1 year or more after initial publication:

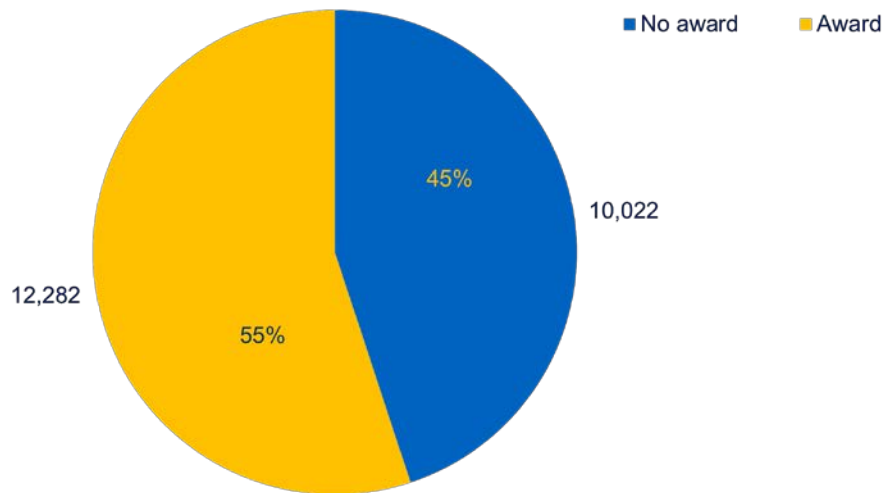


Figure 6.2 - Number and percentage of tenders published to Contracts Finder that do not have a corresponding contract award notice published within 1 year of initial tender publication

Annex

**Department for International Development - Contract Reference: PO 8275 –
Third Party Money Fund Management Services OJEU publication reference
number: 2018/S 068-151197 (01 August 2018)**

29.1 The Supplier acknowledges that DFID is subject to the requirements of the FOIA, the Environmental Information Regulations and associated codes of practice and shall assist and cooperate with DFID to enable DFID to comply with its Information disclosure obligations.

29.2 The Supplier shall and shall ensure that its Sub-Contractors shall:

29.2.1 transfer to DFID all Requests for Information that it receives as soon as practicable and in any event within two (2) Working Days of receiving a Request for Information;

29.2.2 provide DFID with a copy of all Information in its possession, or power in the form that DFID requires within five (5) Working Days (or such other period as DFID may specify) of DFID's request; and

29.2.3 provide all necessary assistance as reasonably requested by DFID to enable DFID to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.

29.3 DFID shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Contract or any other agreement whether the Commercially Sensitive Information and/or any other Information is

exempt from disclosure in accordance with the provisions of the FOIA, the Environmental Information Regulations and associated codes of practice.

29.4 In no event shall the Supplier respond directly to a Request for Information unless expressly authorised to do so by DFID.

29.5 The Supplier acknowledges that DFID may, acting in accordance with any code of practice issued pursuant to Section 45 of FOIA ("the Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose information concerning the Supplier or the Services:

29.5.1 in certain circumstances without consulting the Supplier;

29.5.2 following consultation with the Supplier and having taken their views into account;

29.5.3 provided always that where Clause 29.5.1 applies DFID shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Supplier advanced notice, or failing that, to draw the disclosure to the Supplier's attention after any such disclosure.

29.6 The Supplier shall ensure that all Information is retained for disclosure in accordance with Clauses 29.7 and 29.8 and shall permit DFID to inspect such records as requested by DFID from time to time.

29.7 The Supplier shall, during this Contract and for a period of at least seven years following the expiry or termination of this Contract, retain and maintain all Information:

29.7.1 in accordance with Good Industry Practice and Law;

29.7.2 in chronological order;

29.7.3 in a form that is capable of audit;

29.7.4 at its own expense.

29.8 Wherever practical, original Information shall be retained and maintained in hard copy form.

**Department for Education - CONTRACT FOR THE EVALUATION OF THE
TAILORED SUPPORT PROGRAMME PROJECT REFERENCE NO:
EOR/SBU/2017/092 (16 May 2018)**

12.1. The Contractor acknowledges that the Department is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Department to enable the Department to comply with its information disclosure obligations.

12.2. The Contractor shall and shall procure that its Sub-Contractors shall:

12.2.1. transfer to the Department all Requests for Information that it receives as soon as practicable and in any event within two Working Days of receiving a Request for Information;

12.2.2. provide the Department with a copy of all Information in its possession, or power in the form that the Department requires within five Working Days (or such other period as the Department may specify) of the Department's request; and

12.2.3. provide all necessary assistance as reasonably requested by the Department to enable the Department to respond to the Request for Information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.

12.3. The Department shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Contract or any other agreement whether any Information is exempt from disclosure in Contract Ref No: EOR/SBU/2017/092 accordance with the provisions of the FOIA or the Environmental Information Regulations.

12.4. In no event shall the Contractor respond directly to a Request for Information unless expressly authorised to do so by the Department.

12.5. The Contractor acknowledges that (notwithstanding the provisions of Clause 13) the Department may, acting in accordance with the Ministry of Justice's Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 ("the Code"), be obliged under the FOIA, or the Environmental Information Regulations to disclose information concerning the Contractor or the Project:

12.5.1. in certain circumstances without consulting the Contractor; or

12.5.2. following consultation with the Contractor and having taken their views into account;

12.5.3. provided always that where 12.5.1 applies the Department shall, in accordance with any recommendations of the Code, take reasonable steps, where appropriate, to give the Contractor advanced notice, or failing that, to draw the disclosure to the Contractor's attention after any such disclosure.

12.6. The Contractor shall ensure that all Information is retained for disclosure and shall permit the Department to inspect such records as requested from time to time.

DEFRA - Award of Contract for the Assessing the Economic Impacts of a Potential Ban on Plastic Cutlery, Plates and Balloon Sticks (30 July 2018)

12.1 The Contractor acknowledges that the Customer is subject to the requirements of the FOIA and the Environmental Information Regulations 2004 and shall:

12.1.1 provide all necessary assistance and cooperation as reasonably requested by the Customer to enable the Customer to comply with its obligations under the FOIA and the Environmental Information Regulations 2004;

12.1.2 transfer to the Customer all Requests for Information relating to this Agreement that it receives as soon as practicable and in any event within 2 Working Days of receipt;

12.1.3 provide the Customer with a copy of all Information belonging to the Customer requested in the Request for Information which is in its possession or control in the form that the Customer requires within 5 Working Days (or such other period

as the Customer may reasonably specify) of the Customer's request for such Information; and

12.1.4 not respond directly to a Request for Information unless authorised in writing to do so by the Customer.

12.2 The Contractor acknowledges that the Customer may be required under the FOIA and the Environmental Information Regulations 2004 to disclose Information concerning the Contractor or the Services (including commercially sensitive information) without consulting or obtaining consent from the Contractor. In these circumstances the Customer shall, in accordance with any relevant guidance issued under the FOIA, take reasonable steps, where appropriate, to give the

Contractor advance notice, or failing that, to draw the disclosure to the Contractor's attention after any such disclosure.

12.3 Notwithstanding any other provision in the Agreement, the Customer shall be responsible for determining in its absolute discretion whether any Information relating to the Contractor or the Services is exempt from disclosure in accordance with the FOIA and/or the Environmental Information Regulations 2004.