News Media Association Response to the Independent Commission on Freedom of Information's Call for Evidence

The News Media Association is the voice of news media in the UK – a £6 billion sector read by 42 million adults every month in print and online. Newsbrands - national, regional and local newspapers in print and digital - are by far the biggest investors in news, accounting for more than two-thirds (69 per cent) of the total spend on news provision in the UK.

The Questions:

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

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

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

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

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

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

Questions 1-3 – *These are answered together*

1. Freedom of information is a democratic right. If the Government controls the supply of information, it can withhold information that it fears will make the electorate less likely to vote for it. In 2000, Parliament finally acknowledged this by passing the Freedom of Information Act (FOIA). The Act has not disappointed. From the revelation that RAF pilots

News Media Association, 292 Vauxhall Bridge Road, London, SW1V 1AE
Tel: +44 (0)20 7963 7480 Email: nma@newsmediauk.org www.newsmediauk.org Twitter: @newsmediaorg

were involved in the bombing of Syria without Parliamentary approval to the existence of cracks in the nuclear power plant at Hinkley Point, the range of information that the Act has put in the public domain is breath-taking. As innovative as the FOIA was when it was adopted, it was not revolutionary. Its principles were the logical next step in the steady diminution of the privileges and immunities of the Crown that took place during the second half of the twentieth century and the emergence of a patchwork of information rights for specific purposes under various other pieces of legislation.[1] The societal forces that drove this – mass democracy, mass media, the decline of deference – are if anything stronger now than when the Act was passed, thanks to the digital revolution and the rise of social media. Diluting or reversing aspects of the Act would be a quixotic attempt to go against the grain of irreversible cultural and social change. A far better idea would be to look at the ways in which the Act could be extended so that it keeps up with the public's evermore informed and discerning expectations of those in authority. That is why the News Media Association agrees with the Information Commissioner, Christopher Graham, when he told the LSE in October 2015: "*Based on the facts … the [Freedom of Information Act 2000] is working effectively. The interesting questions are about how to keep FOIA effective for the future – not to limit its effect today.*"[2]

2. We particularly welcomed the Commissioner's emphasis on the facts. In our submission, we will show that the evidence clearly points to a system that works well at balancing the need at times for official confidentiality and the public's right to know. In order to persuade, the critics of the FOIA will need to demonstrate that cases are being wrongly decided; that injudicious FOI releases have been derailing policies and sent the sense of collective responsibility of sitting Cabinets crashing down. They will also need to demonstrate that claims of a chilling effect are grounded in reality and not in myth. Nothing less will do, as FOI is a democratic right and its weakening could only be justified on the very strongest evidence. To date, the Act's critics have failed to supply this evidence, even when the House of Commons Justice Select Committee invited them to do so in 2012. We do not consider much to have changed between then and now.

3. When Parliament passed the Freedom of Information Act it intended that in certain circumstances, it would be possible to obtain under FOI information relating to internal deliberations, policy advice, correspondence with stake-holders, risk registers and on occasion Cabinet minutes. The fact that this material is available under FOI therefore is not some loophole or aberration. Parliament could have placed these under an absolute exemption but in its aim to "transform the culture of government from one of secrecy to one of openness" it did not.[3] Instead, this information was placed under qualified exemptions: Sections 35 for information related to the formulation of government policy; and section 36 for information that could be prejudicial to the conduct of public affairs.

---

[1] In Conway v Rimmer 1968 (AC) 910 House of Lords ordered the production of documents against the wishes of the Crown. For other info rights in legislation see, for example s1 Data Protection Act 1998 (right to access data concerning oneself held by private and public bodies); Local Government (Access to Information) Act 1985 – sets out rights to access papers relating to council meetings

[2] "Working Effectively: Lessons from 10 years of the Freedom of Information Act", Christopher Graham, 1 OCtober 2014

[3] Secretary of State for the Home Department, 2nd Reading, Hansard HC vol 340 col 714, 7th December 1999)

4. These still represent a major exception to the presumption in favour of disclosure that underpins the Act. There has to be an assessment of whether or not the public interest is best served by publication or by maintaining the exemption. If there was not a public interest test and the information was absolutely exempt, then even information that contained evidence of conflict of interest or serious wrong-doing would have to remain suppressed for some arbitrary length of time. The NMA considers that it is better that these matters are decided on the facts rather than determined by blanket, arbitrary devices such as embargoes and absolute exemptions.

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

6. Whenever a case engages s35 or s36 the "safe space" is the central consideration, particularly the need for one during the period when a policy is being formulated is strictly observed. The position on this was set out by the Tribunal in Department for Education vs IC and the Evening Standard 2007: "*the timing of a request is of particular importance to the decision. We fully accept the argument that disclosure of discussions of policy options whilst policy is in process of formulation is highly unlikely to be in the public interest, unless for example, it would expose wrong-doing in Government. Ministers are entitled to time and space to hammer out policy by exploiting safe and radical policies alike.*" [4]

7. As a result, it is practically unheard of to be able to obtain under FOI any information that relates to any policy prior to its official announcement. Indeed, the call for evidence document does not provide an example of where FOI has been used to obtain policy advice prior to the announcement of the policy.

8. The same approach is taken to risk registers. Again these can expect to remain secret at least until the subject matter is settled policy. In deciding in favour of a request to the Department of Health to publish the Transitional Risk Register for the reforms enacted in the Health and Social Care Act, the tribunal attached importance to the timing of the request, which was made "*at a time when consultation had ceased and policy seemed to be fixed*", reducing the need for a safe space.[5] Similarly, in his decision on the HS2 risk register (technically an EIR case), the Commissioner attached importance to the fact that HS2 was settled, announced policy: "*The Government's major announcement on HS2 was made on 10th January 2012. The announcement explained the decision to give the go-ahead to the*

[4] Department for Education and Skills & Information Commissioner & the Evening Standard, EA/20060006 19th February 2007, p23 (iv)
[5] Department of Health & Information Commissioner & Rt Hon John Healey EA/2011/0286 & 287 1st & 2nd November 2011 page 18, para 84

HS2 project. The Commissioner finds that the decision and the announcement were a major milestone in the policy process related to HS2. A "macro" decision had been made. The request by the complainant was made on 14 May 2012 and the Cabinet Office responded substantively on 27 June 2012, significantly after that milestone."[6]

9. After announcement of a policy, the weight accorded to safe space arguments begins to diminish. If ministers are to be held to account for their decisions, it will often be necessary to know the basis on which they were made, the options that were accepted or rejected by them and whether public account they gave of them matched the advice they were receiving from experts. The tribunal has explained that the purpose of confidentiality "*is the protection from compromise or unjust public opprobrium of civil servants, not ministers… we were unable to discern the unfairness in exposing an elected politician, after the event, to challenge for having rejected a possible policy option in favour of a policy which is alleged to have failed*."[7]

10. However, the fact that the safe space diminishes after announcement, does not mean that it suddenly evaporates at that point, denuding everyone involved of protection under the Act: "*a parliamentary statement announcing the policy … will normally mark the end of the process of formulation… we do not imply by that that any public interest in maintaining the exemption disappears at the moment that a minister rises to his or her feet in the House. Each case must be decided in the light of the circumstances."*[8]

11. When the Upper Tribunal decided in favour of releasing the risk register into the badger cull, it emphasised that the argument that the policy had been announced and was already being implemented was not enough on its own to determine the matter and that the full circumstances of the case had to be looked at.[9] The decision to disclose reflects not just the fact that the pilots were already underway, but also, and crucially, that the contents of the risk register were sufficiently uncontroversial, "*anodyne*" to defeat arguments that they should be kept secret.[10]

12. If a public authority can demonstrate strong reasons why secrecy should be maintained it will be. For example, earlier this year, the tribunal backed the Department for Education in not releasing internal discussions documents on the 2012 decision to axe the "Building

---

[6] EIR Decision Notice: FER0467548, ICO, 6th June 2013,

[7] Department for Education and Skills & Information Commissioner & the Evening Standard, EA/20060006 19th February 2007, p23 (iii)

[8] Ibid para (v)

[9] DEFRA v The Information Commissioner and The Badger Trust [2014] UKUT 526 (AAC) 28th November 2014 at para 51 & 52: "…to the extent that there may be a need for a space to think in private concerning Departmental deliberations, no-one doubts that generally speaking the need to maintain that privacy diminishes over time. There have been suggestions in First-tier Tribunals in the past that once a policy had been formulated and announced there could be no further public interest in withholding information from publication. We do not accept that (see OGC v Information Commissioner [2010] QB 98 at paragraph 101.) It all depends on the facts and circumstances of the individual case. 52. For this reason we reject the argument advanced by the Badger Trust that disclosure must be ordered of any risk which has been deleted from the RILs as no longer current."

[10] Ibid paras 59 & 60

Schools for the Future" programme. The request post-dated by two years the decision to scrap the project and the tribunal acknowledged that there was a "strong public interest" in making the information available. However, it concluded that this was outweighed by the need not to erode the confidentiality between ministers and the civil service. Disclosure would, the Tribunal said "*expose a very significant part of the working relationship between Ministers and the politically neutral civil service to a deeper and not necessarily constructive degree of scrutiny. The impact would no doubt differ from case to case, but there are plausible risks that exposure of policy submissions would cause submissions to be written in a different way with an eye to a public audience and presentation, and could further change the inclination of Ministers to seek and rely on formal advice, or to take advice only in circumstances that tend to be less fully committed to paper.*"[11]

13. The tribunal also acknowledges that there will often be no stark dividing line separating policy development and policy implementation. This means that even after a policy has not just been announced but is being implemented, the publication of information relating to it can be blocked if it is being used to inform an on-going decision-making process. The tribunal has said: "*We are prepared to accept that there is no straight line between formulation and development and delivery and implementation… a need for policy review and development and delivery may arise from implementation issues which in themselves require ministers to make decisions giving rise to policy formulation and development.*"[12] In that case the tribunal distinguished between releasing the NHS transitional risk register (TRR), which was purely about implementing the policies set out in the Government's 2010 Health white paper and the strategic risk register which was informing on-going policy-formulation. Although the Government, controversially, wielded the veto on the release of the TRR, it cannot be said that the Tribunal failed to apply its mind to "safe space" argument: "*The TRR largely covers operational and implementation risks being faced by the DOH to deal with the introduction of new policies, not in our view direct policy considerations. This register would have informed the public debate at a time of considerable public concern… In contrast we find that at the time the SRR was requested and the DOH dealt with the application of the public interest test, the public interest in maintaining the exemption did outweigh the public interest in disclosure. By this time the government was again back into policy formulation and development mode. The SRR was provided for the Departmental Board who were requiring to consider risk at a largely policy rather than implementation level. This register was deserving of a protected safe space so that the Government could consider how to best deal with the unprecedented level of public debate following the publication of the Bill.*"

14. The safeguards that surround Cabinet minutes are already more stringent than those around other forms of internal deliberation and do not require re-enforcement. The principles that underpin their protection are similar, but the safe space continues for substantially longer. Also, because of the importance attached to the maintenance of collective responsibility, it is far harder to argue that the public interest is best served through disclosure. The approach the Tribunal adopts to Cabinet minutes was summarised

[11] Department for Education v IC, FTT January2015 para 59
[12] Department of Health v IC and Healey FTT April 2012, para 28

in Cabinet Office v IC FTT 22nd December 2010: "*Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration by many years. The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within 30 years will be very rarely ordered and only in circumstances where there is no apparent threat to the cohesive workings of Cabinet Government, whether now or in the future.*"[13] Those circumstances, the tribunal went on, are: where the ministers have left the public stage; where the publication of memoirs and ministerial statements describing meetings concerned have already been published; if the events have no continuing historic significance; and where the meeting had a particular historic significance. Critics of the current position will need to explain why this position is unreasonable, particularly what the justification would be to keep secret for a generation Cabinet minutes about events that have passed into history or the Cabinet ministers themselves have leaked or otherwise published accounts of the meetings.

15. The Commissioner and tribunal reliably adhere to these principles. Earlier this year, the tribunal joined the ICO is refusing to order the disclosure minutes of Cabinet discussions in 2006 regarding the admission to the EU of Bulgaria and Romania.The tribunal's grounds were: " i) *The Minutes include content attributable to individual Ministers, either by name or by the nature of the subject matter recorded. A high number of those involved remain in front line politics and may well return to Government in the near future. ii) The Minutes provide some insight into how individual views held by Ministers contributed to the formation of the collective Cabinet decision.*" The tribunal added that even though the information was five years old by the time of the request, eastern European immigration remained a "*highly contentious issue of government policy*."[14]

16. Similarly, the Commissioner refused in 2009 to order the disclosure of the notes that were taken during the 2003 Cabinet meetings where ministers debated the opportunity to host the Olympic Games in 2012 because they contained opinions that were attributable to named individuals who would be forced to defend the arguments that they had made in the discussion: "*This would not only undermine the safe space in which Ministers need to discuss issues relating to the Olympics, but also result in pressure on the government to debate and defend the views of individuals which were advanced during the meeting.*"[15]

17. However, because it could not be plausibly argued that the 1986 Westland Affair was still a contentious issue of policy in 2010 when a request for the Cabinet minutes from the time came before the ICO, the Commissioner ordered disclosure. Similarly, the Information Tribunal sanctioned the disclosure of the Cabinet minutes relating to it. Likewise, the 1988 takeover of Rowntrees by Nestle was no longer dominating British politics in 2011 when the Upper Tribunal overruled a Cabinet Office refusal to disclose the minutes where it was discussed. The decision to release the Cabinet minutes regarding Hillsborough came nearly a quarter of a century after the disaster itself.

---

[13] Cabinet Office v Information Commissioner 22nd December 2010 EA/2010/0031 At page 19

[14] Razvan Veer v Information Commissioner & Cabinet Office 21 May 2012 EA/2011/0255, p8 (i)

[15] ICO Decision Notice Ref: FS50185739 16th March 2009 , para 68

18. A decision that caused particular alarm to ministers was the Information Tribunal's ruling in 2009 in favour of a request made in 2006 to release the minutes of Cabinet meetings in the immediate run-up to the Iraq War (2003). Even though the events in question had not quite passed into history when the release (later vetoed by ministers) was ordered, the reasoning of this decision can hardly be considered reckless or a departure from the principles that underpin these cases. The Tribunal ordered this in part because of the exceptional public interest in such a momentous decision but also attached importance to the fact that the only two Cabinet ministers who had dissented had *already* made it clear to the public that they had done so: "*On the particular facts of this case the importance of maintaining the convention is diluted by the extent to which some of the information had already been disclosed, through formal and informal channels*".[16]

19. As has been outlined, obtaining this information under FOI is difficult and most requesters will not succeed at the ICO. According to the ICO submission to this consultation: "at the current time, and certainly over the last five years, a significant percentage of the Information Commissioner's decisions have fallen in favour of protecting policy making processes and deliberative space." The Commissioner adds that in 2014, the number of cases in which central government departments were ordered to disclose information that they had sought to withhold under s35 and s36 was very small compared to the number of times the exemption had been applied. Disclosure was ordered in 10 out of 598 cases where s35 had been applied by departments (1.7 per cent) and 18 out of 420 s36 cases (4.3 per cent). The ICO warns that "given these figures we are concerned that a very small number of high profile cases may be having a disproportionate effect on perceptions of FOIA within government, particularly at a senior level."[17]

20. Published newspaper investigations based on information that engages s35 and s36 are consequently rare. Searching through our digital database[18] of national press articles for this year we could find very few - no more than half a dozen - that clearly relied on FOI requests from newspapers[19] for such material and only one of these concerned internal policy advice.

21. Because of the public interest hurdles that journalists have to clear to obtain information that engages either of the two sections, the resulting stories are invariably pieces of serious, public interest journalism. Internal policy advice obtained by *The Independent* revealed that although the part of the public justification for the Help to Buy programme was that it would stimulate new construction and not just demand, the advice the Chancellor was

---

[1616] Cabinet Office & Information Commissioner & Dr Christopher Lamb, EA/2008/0024 and EA/2008/0029 27th January 2009 at para 78

[17] https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf p5-6

[18] This was a keyword search for "Freedom of Information" stories through the NMA's access to ClipShare. The stories were then read to see if they were based on internal deliberations. This was not a scientific or exhaustive study, but the results are indicative of how rare these stories are.

[19] Newspapers have of course run stories based on other organisation's procuring of internal reports & discussions: eg "Fracking could hurt house prices, health and environment, official report says", Guardian 1 July 2015

receiving from his officials was actually that "it will have a limited impact on housing supply since most of the sales are likely to be for homes which would have been built anyway".[20] *The Times* obtained under the FOIA email correspondence between Treasury and Office of Budget Responsibility officials in which the former appeared to be trying to influence the latter's preparation of its forecasts.[21] The revelations were considered sufficiently serious to prompt the Treasury Select Committee to investigate. In September, the Times also obtained an internal report by the Army outlining financial and planning mistakes associated with medical centres it ran in partnership with the charity Help for Heroes.[22] A month later, *The Mirror* reported that it had used FOI to obtain emails from Lord Prior, when he was chairman of the CQC to a US health consultancy in which he suggests that 50 per cent of NHS beds could be axed. Lord Prior is now NHS Productivity Minister.[23]

22. In earlier years, the fact that internal deliberations can be obtained under FOI was why newspapers were able to reveal that civil servants had told ministers that the "Big Society" initiative would necessarily involve allowing public services to fail and collapse (P.Curtis, "Let schools fail to secure reforms, ministers urged, Guardian 11 July 2011); that civil servants had serious concerns about the drafting of a dossier published by the Government to justify the war in Iraq and that officials were under pressure to firm up their original conclusions (R. Prince, Telegraph, "Whitehall worries about WMD dossier in secret emails," 13th March 2009). They also revealed the reticence of Bank of England officials towards the Treasury's plan to sell off the country's gold reserves between 1999 and 2002 (J.Groves, "Brown defied Bank warning over his £6bn gold give away," Daily Mail 1st April 2010).

23. The public interest in all of these stories is clearly strong. They informed the public of the background of the major Government initiatives of the era. If s35 and 36 were absolute exemptions, the information contained in these could have been suppressed for a generation. This would be to deny the public its democratic right to understand the basis on which the governments they elect decide the policies that they pay for and that shape their lives.

24. But just as these stories are important, it cannot be said that the FOI releases derailed the policy in question or seriously destabilised the department responsible. In some cases, it may have caused some transient embarrassment for a minister, but protection against embarrassment has never been one of the acknowledged arguments for official secrecy.

25. In the call for evidence, it is noticeable that the document does not provide any account of specific damage that any one of the releases it refers has inflicted to a particular policy, department, civil service career or the sense of collective responsibility of a sitting Cabinet. What was the fallout of the decision to publish the Westland minutes a quarter of a century later? Did chaos break out? Similarly, did the long-awaited but ultimately low-key release of

---

[20] "Chancellor ignored advice from Treasury to launch Help to Buy scheme", Independent 6th February 2015
[21] "Treasury has sought to meddle with OBR forecasts", Times, 14th September 2015
[22] "Millions spent on Help for heroes centres with empty beds", Times, 29th September 2015
[23] "Top Tory claims half of NHS beds are facing the axe fuelling fears of health privatisation", Mirror 6th October 2015

the HS2 risk register derail HS2? It appears not. How has the fact of publishing the badger cull risk register materially impacted on the fight against bovine TB? Three new culls were announced this September.

26. Instead, the argument against these aspects of the Act in the call for evidence is not based on any documented or demonstrable harm, but the fact that they exist at all. This, it is argued, creates "uncertainty" for ministers and civil servants, resulting in a "chilling effect" whereby civil servants will dilute and distort their advice or deliver it informally because they fear publication at a future date.

27. Over the years, independent assessments of whether or not the chilling effect exists have found that such fears are neither objectively grounded nor having the distortive effect attributed to it.

28. The Information Commissioner, in his speech to the LSE in October 2015, expressed dismay that civil servants were still talking of a chilling effect, despite the lengths that his office and the tribunal go to in order to protect the safe space. He said that the facts demonstrated "*that the safe space is respected, both by the Commissioner and by the Tribunal. But, despite the weight of the evidence, senior Whitehall figures criticise the operation of FOIA and warn of its icy blast. In response, I observe that if mandarins keep talking about a chilling effect, theirs is a self-fulfilling prophecy.*"

29. Testifying before the Justice Select Committee in 2012, Professor Robert Hazell of the UCL Constitutional Unit said that his research into the effect of the FOIA did not find that it was causing a chilling effect. Hazell said: "*We looked very hard for evidence of the chilling effect in all the interviews that we conducted, in a big two-year research project looking at the impact of FOI on Whitehall and in a related project commissioned by the Information Commissioner. We interviewed, in total, about 100 Ministers and middle and senior-ranking officials. What they told us, in sum, was that, yes, there has been a deterioration in the quality of record keeping in Whitehall, but that, no, on the whole FOI has not been the cause of that… We asked every person we interviewed whether FOI had contributed to a chilling effect, and the majority said that it had not. We then pressed those who thought that it might have done, asking, "Has it changed the way that you work? Has it changed the way that your colleagues work?" We found very little direct evidence that FOI has contributed to a diminution of the record.*"[24]

30. This led the committee to report: "*We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act.*"[25] As a result, it said it would not recommend any restrictions on the Act based on a "chilling effect" justification.

31. The Information Tribunal has drawn similar conclusions to the UCL Constitution Unit. In its ruling on the NHS risk register, the Tribunal attached importance to the fact that risk

[24] Justice Committee Minutes of Evidence, answers to Q62-64
[25] Justice Committee Post Legislative Scrutiny of the Freedom of Information Act 2000, "Policy Formulation Safe-Spaces and Chilling Effect", at para 200

registers had been released in the past resulting in no observable chilling effect and that the senior civil servants who testified against disclosure were unable to substantiate their claims. The tribunal noted the release several years before of the risk register for a third runway at Heathrow and said that "*there was no evidence presented to us that the release of the Heathrow risk register had had a chilling effect on their use by Government*" adding that the arguments against disclosure advanced by Lord O'Donnell, then head of the civil service, "*were based mainly on conjecture of what might happen if there was routine disclosure of risk registers..*"[26]

32. The Tribunal has also over the years been rightly wary about indulging claims from the civil service that if judges enforce the rights of citizens under FOI, they will deliberately neglect their duties to deliver honest advice and maintain proper records. In *DfE v Evening Standard* 2007 the tribunal made it clear that the public has the right to expect a higher standard of conduct than that from its public servants: "*(vii) …In judging the likely consequences of disclosure of officials' future conduct, we are entitled to expect of them the courage and independence that has been the hall mark of our civil servants. These are highly educated and sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions."*

33. If senior management in the civil service are aware that civil servants are putting advice on post-it notes or deploying other evasive strategies, then those civil servants should be rebuked for their unprofessionalism and disabused of their misconceptions about the implications of FOI. This poor conduct should not be validated by petitioning ministers for major legislative change on the back of it.

34. The Tribunal has also reminded civil servants that FOI is not the only source of public scrutiny of their work. They can be hauled before a parliamentary select committee at any time, where they will be named, questioned and under a duty to tell the truth. Public inquiries are also frequent and can require the same. And of course, there are always leaks.

35. Weakening FOI would therefore give them only a modest increase in the certainty they are looking for, but it would come at a huge cost to the public's democratic right to know. The alternative to the "uncertainty" of a multiple levels of oversight examining matters "in all the circumstances" is blanket secrecy and arbitrary embargoes which a 21st century public in a mature democracy will find sinister and insulting.

36. It has been demonstrated here that any strengthening of s35 and 36 based on concerns about the chilling effect would not be evidence-based. The Act only allows the release of this information when it is in the public interest, and the agencies that apply the public interest do so diligently and on the basis of clear, predictable principles. As a result information obtained under these sections is often illuminating but not destabilising of the safe-space for the formulation of policy. Backsliding on FOI on the basis of the "chilling effect" arguments mounted by officialdom would be a dismal capitulation to conjecture and

[26] DoH & Information Commissioner and Rt Hon John Healy, 5th April 2012, paras 71 & 73

civil service self-interest. This is not a strong enough evidential basis for eroding the public's right to know to know.

Question 4 - Vetos

37. We do not favour any strengthening of the executive override power set out in s53 FOIA. The Supreme Court decision[27] in March 2015 – where the court overturned the Government's veto of the release of Prince Charles's lobbying letters to ministers - has narrowed the circumstances in which it can be wielded, but we consider that this was a necessary development bearing in mind the way in which the veto was being used.

38. Prior to the Supreme Court's decision earlier this year, the veto was being exercised in a manner that allowed ministers to quash decisions they did not like just because they took a different view, even when that decision had come from the Tribunal. The only safeguard was judicial review which most requesters would shy away from because of the costs and the high threshold of proving irrationality on the part of the minister.

39. This gave the executive almost a free rein to substitute a court's decision for its own even where the court had tested all the arguments thoroughly and concluded with a decision that was well-reasoned and contained no error in law. On three occasions it has been used against the tribunal including once against the Upper Tribunal, which had sat for six days listening to the evidence.

40. The situation represented an exception to the long-established principle that ministers are subject to the rule of law and therefore also to the principle of equality before the law, as the requester is always bound by the court's decision, while the minister can walk away from it.

41. These principles have deep historical roots. They are a fundamental part of the constitutional settlement that has underpinned this country for centuries. Lord Neuberger made this clear in the Supreme Court judgment in *R (Evans)*: "*A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head.*"[28]

[27] R (Evans) v Attorney General [2015] UKSC 21
[28] At para 52

42. Later in the judgment, Lord Neuberger cites Lord Templeman in *M v Home Office* "the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [is] a proposition which would reverse the result of the Civil War."

43. The use of this sort of power would only have been tolerable and sustainable if it had been used extremely sparingly. The Ministry of Justice's guidance on the veto states that its use is supposed to be "*exceptional*". One of the guiding principles is that it will not "*routinely use the power under section 53 simply because it considers the public interest in withholding the information outweighs that in disclosure.*"[29] The guidance also only discusses use of the veto in connection with upholding Cabinet collective responsibility.

44. Since 2009, the veto appears to have been used seven times. The first exercises of it (over the release of Cabinet materials concerning Iraq and devolution) appear closely connected with concerns about upholding Cabinet collective responsibility. In more recent uses of the veto, the connection with Cabinet collective responsibility becomes less obvious. The veto has been used to quash the release of risk assessments of controversial policies (NHS reforms, HS2) and to protect Prince Charles's lobbying correspondence. The use of the veto in these instances appears primarily aimed at protecting those in authority from embarrassment and scrutiny over their decisions or conduct.

45. The Supreme Court decision in March was welcome and necessary in the context of ministers' increasing use of the veto to wriggle out of adverse court decisions and to block the release of information for what appeared to be essentially reputational reasons. As a result of the judgment, ministers will have to demonstrate either that the facts have changed or that the court was wrong in law. It is very difficult to see in what other circumstances it would be reasonable not to carry out the ruling of a court that has heard the evidence and tested the arguments. Critics of the judgment will need to explain what those are.

46. As for the Call for Evidence's suggestion that the judgment may not accord with the will of Parliament, Lord Neuberger dealt with this in the judgment. Citing previous authority that Parliament had to make it "crystal clear" when legislating contrary to the rule of law, Lord Neuberger states that "*In my view, section 53 falls far short of being "crystal clear" in saying that a member of the executive can override the decision of a court because he disagrees with it. The only reference to a court or tribunal in the section is in subsection (4)(b) which provides that the time for issuing a certificate is to be effectively extended where an appeal is brought under section 57. It is accepted in these proceedings that that provision, coupled with the way that the tribunal's powers are expressed in sections 57 and 58, has the effect of extending the power to issue a section 53 certificate to a decision notice issued or confirmed by a tribunal or confirmed by an appellate court or tribunal. But that is a very long way away indeed from making it "crystal clear" that that power can be implemented so as to enable a member of the executive effectively to reverse, or overrule, a decision of a court or a judicial tribunal, simply because he does not agree with it.*"[30]

---

[29] Ministry of Justice: Statement of HMG policy: Use of the executive override under the Freedom of Information Act 2000 as it relates to information falling within the scope of Section 35 (1)

[30] *R (Evans)* at 58

47. To that, the Campaign for Freedom of Information has added that *"Parliament never intended the veto to be used against the Tribunal or courts – that possibility was not mentioned at all let alone debated during the Bill's passage. The veto was seen as available only in relation to the Information Commissioner's decisions."*[31]

48. The NMA agrees that it cannot be assumed that Parliament was agreeing to this when it passed the FOIA 2000 in the absence of any clear specific reference to this in the statute or parliamentary discussion of this scenario and its implications.

49. In the aftermath of the Supreme Court ruling, the Prime Minister indicated that the Government would return to the Act and redraft the veto power to give ministers the power to overrule domestic courts. If it does, the legal and political controversy that this would generate would likely dwarf even that generated by the debate over whether the UK government should be able to set aside the rulings of the European Court of Human Rights – a non-binding foreign court to whom we are linked by an international treaty.

50. Even if it succeeded in putting such a change on the statute book, its victory would likely prove hollow and fleeting. The courts of this country have always been very alert to attempts to oust their jurisdiction and successful at unpicking them.[32] There is a seam of case law going back to the mid-19th century where the courts have beaten a path through attempts by the executive, even when expressed in statute, to block or neuter judicial review or otherwise shield its decisions from scrutiny.[33]

51. The efforts that the Government went to in order to block the release of Prince's letters were lengthy, expensive[34] and completely backfired. The lesson to be learned from it is not that the FOIA needs to be redrafted but that ministers need to develop a better sense of when a course of action is more trouble than it is worth. If they press ahead with some foolhardy, discreditable attempt to extend the veto power and/or limit judicial review, they will demonstrate that they have learned nothing.

Question 5 - Appeals

52. The call for evidence is correct to identify the appeals process as an area that could benefit from reform. It is lengthy and requests can get stuck in limbo for an excessive amount of time. NMA's recommendation is for a statutory time limit on the length of time that public authorities can spend carrying out an internal review of a refusal notice, just as there is for the handling of the original requests. Journalists often complain that the lack of a time limit on internal review is exploited by public authorities as a means of long-grassing requests that they do not want to answer.

---

[31] "Welcome for Supreme Court's ruling on the ministerial veto in Prince Charles case", press release, Campaign for Freedom of Information, 26th March 2015

[32] For example, Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, where the House of Lords held that a statutory exclusion clause does not deprive the courts from their jurisdiction in judicial review, unless it expressly stated this. The clause in question provided that any "determination by the commission" in question "shall not be called in question in any court of law".

[33] This is set out in paras-54 and 55 of Lord Neuberger's judgement.

[34] "Ministers spend £250,000 on Prince Charles letters legal row", Guardian, 28th March 2014

53. Another practice that would encourage speedier resolution of requests by public authorities would be to place them all under a requirement to publish performance data on the timeliness of request handling and internal reviews. This is considered best practice and a number of authorities (central government departments already publish this information quarterly) already do this.

54. Both of these proposals were endorsed by the Justice Select Committee's post-legislative scrutiny of the FOIA in 2012. Regarding a statutory time limit for internal review, the Committee said: "*It is not acceptable that public authorities are able to kick requests into the long grass by holding interminable internal reviews. Such reviews should not generally require information to be sought from third parties, and so we see no reason why there should not be a statutory time limit—20 days would seem reasonable—in which they must take place. An extension could be acceptable where there is a need to consult a third party.*"[35]

55. On publishing performance data, the Committee said: "*We recommend that all public bodies subject to the Act should be required to publish data on the timeliness of their response to freedom of information requests. This should include data on extensions and time taken for internal reviews. This will not only inform the wider public of the authority's compliance with its duties under the Act but will allow the Information Commissioner to monitor those organisations with the lowest rate of compliance.*"[36]

56. We would not, however, support cutting back on the layers of oversight in the appeals process. A state committed to openness should regard secrecy as a last resort and such decisions should be subject to challenge.

57. While the vast majority of requests will be straightforward and disposed of by the original FOI officer, there will be some that require very fine and complex assessments of competing interests. Several tiers of appeal to escalating expertise are necessary to ensure that the right balance is being struck.

58. In their consultation response to Ministry of Justice proposals on the introduction of fees, the Campaign for Freedom of Information cited a number of compelling cases where the Information Tribunal uncovered new facts or mistakes in earlier decision-making.

59. *In Dr Peter Bowrbrick & Information Commissioner & Nottingham City Council EA/2005/0006*, a requester asked for copes of contracts and other information about the transfer of a failing school from the local authority to another body. The council refused the request, saying that it had already put what little information it had on this into the public domain. The Commissioner endorsed the authority's position, a decision which the requester appealed to the tribunal. The tribunal discovered that on receiving the request, the council had privately acknowledged holding around six to seven lever arch files of the requested material. The tribunal held that the local authority had misled the requester and

[35] Justice Select Committee "Delays and Enforcement" at para 103
[36] Ibid para 109

the Information Commissioner. It forced it to disclose the information and to pay the requester's costs.[37]

60. Serious errors in the Commissioner's reasoning were also detected in the case of Joanna Bryce & Information Commissioner & Cambridgeshire Constabulary EA/2009/0083. The requester had complained to the police about the adequacy of the murder inquiry it had carried out in to the killing of the requester's sister by her husband. As a result, an independent review was carried out by another force, but the report of this was withheld from the requester. The requester challenged this decision with the ICO but met with only limited success. The ICO considered the report to be her personal data under the Data Protection Act and was therefore exempt from FOI. Parts were disclosed to her under the Data Protection Act. The requester appealed to the tribunal pointing out that while those parts of the report describing her own dealings with the police were her personal data the inquiry's findings on the police conduct of the investigation could not be. The Tribunal agreed and ordered disclosure of large parts of the report.[38]

61. In Miguell Cubells & Information Commissioner & Nottingham City Council, EA 2005/0006 the tribunal overturned a decision by the Information Commissioner because of an error of law. The requester's mother had died in hospital after a wrong diagnosis. They made an FOI request to the NHS trust for the information that it had supplied to the Health Service Ombudsman to whom they had complained. The trust argued that it was prohibited from disclosing this information under the Health Service Ombudsman Act 1993. The Information Commissioner upheld the trust's position on this. The tribunal, however, overturned it, explaining that the Act only restricted the Ombudsman from making disclosures, not other bodies from revealing what they had sent to it. The CFOI say that this was an important decision. "*If this decision had not been challenged, it would have led public authorities to refuse to reveal any information supplied by them to the Health Service Ombudsman, the Parliament Ombudsman or Local Government Ombudsman - all of whom are subject to a similar restriction. The result would have been a new and damaging layer of secrecy around all maladministration cases*."[39]

62. These cases demonstrate that the additional layer of oversight that the tribunal provides is necessary. The statistics do the same. The figures from the Ministry of Justice and Information Commissioner supplied in the call for evidence show that a sizeable proportion (38 per cent) of appeals to the ICO of public authority refusal notices succeed either wholly or in part including nearly a fifth of those against central government departments.

63. Nearly a quarter (23 per cent) of appeals to the Information Tribunal of decisions made by the Information Commissioner are successful wholly or in part. Of those brought by requesters, who will often not have legal representation, the appeal success rate is 21 per

---

[37] https://www.cfoi.org.uk/wp-content/uploads/2015/09/Court-and-Tribunal-Fees-Consultation-on-further-fees-proposals.pdf p4

[38] Campaign for Freedom of Information, Response to Court and Tribunal Fees: Consultation on further fees proposals, September 2015, p4-6

[39] Ibid

cent. Thirteen per cent of appeals to Upper Tribunal on a point of law succeed wholly or in part. Of those brought by requesters, 12 per cent succeed.

64. The Call for Evidence appears to place emphasis on the fact that a majority of public authority decisions – particularly central government departments – are allowed to stand. However, it should be remembered that the reason behind an appeals process, any appeals process, is not that there is a fear that a numerical majority of cases are wrongly decided at first instance. This will almost never be the case. It is because the UK legal system abhors error and injustice and wants to root it out whenever it occurs.

65. The cases and the statistics show that the appeals system for FOI is doing just that. They show that the decision-making of public authorities, the ICO and even the First Tier Tribunal is not flawless. Errors of fact and law are still being identified high up the chain. If the appeals process is curtailed there is a real danger that these errors will go undetected and that information that should be shared with the public will remain under lock and key.

66. The figures also undermine any suggestion that the volume of decisions being appealed represents a burden to the public authorities being challenged. The figures provided by the Ministry of Justice statistical bulletin only refer to central government departments and agencies but these show that the number of refusal notices that are appealed is small and shrinking.[40] Out of all the requests received (46,806), 5.3 per cent were internally reviewed in 2014, a decrease of eight per cent on the year before. Three hundred and ninety-five were referred to the Information Commissioner, compared to 408 in 2013, representing around 15 per cent of internal reviews less than one per cent of all requests received (0.8 per cent).

Question 6 – Cost and charges

67. The NMA strongly opposes any introduction of fees for making requests or any measure that would make it easier for requesters to hit the existing cost thresholds. Charging for FOI requests would be a tax on a democratic right. It would also represent the triumph of a wilfully blinkered view of FOI that only sees costs and burdens and ignores the great value to society and the economy of openness, scrutiny and accountability. Considering these benefits, the tiny fraction of an authority's budget that is spent on FOI represents great value for money. What is more, the law already allows for public authorities to refuse vexatious, obsessive and unreasonably burdensome requests, but there is evidence that authorities are not using the existing law to the full. If public authorities are not taking the steps available to them to minimise costs, it would be wrong to concede to any demands from that quarter to change the law in a way that disadvantages everybody else.

68. Introducing charges would be a draconian and backward step. We know this because when fees of EUR15 were introduced in Ireland in 2003, the numbers of people making requests

[40] Ministry of Justice Statistical Bulletin, Implementation of FOI in Central Government, 2014 Annual and October-December 2014, p3-4

collapsed by 75 per cent in the space of a year, and 83 per cent for those from the media.[41] For that reason, the policy was reviewed in 2012 and fees for requests have since been abolished.[42] We strongly urge the Commission not to recommend to ministers that they embark on the same mistake that the Irish government did in 2003.

69. Few pieces of legislation have been as effective at exposing Government waste as the FOIA – which is surely a major reason why public authorities don't like it. By dragging information about incompetent or extravagant spending to the fore, FOI puts authorities under pressure to address waste and pre-empt it in future. The most famous example of this is the FOI request that lit the fuse of the discovery that millions of pounds of taxpayers' money was being used to fund MPs' bizarre, extravagant and in some cases fraudulent expense claims. This led directly to the creation of an independent body to oversee MPs' pay and expenses in an effort to rationalise spending and restore public confidence.

70. It is also thanks to FOI that we learned the following:

- A Mail/Taxpayers' Alliance FOI investigation revealed that Essex County Council spent £874,640 on private medical cover for senior managers over three years. Westminster City Council has spent £409,639 since 2012 on private medical cover for more than 50 senior managers, including £160,392 last year alone. The former leader of Pembrokeshire Council claimed over £2,300 a month on expenses to drive a Porsche to work. And it also revealed that there are 537 town hall staff who earn over £150,000, which means they are paid more than the Prime Minister. [43]
- An investigation by the *Times* and the *BMJ* using FOI and public board papers found that clinical commissioning groups have awarded 437 contracts to companies, clinics and hospitals in which their board members have declared direct personal interests. The value of the contracts exceeds £2.4bn. GP leaders in Birmingham awarded contracts worth £1.7 million to a company in which three of them were shareholders and one was its medical director.[44]
- FOI has revealed the extent to which NHS trusts have had to pay agency staff exorbitant fees to plug staffing shortages. The *Telegraph* revealed that an NHS trust spent £11,000 for a single locum to cover a three-day weekend.[45] The *Yorkshire Post* used FOI to report that 10 NHS trusts in Yorkshire spent £113m on agency staff, up a third on the previous year and with several trusts having drastically under-predicted the increases when drawing up their budgets.[46] The Government is now consulting on introducing caps on agency fees.[47]

---

[41] Review of the Operation of the Freedom of Information (Ammendment) Act 2003 - An investigation by the Information Commissioner into the effects of Amendment Act and the Introduction of Fees on access requests - June 2004 https://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/-Review-of-the-Operation-of-the-Freedom-of-Information-Amendment-Act-2003.pdf p1&2

[42] "Cabinet abolishes 15 euro Freedom of Information Fee", 1st July 2015

[43] "How much do bosses at your council earn? Mail investigation reveals huge pay deals for the public sector fatcats", Mail, 8th November 2015

[44] "GPs award £2.4bn deals to their own companies", Times, 11th November 2015

[45] "NHS Locum Doctor paid £11,000 to work a weekend", Telegraph, 16th August 2015

[46] "Yorkshire hospitals £113m 'rip-off' agency staff bill", Yorkshire Post, 19th September 2015

[47] "Jeremy Hunt bans rip-off agency fees for locum doctors and nurses", Telegraph, 13th October 2015

- Clinical commissioning groups in the Bristol area spent £214,674 on homeopathic treatments, up from £197, 508 in 2013/14.[48] Meanwhile, a widely-reported FOI-based investigation to CCGs across the country revealed the money set aside for personal health allowances is being spent on holidays, games consoles, pedalos, aromatherapy and even the construction of a summer house – all at a time when funding for services of proven medical merit is being cut.[49]
- Poor planning has resulted in a network of Help-for-Heroes medical centres with empty beds, while costs – met by the charity and the Army - have spiralled from £70m over four years to £350m over 10 years.[50] The *Times* report on this has since generated discussion on how these centres can be used to help a wider group of people, such as civilian amputees.
- The Home Office spent over £250,000 chartering a private jet to deport a single deportee.[51]
- The Ministry of Justice paid Serco £1.1m to run an empty children's secure unit after it had closed its doors.[52]
- By 2014, Ministry of Defence Police had spent £360,000 on tasers, despite only needing to discharge one once since 2007.[53]
- Network Rail spent more than £7.2m on car allowances for senior staff last year, bringing its total spend on the perks over the past five years to £32m. The money was paid out to 1,339 individuals and was 27% up on the sum paid to 1,053 in 2010.[54] In response, the Department for Transport acknowledged that Network Rail's corporate culture required reform.
- St Helens Council spent £45,000 on celebrity acts to perform at a single event despite the council having seen its central government grant slashed by over 50 per cent, forcing it to cut back on jobs and services. [55]
- And FOI is still being used to check up on how MPs are using their perks. It uncovered that the Speaker of the House of Commons billed the taxpayer £172 for a 0.7m taxi journey and also £367 for a taxi journey to deliver a speech on how MPs were restoring their reputations following the expenses scandal.[56] It also uncovered that MPs have commissioned £250,000 of portraits of fellow MPs since 1995.[57]

71. The role of FOI in exposing waste and driving up standards of governance was acknowledged by the Public Accounts Committee of the House of Commons in 2014, which recommended extending FOI to private sector companies that carry out public services. The Committee considered FOI an important part of the solution to the poor performance and cost and deadline overruns that have plagued government contracts with companies such

---

[48] "NHS spends more than £200,000 on homeopathic treatments in Bristol", Bristol Post, 2015
[49] "Investigation: The luxury goods purchased with NHS money", Pulse, 1st September 2015
[50] "Millions spent on Help for heroes centres with empty beds", Times, 29th September 2015
[51] "Private jets to deport asylum seekers: After stretch limo farce, now taxpayers are hit with a £15m bill to send migrants home on half-empty planes", Mail, 16th October 2015
[52] "MoJ paid Serco £1.1m for running secure children's unit after it closed", Guardian 21st October 2015
[53] "MoD police spend £360,000 on huge stockpile of Tasers - despite using the weapons just once in eight years", 17th January 2015
[54] "Railway chiefs' £32m car perks", Sunday Times, 6th September 2015
[55] "St Helens council defend £45,000 splurge on celebrity acts for Christmas lights switch on", Liverpool Echo, 20th May 2015
50. "John Bercow claimed £367 for going to Luton to talk about expenses scandal", Guardian, 24th July 2015
[57] "MPs spend £250,000 of public money on vanity portraits", Evening Standard, 14th January 2014

as G4S, Serco and Atos.[58] We have long called for this extension and it is a pity that the call for evidence does not invite views on that proposal, when there has been a groundswell of support for it expressed by major political parties and wider civil society.[59]

72. The Prime Minister, David Cameron, told leaders at the Open Government Summit in 2013 that economic success is built on official transparency: "*the best way to ensure that an economy delivers long term success, and that success is felt by all of its people, is to have it overseen by political institutions in which everyone can share. Where governments are the servants of the people, not the masters. Where close tabs are kept on the powerful and where the powerful are forced to act in the interest of the whole people, not a narrow clique. That is why the transparency agenda is so important.*"[60]

73. Keeping "*close tabs on the powerful,*" as the PM says we should, would become prohibitively expensive if charges for FOI requests were introduced.

74. Before elaborating on the impact on newspaper journalism of charges, it should be remembered that the majority of people who use FOI are members of the public not journalists. FOI is often used by citizens who need to mount a case against a public authority. This could be because they are parents facing child protection proceedings or they are trying to get to the bottom of how a relative died in state care. This will often require multiple FOI requests to NHS trusts, local authorities and clinical commissioning groups and so on, particularly if the authority refuses to release the information when asked and insists instead that the requester takes the FOI route.

75. In the answer to Question 5 (appeals) we saw how the sister of a murder victim had to fight all the way to the Information Tribunal for the release under FOI of a review into how the police had conducted the inquiry, as did a bereaved son trying to get information out of the NHS trust whose doctors had misdiagnosed his mother.

76. The *Hull Daily Mail* has recently been covering the plight of the family of a young woman who committed suicide shortly after being refused a place on a ward by nurses at the mental health trust. Her family were concerned about the standard of care their daughter had received in the run-up to her death and sought more information from the trust, which would not hand it over but instead said they had to go through FOI. The young woman's mother described this as "an ordeal", saying that "every single piece of paper we have requested has gone through a similar convoluted and tortuous process."[61] A coroner later found that Sally's death could have been prevented and criticised the mental health trust for the way it treated the family.

---

[58] House of Commons Committee of Public Accounts: "Contracting out public services to the private sector", 26th February 2014

[59] The idea found its way on to the 2015 general election manifestos of the Labour Party and the Liberal Democrats and is endorsed by transparency campaigners such as the Campaign for Freedom of Information and Transparency International.

[60] PM speech at Open Government Partnership Summit 2013, 31st October 2013

[61] "Sally Mays death: Coroner's damning verdict as NHS Trust accused of causing 'unimaginable suffering'" Hull Daily Mail, 24th October 2015

77. If a charging system was in place, families in these situations would have had pay over and over again for requests, reviews and appeals that they were forced to go through in their protracted battles with public authorities who in many cases should have just given the information when asked.

78. Many people in this situation would simply not use FOI, even though they might have very good reason to. Among those who would be discouraged from using FOI would be journalists investigating public authorities. Making FOI requests, often multiple FOI requests, is a central part of many journalists' jobs. If they are on a national newspaper and are reporting on the performance of police forces nationwide for example, they will need to find answers from a reasonable number of forces in order to make meaningful conclusions about how police are performing. The same applies to any investigation into NHS trusts, clinical commissioning groups or any branch of local government such as a local education authority or housing standards enforcement.

79. In September 2015, the *Independent* reported that FOI requests it had sent to police forces in England and Wales revealed that over 3,000 police officers in England and Wales were under investigation for alleged violence against members of the public and that just two per cent were suspended while the investigation was carried out.[62] In the requests, the paper had asked about the ethnicity of the complainants and the answers revealed that a disproportionately large number of people of black or Asian backgrounds were among those alleged to have been assaulted by the Metropolitan and West Midlands Police Forces, the two forces that accounted for half of the total number of incidents. The paper reported: "*Black and minority ethnic people make up one in three of London's population but represent 55 per cent of alleged victims of brutality by Met officers. The disparity is even worse in the West Midlands where nearly half of assault complaints against police come from black or Asian people – though just 14 per cent of the population is black or ethnic minority. This means black and Asian people are 3.5 times more likely to allege assault by officers.*" This was clearly a rigorous and public-spirited investigation by the paper that yielded a lot of important information. If charges of £20 per request were in place – which is one of the figures that has been briefed as a possibility - this investigation would have cost £860 to carry out.

80. In August this year, the *Telegraph* reported that NHS A&E departments have half the number of senior doctors on duty at weekends compared to during the working week.[63] Across the 50 A&E departments whose trusts answered the paper's FOI request, there were 210 consultants working midweek compared with 95 at the weekend. The weekend numbers fell to just 38 at nights. The paper found that some hospital trusts have no consultants working in A&E on weekend nights and rely on senior doctors who are on call. The report came against the backdrop of research revealing that mortality rates spike for patients admitted at weekends. The *Telegraph* obtained the information from NHS trusts by

[62] "Over 3,000 police officers being investigated for alleged assault - and almost all of them are still on the beat", Independent, 24th September 2015
[63] "Revealed: the alarming shortfall of A&E doctors at weekends" Telegraph, 30th August 2015

FOI. There are 155 NHS acute trusts. To FOI them all with a £20 charge in place would cost £3,100.[64]

81. The *Times* piece cited above on conflicts of interest at clinical commissioning groups is another good example of the value of multiple FOI-based investigations. The newspaper received responses from 151 CCGs. According to the NHS Confederation, there are 209 CCGs. Under a fee-regime, this investigation would have cost £4,180 and the paper would have had to pay the fee to the CCGs who did not answer, even though others found the information perfectly retrievable.

82. A regional paper, the *Northern Echo* reported over the summer that over 1,500 children in local authority care had been reported as missing in the North East since 2011.[65] In one year, 500 were lost track of in Middlesbrough alone. This information was obtained through FOI. In recent years, the region has been hit by a wave of scandals over the way in which police and local authorities dealt with children, often in local authority care, being groomed to perform sexual favours for gangs of men. There was intense public interest in establishing the record of local authorities in keeping track of the children whose care is entrusted to them. If charges were in place, requesting the information from the five councils cited in the report would have cost the Echo £100. Regional newspapers have very finite resources. Councils should not demand payment from them - or anyone else - before revealing how many children they have lost.

83. It is not just large-scale, multiple-agency investigations that would be hit by charges. Any local newspaper's day-to-day reporting on the town hall would be too as this will often entail FOI requests on various aspects of its work. Since 2014, the *Sheffield Star* has used FOI to uncover a panoply of important information about Sheffield City Council. As a result, in an 18-month period, it has used FOI to reveal that the Council had spent £3m on temps for senior positions in four years, with two people being paid £75 an hour to perform "interim ad hoc" work;[66] pursue a "hidden" Council report on libraries thought to be under threat;[67] to reveal that the Council lost, misplaced or leaked confidential data 22 times since February 2012;[68] that it had spent £17,000 on chairs – working out at £73 per chair;[69] that it was planning to cut down 1,200 trees;[70] that there have been 250 "paupers' funerals" in South Yorkshire since April 2012 and that the numbers are increasing;[71] that 46 pubs have closed in Sheffield since 2010;[72] to investigate whistleblower claims that the Council was re-hiring "in droves" staff it had previously laid off;[73] to discover that only 30% of those who

---

[65] "More than 1,500 North-East children missing from care since 2011: Echo investigation", Northern Echo, 29th August 2015
[66] "Freedom of Information: Council £3m temp bill", Sheffield Star, 5th May 2014
[67] "Town Hall 'hid library review'", Sheffield Star, 23rd January 2014
[68] "Sheffield Council lost document of children's names - authority's data breaches exposed", Sheffield Star 5th November 2014
[69] "Sheffield Council's £17,000 bill ... for chairs" Sheffield Star, 13 March 2014
[70] "1,200 trees facing the chop," Sheffield Star, 18th January 2014
[71] "Too poor to die... More than 250 paupers funerals in South Yorkshire since April 2012", 16th February 2015
[72] "Sheffield's pub closure hotspots", Sheffield Star, 23rd February 2015
[73] "Sheffield council rehiring droves of staff it made redundant", Sheffield Star, 24th November 2015

bid for council housing in Sheffield are successful;[74] and that there has been a 41% surge in the number of children taken into care.[75]

84. If there were charges, the bill for keeping such regular, diligent tabs on town hall would run into several hundreds of pounds. This is not an extravagantly wealthy sector. It has been through hard times. If fees were in place, local newspapers would have to cut back on this important work that tests the claims that councils make for themselves. That in turn, would mean that their readers would receive less information on how councils are performing to inform how they vote in local ballots.

85. It is no answer to the complaints of newspaper journalists that there are other ways of obtaining information. The time limits, cost limits and large number of exemptions on FOI can make it a protracted, unwieldy and legalistic way of getting information especially when up against an authority that has not embraced the spirit of it.

86. FOI is only used when it has to be, but often it does have to be. The information put in the public domain by authorities is limited. A journalist investigating how the police treat domestic violence will often not even be able to find basic information such as the number of people charged and convicted per year on a police force website.

87. Questions can be put to press offices, which will usually be the first port of call for a journalist, but the more difficult or awkward the question, the less likely they are to get an answer. This requires them to take the FOI route. We have heard that press offices will insist that journalists use the cumbersome, legalistic route of FOI instead of just giving them the information. The Thames Valley Police press office, for example, insisted that a journalist at the *Oxford Mail* put his request abour whether the force had used powers under the Regulation of Investigatory Powers Act to obtain journalists' phone records through FOI to find out. The request, which was actually submitted to the force's FOI team by the press office on behalf of the journalist, was still then refused as "vexatious."[76]

88. Even where the information put in the public domain by authorities is expanded through Open Data initiatives, this is no substitute for FOI. Open data drives are welcome and we do not discourage them, but they still put officialdom in control of what it publishes about itself. The proactive inquiries from newspapers and members of the public will often concern information that goes beyond the prescribed dollops of data they get given from the Government. The Cabinet Office did not include as part of the information that it routinely publishes the complete correspondence with Downing Street that took place over the award of a knighthood to Cyril Smith. Only an FOI request - doggedly pursued by the *Mail on Sunday* - could get to it and the same applies to any internal report that an authority decides not to publish. Equally, while Manchester City Council does publish a

---

[74] "Sheffield Council defends record on social housing shortage and pledges more building," Sheffield Star, 14th July 2015

[75] "Forty-one per cent surge in children taken into care in Sheffield 'reflects tougher stance on neglect", Sheffield Star,22nd September 2015

[76] "Oxford Mail branded 'vexatious' by Thames Valley Police - for RIPA FoI submitted by force's own press office", Press Gazette 18th March 2015

range of data sets as part of its publication scheme, these do not include the numbers of taxi licences that it hands out to convicted sex offenders. The Manchester Evening News had to obtain these through FOI.[77].

89. Because of these benefits to the economy and business environment of the UK, we consider that FOI is great value for money. There are costs associated with compliance but these are invariably a tiny proportion of a public authority's budget and a fraction of what it spends on external communications and PR.

90. Research by *Press Gazette* found that central government departments will have spent around £6m in total on compliance with FOI which represents 0.001 per cent of the £577.4bn that they spend each year and equates to two per cent of the £289m they spend on external communications (according to the Government's own Government Communications Plan 2014/15).[78]

91. At council level, local authorities rarely put into the public domain what they spend on FOI. However, on those rare instances where they do, the estimate that they provide emerges as a very small proportion of what they spend on services.

92. In 2015, Staffordshire Council complained to the press that it spent in 2014 £160,800 on FOI.[79] During that period, the council was spending over £500 million a year overall on delivering services (£512.6m in 2014-15[80] and £531.9m in 2013-14[81]). The figure the council cited for FOI appears to represent around 0.03 per cent of that.[82]

93. In April 2014, the leader of Essex County Council criticised the cost of FOI and provided a figure of £185,000 for the previous year.[83] During that time, Essex County Council was spending around £1.9bn delivering services.[84] The FOI figure given represents around 0.01 per cent of that.

94. London Borough of Hounslow says on its website that it spends £371,800 on answering FOI.[85] There is no explanation on how it calculated this figure and it does not appear in the annual statement of accounts. For the last financial year, the council spent £181m overall. So the FOI figure given by the council represents 0.16 per cent of that.[86]

---

[77] "Revealed: How officials let sex offenders, paedophiles and a rapist drive your taxis", Manchester Evening News, 16th December 2014

[78] "Cost to central Government of complying with 50 times less than external comms budget", Press Gazette 13th October 2015

[79] "Information requests cost Staffordshire Council £160k", Express & Star, 11th September 2015

[80] Staffordshire Council: Statement of Accounts for 2014/15, p3.

[81] Staffordshire Council: Statement of Accounts for 2013/14, p3

[83] "Essex Council leader criticises cost of 'trivial' FOI requests", BBC News, 12 April 2014

[84] Essex County Council Annual Report 2013/14, p22 & Essex Council Annual Report 2012-13 p19

[85] http://www.hounslow.gov.uk/index/council_and_democracy/foi/foi_send_request.htm

[86] London Borough of Hounslow, Statement of Accounts 2014-15

95. London Borough of Merton on its website put its FOI cost at £235,753.[87] It says this is based on the 2010 formula used by UCL in its research into FOI of assuming an average per request of 6.3 hours work to answer at £25 per hour, coming to around £158. That figure, which the council stresses is guideline only equates to 0.15 per cent of the £158.4m that it spent on services in 2014-15.[88]

96. In 2012, Merthyr Council told the BBC that it "could have" spent £160,000 answering FOIs in 2011.[89] During that period, the council was spending just over £106m delivering services. The £160,000 spent on FOI would have represented 0.15 per cent of that.[90]

97. The above councils feel so strongly about FOI that they feel the need to discourage citizens from using it either explicitly in the press or implicitly by putting the cost on the FOI pages of their websites. Yet all of them spend on FOI substantially less than one per cent of what they spend overall on delivering services.

98. The introduction of FOI charges and subsequent drop-off in requests would have a negligible impact on councils' financial position, but, as the Irish example has shown, it would have a calamitous effect on the exercise of this important, democratic right. Charging for FOI would therefore be a wholly disproportionate response to the costs of administering the system.

99. The FOI law as it stands offers safeguards against unmanageable cost and burdens, yet there is evidence that even though councils complain about the cost of FOI, they are not using these safeguards.

100. Section 12 of the Act entitles public authorities to issue refusal notices to requests that would exceed specified cost limits. These are £600 for central government departments and £400 for other authorities. Requesters can also be charged for any postage and photocopying involved in answering.

101. Requests can also be refused if they are considered "vexatious" or "repeat" requests under s14 of the Act. "Vexatious" (s14 (1))is not defined in the Act, but the Upper Tribunal considered its meaning at length in Information Commissioner v Dransfield [2012] UKUT 440 (AAC). The tribunal said there are four main factors to consider: the burden, motive, the value or serious purpose, and whether the request causes distress or harassment to staff.

102. Under these principles, authorities are entitled to refuse to answer requests that are part of an obsessive pattern of requesting or one that is aimed purely at disrupting and annoying the council in the pursuit of a grievance against it. Requests that are part of a co-ordinated public affairs campaign, by a union or charity or example, can also be declined as vexatious

---

[87] http://www.merton.gov.uk/council/dp-foi/foi.htm

[88] LB of Merton Statement of Accounts 2014/15 p2

[89] "Freedom of Information requests 'puts strain on councils', BBC News, 14th October 2012

[90] http://www.merthyr.gov.uk/media/1360/statement-of-accounts-2011-2012.pdf p2

if they are disproportionately burdensome.[91] And requests that contain offensive language or unsubstantiated allegations against an authority may be considered vexatious too.

100. Importantly, the Court in Dransfield said that the breadth and scope of a request can be relevant when considering vexatiousness. This is separate from the cost limits in s12, which cover certain costs such as the time taken to read and locate information in documents, but not others such as redaction, or considering what may need to be redacted. The *Dransfield* definition of s14 means that where answering a request would cause a disproportionate burden to an authority in ways other than those set out in s12 the authority may be able to refuse them. There is now a clear line of decision notices at ICO level that requests that take an excessive amount of time to redact or to assess what falls in scope for release, or are in other ways "grossly oppressive" can be refused under s14 "vexatiousness". For example:

- In September 2015, the Commissioner upheld the Ministry of Defence' application of s14 (1) to a request for eight specific documents concerning the peaceful use of nuclear explosives. The MoD embarked on the answer but then realised that the time it would take to assess the material and weigh judgments about what needed to be redacted represented a much greater undertaking than it had anticipated. The Commissioner acknowledged that there are strong public interest arguments in favour of ordering publication, but came down in favour of the MoD saying that it was "*satisfied that complying with this request would, or more accurately did, place a grossly oppressive burden on it.*"[92]

- In July this year, the ICO also found in favour of an NHS ambulance trust applying the exemption to a request for the ambulance response times for every incident since 2015 as well as other data including the street, the date, the postcode, and the category of complaint. The trust said that some of this was disclosable but some of it could render individuals identifiable and would need to be redacted. The Commissioner agreed, saying that "*he does not consider this to be a proportionate or sensible use of the Trust's resources.*"[93]

- In March 2015, the ICO upheld London Fire Brigade's use of s14 (1) to refuse a request for all of its policies and procedures since 2008 on the grounds that the time taken to assess what needed to be redacted and what did not would be in the region of 100 hours and it only had a two officers working on FOI: "*The Commissioner considers any reasonable person would find it difficult to conclude that this would place anything but a grossly excessive burden on the two members of staff at LFB who would be burdened with undertaking the task.*"[94]

---

[91] ICO Decision Notice: FS50593969 2nd September 2015 - The Information Commissioner found that the National Gallery had properly applied s14 when refusing to answer a request that was part of a co-ordinated campaign of FOI requests from the PCS union over an out-sourcing contract.
[92] ICO Decision Notice FS50578749 21st September 2015 paragraph 31
[93] ICO Decision Notice: FS50569582 12 July 2015 at para 35
[94] ICO Decision Notice FS50569583 17th March 2015

101. Public authorities should therefore feel confident in refusing under s14 (1) requests where the burden of assessing what can be released and redacting it if necessary is manifestly unreasonable. The wording of the Act on this does not need to be revisited given the ICO's consistent application of the principles set out in *Dransfield.* The introduction of new hard and fast statutory limits, plucked out of the air, for redaction and thinking time, would make it easier for authorities to flatly refuse requests and harder for the requester to challenge the grounds. It would also restrict the ability of the ICO to look at the request in the round and weigh the public interest in the request against the additional burdens that may be involved in releasing it. The further the Act goes in the direction of automatic cost-bars and other devices that catch requesters out regardless of the merit of their request, the more it will drift away from its purpose of bringing to the fore information that the public has a right to know.

102. Sometimes, additional effort to carry out a request is proportionate, where the public interest is strong and there is a serious purpose behind it. Furthermore, since Dransfield, some public authorities have been observed to have overstated the burden that a particular request would generate in order to apply the exemption. For example:

- In 2013, a requester asked the CQC for copies of all emails sent and received by CQC chief executive David Behan in 2013, which contain any of the following terms: 'winterbourne', 'private eye'. The CQC tried to argue that trawling through the emails, which were often part of chains and contained lengthy attachments, was necessary to identify sensitive/personal information that would need to be redacted. This it said would place an oppressive burden on its resources and this preliminary task alone would take over 30 hours. The Commissioner accepted that there would be over 300 pages to review. However, the Commissioner a) was sceptical about how long this would really take and b) considered that the public interest around the Winterbourne View abuse scandal justified putting the CQC to the trouble: "*the Commissioner concludes that the request does not impose a grossly oppressive burden upon the CQC and that the impact upon the CQC is justified and proportionate given the purpose of the request and the value to the public of the majority of the information within its scope.*"[95]

103. If councils and other authorities are concerned about costs, it is essential that they use the tools available to keep them down. There are some troubling indications that they do not use them to the full and then blame the Act for the expense incurred by their own flawed administration of it.

104. The leader of Essex Council, cited above, when attacking FOI reportedly said that answering requests about "apocalypse zombies or the number of lavatories" was wasting the council's money. In 2014, the Local Government Association put out a press release listing the "wacky" requests that have been made to councils under FOI: "*One Wigan resident must have watched one too many episodes of 'Game of Thrones' before asking his council what*

[95] ICO Decision Notice: FS50532615 20 August 2014

plans they have to protect the town from a dragon attack. Officers at Worthing Borough Council were surprised to be asked if the seaside town was ready to cope with an asteroid crash. Elsewhere, Rossendale Council was asked if it had paid for exorcisms to be performed on possessed pets and animal-lovers in Cambridge quizzed the City Council how many animals it had frozen".[96]

105. If councils are answering questions about zombies, dragons and pet exorcisms, then yes, they absolutely are wasting taxpayers' money. All of these can be safely refused under the Act as vexatious. There is no need under the Act to answer any of these at all.

106. The release added that "councils are also having to answer requests for information readily available on council websites, such as for staff telephone numbers." This is wrong. Councils are not "having to" do this. There is an absolute exemption under the Act for information that is publicly available. If council officials are wasting time and money by not using the exemption that is available to them, it really is not the Act's fault.

107. The Information Commissioner has noted that councils and public authorities do not make full use of the Act's provisions to minimise the burden. He said "*public authorities are, rightly, empowered to say "enough is enough" and refuse a vexatious request. The ICO has a good clear track record of supporting public authorities when they have relied reasonably on these provisions to refuse to deal with a request. What's surprising is that more public authorities don't use these provisions more often, but instead complain about having to deal with requests which could validly be described as vexatious – lacking in serious purpose, excessively burdensome, or designed to disrupt or annoy.*"

108. He added that authorities "*invariably choose not to raise a fee for the supply of information even when they are entitled to do so*" and made it clear that he considers that this diminishes the force of their complaints and undermines any argument in favour of charging for requests: "*If fees for simply making a reasonable request for information were to come back on the agenda, it would indeed be a retrograde step - particularly when public authorities are not using the powers they already have to refuse the unreasonable or charge for the most costly.*"[97]

109. Not only is FOI a tiny fraction of spending for public authorities, but the existing rules offer plenty of under-used scope for them to make it cheaper still. Changing the Act, to bring in charges for requests or new limits under s12, is not only unnecessary but would diminish the Act's power to shine a light on how taxpayers' money is being spent. The more information on that which is kept in the dark, the less incentive and pressure there is to ensure that every penny is spent wisely. The predictable result will be that it will not be spent wisely and that more would find its way into business class travel for officials, lavish car allowances, vanity projects, rip-off staffing agencies, bungling contractors, dubious medical treatments and all the other places where money ends up when there is insufficient scrutiny to put a stop to it. Any meaningful, far-sighted cost-benefit analysis of FOI would conclude that cutting back on FOI is a false economy and that extending it is the enlightened way forward.

---

[96] "Councils quizzed on dragon attacks, asteroid crashes and possessed pets in wacky FOI requests", Local Government Association, 16th August 2014

[97] Information Commissioner speech to the LSE 1st October 2015

110. Finally, the NMA concludes by inviting the Commission to consider the case for extending FOI to private sector companies contracted to carry out public services, along the lines endorsed by the Public Accounts Committee in 2014. We would be happy to brief the Commission on the issues and consider this a far more enlightened way of developing freedom of information law in this country than that set out in the call for evidence.