

Working Effectively: Lessons from 10 years of the Freedom of Information Act



*In July 2015 the government announced that it was setting up a **review of the UK's Freedom of Information Act**. Christopher Graham, Information Commissioner since 2009, speaking at an event organised by the **LSE Media Policy Project**, talks about his experience as Commissioner over the past six years, and why he believes the FOIA is effective and what should be done to keep it operating effectively in the future.*

My theme, 'is the Freedom of Information Act working effectively?', is drawn from the terms of the Written Ministerial Statement establishing the FOI commission back in July. '**We fully support the Freedom of Information Act**,' wrote the Cabinet Office Minister, Lord Bridges. 'But, after more than a decade in operation, it is time that the process is reviewed, to make sure it's working effectively,' he went on.

As Information Commissioner, I am responsible for policing the operation of the Freedom of Information Act – or FOIA, as we know it. It is not, however, my job to campaign. I am sure there will be plenty of people here this evening who are qualified, and free, to argue the pros and cons of the Act. We have already seen the press mobilising to defend the legislation. I leave all that to others.

What I would like to do in my talk this evening is to look at the facts, and speak from the experience of what has actually happened. The facts as we have experienced them at the ICO over the almost 11 years of FOIA in operation – and the five years before that of preparation and implementation work.

And, for what it's worth, my own experience as Information Commissioner over the past six years. I'm also going to be quoting extensively from Ministers so that we can be sure that we are all talking about the same thing.

So is FOIA working? Is it working effectively? As a Commissioner and not a cheer leader, my contention, based on the facts, is that the Act is working effectively. The interesting questions are about how to keep FOIA effective for the future – not how to limit its effect today.

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

The other day, the Cabinet Secretary referred to the commission as "an independent review by a group of very eminent people", who will look at the "pros and cons of the current regime... We'll see what they come up with, and the Government will make a decision," He said.

We are promised a formal call for evidence. So this evening I want to sketch the outlines of the evidence the ICO will be submitting to Lord Burns and his colleagues – when the call comes.

In the first part of my talk I'm going to look at the 'safe space' argument, drawing on the record of 10 years of decisions, both by the Commissioner and the Tribunal. Then I shall tackle the arguments around the burden that Freedom of Information (FOI) places on public authorities. And finally, I will look at the concepts of FOI and Open Data. Are they the same thing, or different? And if they are not the same thing, what are the implications for the Act and the suggestions that it needs to be amended in some way?

Of course, we have been here before. In the last Parliament, the Justice Select Committee undertook an exercise in post-legislative scrutiny. They called for evidence, considered written submissions, and held oral hearings. The ICO gave evidence, both written and oral. The committee's report was published more than three years ago.

On the matters under debate this evening, what were the Committee's conclusions?

On the so-called 'chilling effect' the Committee looked at the very limited evidence available, recognised there could be a problem – at least of perception – at the highest levels of policy formulation, but believed that the existing provisions of the Act could be used more effectively to give assurance that there was no need for high-level policy discussions, and the recording of such discussions, to be inhibited by the Act.

The MPs, however, reiterated that it was the clear intention of Parliament when passing the legislation to allow a "safe space" for policy discussions and called for guidance to be issued to civil servants about the protections in the Act. The MPs accepted that it could be appropriate to use the ministerial veto to ensure a "safe space" for high-level policy discussions.

On the matter of the burden, the report concluded that while FOI imposes costs, it also creates savings when the inappropriate use of public funds is uncovered – or where fear of disclosure prevents the waste of public money.

On the relationship between Freedom of Information and Open Data, the Committee observed that while proactive transparency clearly has the potential to reduce the burden of responding to information requests on hard-pressed public authorities, the proactive publication of data cannot substitute for a right to access data because it is impossible for public bodies to anticipate the information that will be required. Nevertheless, proactive publication is important in achieving the primary objectives of the Act of openness and transparency, the MPs said.

Nothing much happened following the Justice Committee report, presumably because the coalition parties were not in agreement on the next steps. But since the election, things have begun to move.

In his statement, Lord Bridges from the Cabinet Office set out the new Government's policy:

Our aim is to be as open as possible on the substance, consistent with ensuring that a private space is protected for frank advice. To that end as a government we must maintain the best environment for policy-makers to think freely and offer frank advice to decision-makers. The most effective system is when policy makers can freely give advice, whilst citizens can shine a light into government.

A month or so earlier, the Lord Chancellor, no less, was **offering the view that the Freedom of Information Act needed attention.**

"I think we do need to revisit the Freedom of Information Act," he said.

It is absolutely vital that we ensure that the advice that civil servants give to Ministers of whatever Government is protected so that civil servants can speak candidly and offer advice in order to ensure that Ministers do not make mistakes. There has been a worrying tendency in our courts

and elsewhere to erode the protections for that safe space for policy advice, and I think it absolutely needs to be asserted...

Some of the judgments that have been made have actually run contrary to the spirit of the original Act, said the Lord Chancellor and some of those behind the original Act, including former Prime Minister Tony Blair and the Home Secretary who introduced the legislation, Jack Straw, have been very clear about the defects in the way in which the Act has operated. It is vital that we get back to the founding principles of freedom of information.

Mr Gove continued:

It is vital that we protect civil servants by making sure that they can give full and frank advice. Sometimes, as well as respecting transparency, we have to respect confidentiality. We have a duty of care towards those in the civil service who do such a good job of supporting Ministers.

So apparently this is all about a duty of care towards civil servants. It's about protecting Ministers from making mistakes. Not at all about protecting Ministers.

Last week, the Cabinet Secretary [Sir Jeremy Heywood joined the debate at an interesting event hosted by the Institute for Government.](#)

Sir Jeremy was asked a somewhat leading question about FOIA by James Kidner from the Foreign Office. Mr Kidner, a former adviser to the Prince of Wales, complained to Sir Jeremy about the legislation (adding the killer descriptor, "whose architects now regret it".) The man from the Foreign Office likened FOIA to "sand in the machinery that constantly distracts from the process of getting on and delivering on policy agendas". "Can you say what you'd like to do to take that sand out of the machinery?", he asked.

The Cabinet Secretary's response was measured . The Act had "been a very big positive", he said, but he added

Clearly there are some extra costs that come with the Freedom of Information Act, there are some chilling effects, there's no doubt about it whatsoever... There are small areas of national security or advice to Ministers where it is best done confidentially and then best revealed at a later stage. The Freedom of Information Act recognises that. That was what the intention was.

So what does the record tell us about how effectively FOIA is working to protect this necessary safe space? And what of the so-called chilling effect of the Act?

In fact, there are many, many, examples of the Commissioner – and the Tribunal – upholding the safe space.

Section 35 of FOIA provides for exemptions from the presumption of disclosure which are very broad. These cover the formulation and development of government policy – and that includes advice to ministers. And ministerial communications – in other words communications between ministers – are protected too. This clearly includes cabinet material.

Decisions on disclosure or non-disclosure are subject to the public interest test. And the balance of public interest has very often favoured maintaining the exemption and withholding the information.

Then there is Section 36 which exempts disclosures that would inhibit free and frank discussion or the exchange of views for the purposes of deliberation. This is where the chilling effect is said to manifest itself (or one aspect of it, at least – the other being the failure to record advice and/or the reasons for decisions.)

Again, we have to apply the public interest test. And recent ICO decisions have upheld withholding briefing notes and notes of discussions – one recent example, those between the Cabinet Secretary and newspaper editors.

We also upheld the decision to refuse to release prematurely documents declassified for the purposes of the Chilcot Inquiry – on the grounds that FOI should not pre-empt the process or outcome of that inquiry by piecemeal disclosures.

Or take Cabinet papers. A few years ago, just before my time, we refused disclosure of the minutes of the Cabinet meeting in 2003 when the opportunity to bid to host the 2012 Olympic Games was discussed. We upheld free and frank discussion. The decision had been made. There was no significant public interest in who said what. And we respected the principle of collective cabinet responsibility.

To be clear, Parliament has made these exemptions subject always to the public interest test. Sometimes issues are of significant public interest and the balance tips in favour of disclosure. Such cases have included requests for information held about the Hillsborough disaster, the takeover of Rowntrees, and, famously, the minutes of Cabinet meetings immediately prior to the declaration of war with Iraq in 2003. Different factors were at play in each of those cases, but they were not matters of the routine business of government and each had far-reaching significance.

The ministerial veto, which Parliament included in the Act, was exercised in the Iraq case, but following the Supreme Court decision in Evans, the Prince of Wales's letters case, the circumstances in which the veto can be exercised are, in practice, very limited.

For environmental information requests, the Supreme Court has confirmed that the veto is not available at all. That is because provision for a veto is simply incompatible with the UK's international obligations under the EU Directive and the Aarhus Convention.

Environmental matters often throw up wider public interest issues. The HS2 project is a good example. But when the Government was finally forced to publish the Major Projects Authority report on HS2, the month before last, life went on – and the HS2 project went on.

It's important to remember that the grounds for withholding information under the Environmental Information Regulations (EIR) are slightly different to those under FOIA. So the formulation and development of government policy, ministerial communications and even absolute exemptions such as communications with the most senior members of the Royal Family are not available as such as legal grounds for refusing a request.

Of course, the Information Commissioner also has responsibility for regulating the EIR. And, in this connection, it is interesting to note that the EIR are not covered by the terms of reference of the FOI commission. In some ways this is welcome, but if the reason for this is simply that the EIR cannot easily be amended because of international obligations, it does suggest that the Commission is only concerned with issues where the UK law might be changed, rather than examining more broadly the impact of the totality of our access to information laws.

In our evidence to the FOI commission, we will be submitting figures showing the balance of withhold versus disclose calls in relation to sections 35 and 36 in central government Decision Notices – updated since Post Legislative Scrutiny – showing the significant percentage of such DNs that sanction withholding.

I think the facts I have set out, and which we will submit in greater detail to the commission, show 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.

Now to my second theme. The burden. Is it all worth it? I suspect the safe space and chilling effect arguments are what the commission was primarily intended to address. But concerns about the burden of having to deal with requests for information have been a regular occurrence in the ICO's experience of the first ten years of FOIA.

The provision excusing public authorities from the duty to comply with a "vexatious" request was included in FOIA to limit any disproportionate burden. Likewise the EIR include an exception for "manifestly unreasonable" requests. The ICO gave clear guidance on the interpretation and use of these provisions right from the outset, and we have developed it since to reflect experience and case law.

Earlier this year, this aspect of the law was considered at length by the Court of Appeal which, eventually, unanimously upheld the ICO's case, confirming the Upper Tribunal judgment on which our latest guidance is based. Now one of the appellants is trying to have the decision in his case appealed to the Supreme Court, but so far he hasn't been granted permission.

For now the law is settled. 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.

There are also provisions for a cost limit on the duty to search and retrieve requested information and for fees in certain circumstances. The ICO has consistently argued against upfront fees for making requests. That would be to impose a tax on the exercise of a democratic right – before it was clear what information could or could not be released. It is interesting that public authorities invariably choose not to raise a fee for the supply of information even when they entitled to do so.

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.

Which leaves us with my third question. Freedom of Information and Open Data. Are they two sides of the same coin? Or different currencies altogether? These, I think, are questions on which the Information Commissioner is well placed to comment, given my responsibilities under both FOIA and the Data Protection Act.

The UK's commitment to Open Data is certainly impressive. But is Open Data on its own the same thing as transparency?

Back to Lord Bridges announcing the Burns commission (and, incidentally, the move of responsibility for FOI policy to the Cabinet Office). The Minister lauded the Government's achievements.

- *We are opening up government to citizens by making it easier to access information.*
- *We are strengthening accountability and making public services work better for people.*
- *We are proud of these achievements and are committed to going further*

the Minister said. And this has been the consistent theme of Ministers over the past few years.

Speaking to Select Committee chairs on the Commons Liaison Committee back in March 2012, the Prime Minister spoke about the Freedom of Information process as looking at things from "the wrong end of the telescope".

'It seems to me,' he said 'that real freedom of information is the money that goes in and the results that come out. Making Government transparent is the best thing. We spend, or the system seems to spend, an age dealing with freedom of information requests which are all about processes, and actually what the public or the country want to know is how much money are you spending, is that money being spent well and what are the results... That's freedom of information. But this endless discovery process that furs up the whole of government – don't worry, we are not making any plans to change it.

That was three years ago. But does Open Data on its own really make for 'the most transparent government in the world' which was the bold claim in the Ministerial Statement setting up the FOI commission? Or does this approach sound rather too reminiscent of the 'the gentleman in Whitehall knows best' caricature of a previous age?

Certainly, the questions we at the ICO see being asked of public authorities, both great and small, show a breadth of interest and insight that can only aid transparency and accountability, however inconvenient some of the answers may prove.

On this matter at least, I should be surprised if the independent commission arrived at any different conclusion from the Justice Committee. Transparency and accountability involve both proactive and responsive routes to disclosure of official information.

The fact is that transparency and accountability are not just a challenge for governments. Think Volkswagen. Think FIFA. Think even how charities conduct their fund-raising.

Whether it's sand in the machine or fur in the arteries of government, I suspect that it is the public demand for real transparency and accountability, combined with the insurgent power of new media and digital communications, that makes life more difficult for those in authority than was the case 10 or 15 years ago.

And changing the Freedom of Information Act would not put that genie back in the bottle.

This article, drawn from a speech, gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics and Political Science.

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