Ministry of JUSTICE

Government Response to the Justice Committee's Report: Post-legislative scrutiny of the Freedom of Information Act 2000

November 2012

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by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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Introduction

This document is the Government's response to the Justice Committee's First Report of the 2012–13 Session on its post-legislative scrutiny of the Freedom of Information Act 2000. The Justice Committee's report was published in July 2012.

The Ministry of Justice is grateful to the Justice Committee for its analysis of these issues and has given careful consideration to its findings and recommendations.

1. The Objectives of the Act

We agree with the Ministry of Justice that the Act has contributed to a culture of greater openness across public authorities, particularly at central Government level which was previously highly secretive. We welcome the efforts made by many public officials not only to implement the Act but to work with the spirit of FOI to achieve greater openness. Our evidence shows that the strength of the new culture of openness is, however, variable and depends on both the type of organisation and the approach to freedom of information of the individual public authority. (Paragraph 17)

1. The Government welcomes the Committee's recognition of the contribution made by the Act to the culture of greater openness and of the role played by officials in helping to instil freedom of information across public authorities.

2. The latest research of monitored public bodies shows that the number of requests to Central Government is continuing to rise; in Q2 2012, Central Government received 11,634 requests, an increase of 5% on Q2 2011.

3. In this response, the Government proposes measures which, within a continuing culture of openness, will encourage FOIA to be applied more consistently across the public sector whilst ensuring that the FOI regime offers value for money

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. (Paragraph 31)

Government must ensure that the freedom of information regime and the transparency agenda work together to ensure best value for money. Individual initiatives in different departments must be examined before implementation in the light of existing policy to see whether they constitute the most effective approach. Equally, existing initiatives should also be assessed after a period of time to ensure they both offer value for money and have not produced unintended consequences. (Paragraph 32)

4. The Government agrees with the Select Committee's assessment of the importance of proactive disclosure of information. It agrees that, while not a substitute for a reactive disclosure regime, the Government's Transparency Agenda is an important element of the Government's commitment to increased transparency.

5. The Government believes the freedom of information regime and transparency agenda are complementary. That is why, in the Open Data White Paper 'Unleashing the Potential' (June 2012), the Government set out how the transparency agenda can help to further deliver greater access to and re-use of raw data (a subset of information) which government holds. The Government is also working to improve the usefulness of the information it releases. The Protection of Freedoms Act will provide that datasets disclosed in response to a FOIA request should, where reasonably practicable, be released in a reusable format alongside a specified licence. This will ensure that disclosure is not just about dissemination but allowing data to be readily used.

6. Information now routinely released includes financial information, contracts and tendering details, performance indicators and pay grades. Local authorities now routinely publish expenditure above £500 as well as detail of new tenders and contracts. Central Government departments are required to publish spending decisions above £25,000 but a number have opted to publish all expenditure above £500; DFID also publish details of spend on International Aid. Central Government contracts and tender documents over £10,000 are published, including performance indicators, break clauses and penalty measures. The names, grades, job titles and annual pay rates for most Senior Civil Servants (SCS) are published as part of a detailed organogram for each Government organisation. Additionally further detail of those Senior Civil Servants with salaries over £150,000 are now routinely published, along with details of non consolidated payments made to SCS. In 2012 tax details of public appointees were also published. Similarly, public service performance indicators, such as crime statistics at a street-by-street level and hospital data on MRSA and C-difficile infection rates, are published.

7. Departmental Open Data Strategies, which were published alongside the White Paper, are a further example of the close links between FOI and transparency. The strategies set out what and when departments are going to publish in terms of new data over the next two years, adding to existing publication schemes. As Departments progress on their commitments, the Government will be reporting regularly to Parliament.

8. The ongoing success of the Public Sector Transparency Board and the various sector-specific Transparency Sector Panels have proven to be an effective way to further shift the behaviour of departments into being more ambitious in regards to the implementation of the transparency agenda. Through the creation of small, agile groups which include external data users and other interested parties which both support and challenge departments, the amount of data released regularly in an open and re-usable format has increased and alongside the commitments outline in the Open Data Strategies, will continue to do so. The Government continues to look to create, where needed, further sector-specific groups to help foster greater data publication. Even so, the call for more open data continues from the community at large, evidenced by the requests received to date through the Open Data User Group's Data (ODUG) 'Request Form'. ODUG created this process to help better advise

themselves and in turn, Government, on what key datasets are currently being sought by the public and businesses, which are held by public sector bodies and they believe have commercial and social benefits and could contribute to economic growth.

Our evidence on the impact of the Act on trust generally agreed with the findings of the Memorandum. Whether the Act will contribute to an increase in public confidence in the Government, Parliament and other bodies is primarily dependent on the type of information which is published following a request. The majority of people will receive information published under the Act through the media. Evidence of irregularities, deficiencies and errors is always likely to prove more newsworthy than evidence that everything is being done by the book and the public authority is operating well. In these circumstances, the expectation of a substantial increase in public trust following the introduction of the Act was always going to prove unrealistic. (Paragraph 37)

Greater release of data is invariably going to lead to greater criticism of public bodies and individuals, which may sometimes be unfair or partial. In our view, however this, while regrettable, is a price well worth paying for the benefits greater openness brings to our democracy. (Paragraph 38)

9. The Government agrees that improved trust in Government may not have been an entirely realistic objective of FOIA. Nonetheless, some limited evidence suggests that FOIA has resulted in greater public trust in Government. Research from the Information Commissioners Office (ICO) indicates a significant increase in the proportion of people agreeing that 'Being able to access the information held by public authorities increases your confidence in them' and 'Being able to access the information held by public authorities increases your trust in them'. In 2011, 76% and 71% respectively agreed with a consistent rise from the 51% who agreed with both statements in 2004. Despite this, the Government agrees that FOIA has not had a significant positive impact on public trust in Government.

10. Although FOIA can result in criticism of public authorities, this tends to represent a minority of cases. The Government agrees that, notwithstanding any negative coverage of public authorities generated as a result of FOIA, the increased openness, transparency and accountability of public authorities brought about due to FOIA have lead to significant enhancements of our democracy.

Having received limited evidence on the impact of the Act on increased public participation in decision making, we would not seek to disagree with the findings of the Constitution Unit that this objective has not been achieved, at least in central Government. We welcome, however, the suggestion that, while the Act may not have had a direct impact on increasing public participation in decisions made in the NHS it has assisted in a move towards a culture of greater public involvement. (Paragraph 43)

11. The Government does not disagree with the conclusion of the Committee and of the Constitution Unit. Notwithstanding the possibility that this final objective may not have been achieved, the Government remains of the view that FOIA has been successful in achieving its core aims of increased openness, transparency and accountability.

2. Costs and Fees

The Freedom of Information Act is a significant enhancement of our democracy. It gives the public, the media and other parties a right to access information about the way public institutions in England and Wales are governed, and the way taxpayers' money is spent. Governments and public authorities can promote greater transparency but, without FOI requests, decisions on what to publish will always lie with those in positions of power. FOI has costs, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure. (Paragraph 53)

12. The Government agrees that FOIA carries benefits as well as costs, and is committed to extending the Act to improve transparency. Nonetheless, the economic situation and increased pressure on the budgets of public authorities means that the Government must also consider how best to reduce burdens where it can do so without undermining transparency.

Developing a methodology whereby subjective activities such as reading and consideration time could be included in the 18 hour time limit does not seem to us to be a feasible proposition. Such activities are overly dependent on the individual FOI officer's abilities, introducing an element of inconsistency into the process that undermines the fundamental objective of the Act, that everyone has an equal right to access information. (Paragraph 60)

We recognise, however, that complying with its duties under the Act can be a significant cost to a public body. A standard marginal decrease in the 18 hour limit may be justifiable to alleviate the pressure on hard-pressed authorities, particularly in the context of increasing numbers of requests. We would suggest something in the region of two hours, taking the limit to 16 hours rather than 18, but anticipate the Government would want to carry out further work on how this would affect the number of requests rejected under section 12, and the corresponding weakening of the right to access information. (Paragraph 61)

13. Section 12 of FOIA, in the Government's view, was designed to exclude from consideration those FOI requests which would impose an excessive burden on public authorities. It remains an important provision. The Government is clear that efforts to reduce burdens should be focused on those who impose disproportionate burdens on public authorities by making what may be considered as 'industrial' use of the Act.

14. It is clear, however, that the provision under section 12 applies inconsistently at present. Information which is voluminous but easy to locate can often not be refused under section 12 even though the overall burden on the public authority of answering the request may be significantly higher than £450 or £600. The time taken by public authorities

to examine and consider information and determine whether it is suitable for public release can be significant. It often takes a public authority considerably more time than determining whether it holds the information or locating, retrieving or extracting it. It is the Government's view that it ought to be possible to take into account some or all of the time spent on considering and redacting when calculating whether the costs limit has been exceeded.

15. The Government does not share the assessment of the Committee that it is unfeasible to develop an objective and fair methodology for calculating the cost limit which includes further time spent dealing with information in response to a request. As such, the Government is minded to explore options for providing that time taken to consider and redact information can be included in reaching the cost limit.

16. While this change would affect only a small number of FOI requests, the proportionate reduction in burden would be considerably greater. Evidence from the study by Ipsos MORI commissioned by the Ministry of Justice suggests that the proportion of requests which must be answered under the current regulations, but which would not need to be answered if all activities were included in the cost limit is relatively low at around 4% of requests to central government and 10% for other public authorities. The Ipsos Mori research also concluded that while only 1% of requests to central government cost at least £1,000 to answer these requests made up 5% of total costs.

17. The Government does not agree that inclusion of these sorts of costs would inevitably mean that the application of the costs limit would become more subjective. The cost limit, at present, depends to a large extent on the good faith of the public authorities concerned, and can be a subjective judgement of the person handling the request. Where the cost limit is inappropriately or incorrectly calculated, the ICO is in a position to intervene. The Government does not accept, therefore, that extending the activities which can be included in reaching the cost limit would necessarily demand more subjectivity than is already the case. It also considers that this objection can be addressed by the publication of comprehensive guidance with the aim of ensuring consistency across public authorities. The Government will consult on this change and will seek to develop a method of calculation which assesses the time spent on such activities in a uniform manner across all public authorities.

18. The Government will also look at other options to reduce the burden on public authorities in relation to the cost limit. These will include the possibility of reducing the current overall limits of £600 and £450. The Government does not agree that a two hour reduction in the cost limit would be an appropriate means of reducing the burdens that the Committee recognises. A two-hour reduction would affect a very small number of cases, resulting in minimal reduction in burdens, but the Government will consider whether the measures described above can, on their own or when combined, generate a reduction in burdens without an excessive impact on transparency.

19. We will also look at addressing where one person or group of people's use of FOIA to make unrelated requests to the same public authority is so frequent that it becomes inappropriately or disproportionately burdensome.

The Act operates on the basis of requester blindness. As a result developing a way to charge requesters who commercially benefit from the information they receive from public authorities is difficult, if not impossible. Any requirement that requestors identify themselves could easily be circumvented by requestors using the name of a friend, family member or other person. Attempts to police such a system, either by public authorities or the Information Commissioner, would be expensive and likely to have a limited effect. (Paragraph 81)

It must also be recognised that the focus of the Act is whether the disclosure of information is justified, not who is asking for that information. If the statutory scheme deems it right that data should be released then it is irrelevant who is asking for publication; release of such information is to all, not just the individual requestor. Nevertheless it can be argued that someone seeking to exercise freedom of information rights should be willing for the fact they have requested such information to be in the public domain; we therefore recommend that where the information released from FOI requests is published in a disclosure log, the name of the requestor should be published alongside it. (Paragraph 82)

While we recognise that there is an economic argument in favour of the freedom of information regime being significantly or wholly self-funding, fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented. (Paragraph 85)

Any future reconsideration of the economic argument for charging would need significantly better data on the number of requests made under the Act and the costs incurred in responding to them. (Paragraph 86)

20. The Government has commissioned research into costs which was shared with the Select Committee in March 2012. This research provides a useful base for analysis of policy options. The Government agrees with the Select Committee that targeted charging would be difficult and burdensome to enforce and police. The fact that the Act is requester blind means that there is no meaningful way for public authorities to keep track of requesters' real identities without increasing the burdens on those authorities. In addition to the problems of identifying requesters, identifying their motives would also be difficult to do effectively. It would be difficult to draw the line between a requester who requests information for commercial use and the same requester seeking information for non-commercial purposes. Likewise, it would be difficult to prevent individuals from requesting information on behalf of others. The Government has concluded that any targeted charge would, therefore, be

difficult and expensive to apply and would give rise to increased risk of litigation.

21. The Government agrees with the Committee's assessment that charging for FOI requests would have an adverse impact on transparency and would undermine the objectives of the Act. For commercial requesters, the Government's Transparency Agenda has been supportive of the role that public sector information can play in driving economic growth and thus, the Government is not minded to seek to curtail the ability of those seeking information for commercial purposes.

22. The Government recognises that any consideration of the burdens of FOIA must also take adequate account of the benefits, both tangible and intangible, rendered through the Act. As such, we are not minded to alter the current fees regime whereby fees can be imposed for the reproduction or communication of requests.

23. Furthermore, a charge would be expensive to administer and may result in increasing, rather than reducing, burdens on public authorities. This is particularly the case where a nominal charge, rather than a much higher full-cost recovery charge, is being considered. The experience with Subject Access Request charging under the Data Protection Act suggests that a nominal, routine charge would be inconsistently applied and therefore whether a requester had to pay for information may become dependent on the public authority holding the information they seek. As such, the Government agrees with the Committee and is not minded to introduce a charge of any kind.

24. However, the Government is keen explore the potential for users to contribute more towards the costs of tribunals. Fees are already charged in some jurisdictions (for example, in the Immigration and Asylum tribunal) and we will examine the scope for extending this approach to other types of tribunal, including the Information tribunal.

25. The Government does not share the view that publishing the names of requesters in disclosure logs would be beneficial in terms of burdens. Such a move would have implications for the data protection of requesters, and there is no evidence that it would have any positive impact either on transparency or on reducing the burdens of FOIA. As such, the Government is not minded to accept that recommendation at this time.

Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme. (Paragraph 90)

26. The Government recognises that there are other, non-legislative means of improving how FOIA operates within public authorities and improving the

efficiency of handling FOI requests, thereby reducing the burdens. As such, the Government will consider ways in which we can share best practice and encourage public authorities to improve their processes. The Government is minded to review the Code of Practice issued under section 45 as well as guidance issued to public authorities to identify where improvements could be made. The Government is also mindful that different public authorities have different needs and objectives, and so the Government is keen that public authorities should, themselves, continue to decide their own processes. The Government sees its role as facilitating and enabling improvement of information sharing.

3. Delays (Section 10) and Enforcement (Section 77)

We were pleased to hear relatively few complaints about compliance with the 20 day response time. We believe that the 20 day response time is reasonable and should be maintained. (Paragraph 94)

27. The Government shares the Committee's views on the 20 working day timeframe for answering initial requests. We have been keen to see improvements in the extent to which this timeframe is complied with. Statistics show improvement in timeliness since the Act came into force.

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. (Paragraph 103)

We recommend that a time limit for internal reviews should be put into statute. The time limit should be 20 days, as at present under the Code of Practice, with a permitted extension of an additional 20 days for exceptionally complex or voluminous requests. (Paragraph 112)

28. The Government agrees that internal reviews should be completed in a timely fashion but does not share the Committee's view that internal reviews are used routinely to delay responses. Statistics indicate that in 2011 63% of Internal Reviews with a known outcome were completed within 20 working days and 86% within 40 working days, within central government. Where a public authority is taking an unreasonable time to conduct an internal review, it is open to the requester to make a complaint to the ICO and the ICO can, in turn, order the completion of the internal review within a specified timeframe where it is satisfied of a need to do so. As such, the Government does not consider that the evidence suggests a considerable problem with excessive delays with internal reviews. Where problems do arise, the Government is satisfied that the appropriate remedies are available. Additionally, there is a risk that a statutory timeframe may provoke a rush to complete internal reviews in line with the timeframe but which are not conducted with the thoroughness that they need.

29. A requirement for the conduct of internal reviews is not set out in FOIA itself, but is a product of the Code of Practice issued under section 45, which also requires that the length of time taken to conduct the review should be reasonable in the circumstances. The Government takes the view that establishing best practice for internal reviews through Code of Practice, rather than statute, and allowing some discretion over the timeframe for response, is an appropriate means of establishing a clear

expectation of timeliness. It also about the timeframe while allowing public authorities the flexibility they may need to conduct thorough reviews of original decisions in relation to what can sometimes be highly complex cases.

30. The Government believes that removing that flexibility risks placing further burdens on public authorities and that such a move could not be justified based on the evidence. Further, there is a risk that public authorities dealing with complex internal reviews would feel compelled to rush the consideration of those reviews, resulting in poorer decisions.

31. Nonetheless, in light of its agreement that internal reviews should be completed as speedily as possible, the Government does consider that there may be room for clarification in the Code of Practice as to what constitutes a reasonable time. Although the ICO has set out views on this matter, the Government is minded to amend the Code of Practice to indicate that, as far as possible and unless a public authority has a good reason otherwise, internal reviews should be completed within 20 working days.

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. (Paragraph 109)

32. Many larger public authorities routinely publish statistics on their compliance with FOIA, including the quarterly publication of statistics by central government.

33. The Government does not consider that there is a need for a stronger requirement to publish statistics because of the potential burden this would place on public authorities, smaller ones in particular. At a time when many public authorities are operating with fewer resources, the Government is not minded to place additional burdens on public authorities where there is no clear benefit in doing so.

We recommend the 20 day extension be put into statute. A further extension should only be permitted when a third party external to the organisation responding to the request has to be consulted. (Paragraph 111)

34. The extension allowed to consider the public interest is set out in section 10 of FOIA with the requirement that the duration of the extension be reasonable. The Government believes that the extension is necessary for the consideration of complex cases but agrees that the extension should not be excessive. The Government does not consider that there is a significant problem of the extension causing significant delays in responding to requests. Additionally, where extensions do become

excessive, the ICO has the power to investigate, and order that the extension be completed within a specified timeframe. Statistics indicate that in 2011 within central government, 56% of extended requests processed were completed with 20 working days and 79% within 40 working days. The ICO has issued guidance as to what constitutes a reasonable timeframe, and can, at its discretion; order that a public authority has exceeded a reasonable timeframe and that the request should be answered within a specified timeframe, thereafter.

35. As with internal reviews, it is important that public authorities have some flexibility in the length of time available to consider the public interest. As such, the Government is not minded to limit that flexibility and risk rushed decisions on the part of public authorities by setting out a statutory deadline for completing the extension.

36. The Government does consider, however, that there that the Code of Practice issued under section 45 of FOIA is an appropriate vehicle through which to recommend that extensions should last no more than twenty working days, except where public authorities have good reason for exceeding that time limit.

The summary only nature of the section 77 offence means that no one has been prosecuted for destroying or altering disclosable data, despite the Information Commissioner's Office seeing evidence that such an offence has occurred. We recommend that section 77 be made an either way offence which will remove the limitation period from charging. We also recommend that, where such a charge is heard in the Crown Court, a higher fine than the current £5000 be available to the court. We believe these amendments to the Act will send a clear message to public bodies and individuals contemplating criminal action.(Paragraph 121)

37. The Government accepts the conclusion of the Select Committee that the current provisions under section 77 are insufficient to allow the Information Commissioner's Office sufficient time to bring a prosecution where appropriate. However, the Government does not consider it necessary that cases under section 77 are heard by the Crown Court, nor that the existing penalties are insufficient in being an effective deterrent to misconduct. To address the problem, the Government is instead minded to extend the time available to the ICO to bring a prosecution to six months from the point at which it becomes aware of the commission of an offence rather than six months from the point at which such an offence occurs. This change will address the core problem of insufficient time available to bring a prosecution without an excessive response of making the offence triable either way.

4. Vexatious Requests (Section 14) and Types of Requesters

It is apparent from witnesses that frivolous requests are a very small problem, but can be frustrating. There is a case for adding frivolous requests to the existing category of vexatious requests which can be refused, but such requests can usually be dealt with relatively easily, making it hard to justify a change in the law. (Paragraph 135)

38. The Government shares the view of a number of witnesses who gave evidence to the Committee that vexatious requests can be frustrating and burdensome for public authorities. The Government takes the view that frivolous requests are already capable of being refused as vexatious, in line with guidance issued by the Information Commissioner. As such, the Government agrees with the Committee that a statutory change would not be justified.

39. There is some evidence that public authorities do not feel as confident as they might in employing section 14. For that reason, the Government is minded to consider whether the Code of Practice issued under section 45 could be amended to provide greater clarity for public authorities in what type of requests may be refused under section 14 and what factors they may consider in deciding whether to employ section 14. As part of this, and in relation to interpreting Section 8 of the Act, the Government will consider whether the Code of Practice offers sufficient guidance for public authorities for dealing with anonymous or pseudonymous requesters.

We believe it would be helpful for public authorities to indicate in a response letter how much responding to the request has cost, in approximate terms. We recommend the Information Commissioner consider the easiest way for authorities to arrive at such a figure. We think this unlikely to deter genuine inquiries but it will at least highlight to irresponsible users of the Act the impact of their actions. (Paragraph 138)

40. The Government understands the purpose of this recommendation and recognises that public authorities are free to calculate and communicate the cost of dealing with individual requests where they deem it appropriate. The Government is not minded to push this option on public authorities and is content to leave it to the better judgement of individual public authorities as to whether this option would be an effective means of deterring excessively burdensome requests.

5. Policy Formulation, Safe Spaces and the Chilling Effect

Freedom of Information brings many benefits, but it also entails risks. The ability for officials to provide frank advice to Ministers, the opportunity for Ministers and officials to discuss policy honestly and comprehensively, the requirement for full and accurate records to be kept and the convention of collective Cabinet responsibility, at the heart of our system of Government, might all be threatened if an FOI regime allowed premature or inappropriate disclosure of information. One of the difficulties we have faced in this inquiry is assessing how real those threats are given the safeguards provided under the current FOI legislation and what, if any, amendments are required to ensure the existence of a 'safe space' for policy making. (Paragraph 154)

It is evident that numerous decisions of the Commissioner and the Tribunal have recognised the need for a 'safe space'. However, equally evident is the fact that in some cases their decision that information should be disclosed has challenged the extent of that safe space. We accept that for the 'chilling effect' of FOI to be a reality, the mere risk that information might be disclosed could be enough to create unwelcome behavioural change by policy makers. We accept that case law is not sufficiently developed for policy makers to be sure of what space is safe and what is not. (Paragraph 166)

While we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material, the use of the word exceptional when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level policy discussions rather than to deal with genuinely exceptional circumstances then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned. We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the veto is an appropriate mechanism, where necessary, to protect policy development at the highest levels. (Paragraph 179)

The Constitution Unit's research on FOI is the first major piece of research of its kind and is a valuable contribution to the debate around FOI. In its consideration of the chilling effect, the Unit broadly concluded that the effect of FOI appeared negligible to marginal. We note this finding and have taken it into account in our deliberations. However, we have also been cognisant of two related points: while respecting the overall conclusions, we note that the research did feature a number of interviews with participants which suggested behaviour had changed, at least in part because of FOI; secondly, as the Unit itself notes, if the chilling effect does exist it would, by its nature, be very difficult to find

hard, objective evidence of it. That is why, on this subject, it is necessary at least to consider anecdotes and impressions,

albeit they might lack the academic rigour on which we would ideally like to base conclusions. (Paragraph 190)

If the most senior officials in Government are concerned about the effect of the Act on the ability to provide frank advice they should state explicitly that the Act already provides a safe space, and that the Government is prepared to use the ministerial veto to protect that space if necessary. (Paragraph 198)

Since the passing of the Act other ways in which minutes and records are likely to be made public have developed which are likely to lead to greater publicity for the information disclosed than if it had been published under the right to access information. (Paragraph 199)

We are not able to conclude, with any certainty, that a chilling effect has resulted from the FOI Act. On the one hand, the Constitution Unit's research—the most in depth available—suggests it has only a marginal effect. On the other hand, a range of distinguished participants who are, or who have been recently, at the heart of the policy-making process attest that it is a problem. We see no reason why former senior ministers and officials in particular would flag this up as a concern if they did not genuinely believe it to be so, and we think their views are of value. However, so too of value is the increased openness introduced by the Act and, especially, the power of individuals to exercise their right to information proactively, rather than having public authorities decide what they will disclose, when and to whom, even when acting with the best intentions. Equally, there are other reasons why some officials and politicians may be increasingly reluctant to create paper records, not least the increasing possibility that some form of public inquiry may lead to the subsequent publication of minutes and records. That is why we are cautious about restricting the rights conferred in the Act in the absence of more substantial evidence. (Paragraph 200)

Given the uncertainty of the evidence we do not recommend any major diminution of the openness created by the Freedom of Information Act, but, given the clear intention of Parliament in passing the legislation that it should allow a "safe space" for policy formation and Cabinet discussion, we remind everyone involved in both using and determining that space that the Act was intended to protect high-level policy discussions. We also recognise that the realities of Government mean that the ministerial veto will have to be used from time to time to protect that space. (Paragraph 201)

41. The Government welcomes and shares the Committee's conclusion that it was Parliament's clear intention that FOIA should protect safe space for policy formulation and Cabinet discussion. We agree with the Committee that assessing the true impact of FOIA on safe space and the chilling effect is difficult but it is clear that a perception exists that FOIA currently

provides inadequate protection, which is in itself, problematic. Such a perception risks becoming self-perpetuating and could, if unaddressed, impact on the ability of officials to provide free and frank advice, or, on their approach to proper record-keeping.

42. The Government considers that it is important that appropriate protection is afforded to Cabinet records and to the safe space for policy formulation and development. Effective Government depends on the ability of both Ministers and officials to discuss issues and provide advice freely, frankly and without inhibition. The Government also recognises, however, that Cabinet information has rarely been ordered for disclosure and that, in cases where it has, the veto has been available as a means of providing appropriate protection. It is also evident that the Information Commissioner has been willing to uphold the use of section 35 in many cases, demonstrating the level of protection that it already provides. For that reason, the Government believes that the legal framework of the FOIA, through both the exemptions and the availability of the veto, offers sufficient protection for these types of sensitive information.

43. The Government agrees with the Committee that the Ministerial override provided by section 53 (the veto) is a necessary tool to protect vital information where the Government forms the view that that the sensitivity of the information warrants its use. To date, the veto has been used by both the current and previous Governments only in exceptional circumstances, which have on each occasion been fully explained by the accountable person. The Government believes that the veto is an appropriate and proportionate tool to protect sensitive information without a significant impact on transparency. The fact that the veto has been used on only six occasions in almost eight years demonstrates that the exercise of the veto is necessary only in an extremely small proportion of requests.

44. The use of the veto is guided by the collectively agreed Government policy on its use, which states that it should only be employed in exceptional circumstances. The Government notes the Committee's recommendation that the appropriateness of this principle of exceptionality might be re-examined.

45. The veto policy also currently focuses directly on the protection of information which relates to the doctrine of collective responsibility in Cabinet. Although it explicitly does not preclude the use of the veto in the case of other information, the policy is not easily adaptable to apply outside that context given its focus. For example, the criteria to be used in deciding whether to apply the veto set out in the policy relate strongly to collective responsibility but less clearly to other information.

46. The Government is minded to review and, as appropriate, revise the policy on the use of the veto. As part of that review, we propose to consider how the veto policy can be adapted both in terms of the process involved in its use and to offer greater clarity and reassurance on its ability to offer appropriate protection in addition to that which it provides in the context of information relating to collective Cabinet responsibility.

6. The Pre-Publication Exemption (Section 22) and the Health and Safety Exemption (Section 38)

We recommend section 22 of the Act should be amended to give research carried out in England and Wales the same protection as in Scotland. While the extension of section 22 will not solve all the difficulties experienced by the universities in this area, we believe it is required to ensure parity with other similar jurisdictions, as well as to protect ongoing research, and therefore constitutes a proportionate response to their concerns. Whether this solution is sufficient and works satisfactorily should be reviewed at a reasonable point after its introduction. (Paragraph 214)

As section 24 of the Animal (Scientific Procedures) Act 1986 remains under review by the Home Office following changes in European law we make no recommendation as to how the Government should act but will consider the outcome of the review when it is received. It should not be necessary to amend the Freedom of Information Act to meet the concerns of universities in this area. (Paragraph 221)

We strongly urge universities to use to the full the protection that exists for the health and safety of researchers in section 38 of the Act, and expect that the Information Commissioner will recognise legitimate concerns. No institution should be deterred from carrying out properly regulated and monitored research as the result of threats; this was not Parliament's intention in passing the Act and we are happy to reiterate that that remains the position. (Paragraph 222)

47. The Government understands the concerns that have been expressed by the Higher Education sector in its evidence to the Committee, and appreciates the importance of the UK maintaining and strengthening its position at the forefront of international research. It is important that its position should not be undermined by the fear of inappropriate disclosure under FOIA. FOIA already provides a number of exemptions which may be used to protect research information, including those in sections 22 (information intended for future publication), 36 (effective conduct of public affairs), 38 (health and safety), 40 (personal data), 41 (actionable breach of confidence), and 43(2) (commercial interests). The Government is also appreciative of the Information Commissioner's successful work to enhance understanding of FOIA in the Higher Education context. It is important that this should continue.

48. However, the Government recognises that the adoption of a qualified exemption for research would provide additional clarity and reassurance, both to Higher Education institutions and non-public sector research partners. We accept that despite the wide applicability of existing exemptions, the lack of a dedicated research exemption can at least give the impression that FOIA does not provide adequate protection. On

balance, therefore, the Government is minded to amend FOIA to introduce a dedicated exemption, subject to both a prejudice and public interest test, as recommended by the Committee. The Government shares the Committee's view that this would constitute a proportionate response to the concerns expressed. The Government also agrees that such a measure should be reviewed at a suitable point after introduction.

49. The Government agrees with the Committee that it should not be necessary to amend FOIA to meet the concerns of universities about its interaction with the Animals (Scientific Procedures) Act (ASPA). It would certainly not be appropriate to recommend any change to ASPA itself through a review of FOIA. This is especially the case given the fact that, the Home Office intends to review section 24 of ASPA in 2013. The Government will also work with universities to address the concerns expressed in evidence to the Committee.

50. The Government also welcomes the Committee's recognition of the protection that section 38 of FOIA provides, together with its comments about Parliament's intentions during the passage of FOIA in relation to properly regulated and monitored research. It is not in the public interest that the physical or mental health of any individual be endangered through their involvement in such research. The Government shares the Committee's view that section 38 provides valuable protection that should be used by universities in appropriate cases.

7. The Commercial Exemption (Section 43) and the Application of FOI to Outsourced Public Services

We do not have sufficient evidence to come to a conclusion on whether section 43 operates effectively to protect the competitiveness of public bodies when competing for public sector contracts. However, there is a strong public interest in competition between public and private sector bodies being conducted on a level playing field to ensure the best outcome for the taxpayer. With the increasing contracting out of public services we recommend the Government keeps this issue under review, and if public sector bodies are found to be at a disadvantage we expect either that section 43 will be amended or another model found to protect such commercial interests. (Paragraph 231)

51. The Government agrees with the Committee that there is a strong public interest in competition between the public and private sectors being conducted on a level playing field, ensuring the best outcome for the taxpayer. We therefore agree that while transparency is of key importance, it is also vitally important that commercially sensitive information is adequately protected. We agree that we should keep this issue under review.

We agree with the Information Commissioner that universities are an important part of the public realm and we believe that they are generally regarded by the public and by those working in universities as important public institutions. We do not therefore recommend that universities should be removed from the jurisdiction of the Act. We make separate recommendations in paragraph 214 to deal with potential problems the Act may create for university research. (Paragraph 232)

52. The Government agrees with the Committee and the Information Commissioner that publicly funded universities should remain subject to FOIA. Publicly funded universities carry out important public functions and it is important that they should be accountable through FOIA. While FOIA is not without its costs, which are addressed elsewhere in this response, research shows the benefits that FOI officers at universities believe that FOIA has brought in terms of openness. A small survey of FOI officers found that 73% of think that the FOIA has improves openness and transparency within their institution, and a further 59% believe it has improved information management.[1] However, the Government has recognised the specific concerns of universities in relation to research information through its acceptance of the Committee's recommendation that a dedicated qualified exemption be introduced for such material.

[1] UCL Constitution Unit (2012), The Freedom of Information Act and Higher Education: The experience of FOI officers in the UK.

The right to access information must not be undermined by the increased use of private providers in delivering public services. The evidence we have received suggests that the use of contractual terms to protect the right to access information is currently working relatively well. We note the indication that some public bodies may be reluctant to take action if a private provider compliant with all other contractual terms fails to honour its obligations in this area. In a rapidly changing commissioning landscape this has the potential fundamentally to undermine the Act. We remind all concerned that the right to access information is crucial to ensuring accountability and transparency for the spending of taxpayers' money, and that contracts for private or voluntary sector provision of public services should always contain clear and enforceable obligations which enable the commissioning authority to meet FOI requirements. (Paragraph 239)

We believe that contracts provide a more practical basis for applying FOI to outsourced services than partial designation of commercial companies under section 5 of the Act, although it may be necessary to use designation powers if contract provisions are not put in place and enforced. We recommend that the Information Commissioner monitors complaints and applications for guidance in this area to him from public authorities. (Paragraph 240)

53. The Government remains committed to the extension of FOIA to provide greater transparency. We have already extended FOIA to academies, the Association of Chief Police Officers, the Financial Ombudsman Service, and (for its admissions functions) the Universities and Colleges Admissions Service. The Protection of Freedoms Act will, from next year, bring over 100 additional bodies within scope by including companies wholly owned by any number of public authorities. We intend to continue consultations with over 200 more organisations, including the Local Government Group, NHS Confederation, harbour authorities and awarding bodies, about their possible inclusion in relation to functions of a public nature that they perform; and then to consult more than 2000 housing associations on the same basis. Where we conclude that such bodies are performing functions of a public nature, we intend to legislate under section 5 of FOIA to bring them within the scope of FOIA in relation to those functions, unless there are very good reasons not to, by spring 2015. More orders will also be made under section 4 of FOIA to respond to the creation of new government bodies that ought to be covered. More generally, we will keep the scope of FOIA under review to indentify further ways in which it would be appropriate to extend its provisions.

54. The Government also recognises, despite the progress and plans outlined above, the potential challenge that the increased delivery of public services by non-public sector providers poses to transparency. Where public services are delivered on behalf of a public authority under contract, the Government expects that contractors will fully assist public authorities in meeting their current obligations under FOIA to consider for disclosure information held on public authorities' behalf by a contractor. We agree with the Committee that contracts should include clear provisions in this

regard, and stress that public authorities should not be reluctant in taking all necessary steps to ensure compliance.

55. However, not all information about a contract and its delivery will be held on behalf of the contracting public authority for the purposes of section 3 of FOIA. The Government has, in the light of the Committee's analysis, considered how best to respond to this issue. While it is important that transparency is maintained, it is also vital that regulatory burdens on business are minimised. We were encouraged to hear suggestions in evidence to the Committee that some public authorities and their contractors interpret holding information on behalf of one another broadly. This is a highly commendable approach. To maximise transparency, the Government strongly encourages public authorities and contractors to interpret their obligations in this way, so as to provide, on a voluntary basis, information that they think the requester and the wider public may be interested in but which is additional to the bare minimum that is technically covered by an FOI request to the public authority. The Government intends to issue guidance in a revised Code of Practice issued under section 45 of FOIA to explain further the circumstances where it would and would not in its opinion be appropriate to share information to answer FOI requests.

56. We consider a combination of these approaches to be a proportionate response, striking the right balance between the need for accountability and the need to minimise burdens on business. The Government therefore does not intend, at this time, to legislate to extend FOIA obligations to contractors. In particular the Government is concerned about the potential impact on SMEs, the voluntary sector and social enterprises, but does not think that a minimum contract value threshold for formal inclusion should be adopted given that public interest does not always equate to the size of a contract.

57. However, the Government recognises that its favoured light-touch approach requires a considerable degree of goodwill and cooperation on the part of public authorities and contractors alike. We strongly urge maximum possible transparency and will, together with the Information Commissioner, monitor the success of this approach. Should the results be inadequate we will consider what other steps, including the possible designation of contractors under section 5, might be necessary to ensure accountability.

58. Although it is not an issue on which the Committee commented, the Government is concerned by the complexity of the mechanisms available to add and remove bodies from the scope of FOIA. It intends to consider options for reform to make this a more efficient and less burdensome process. Particular attention will be paid to the order making powers under sections 4 and 5 of FOIA, and whether they might be usefully altered, for instance to bring more bodies within scope automatically or whether they might be expanded to potentially catch a wider range of organisations. Although we do not currently intend to include contractors, it is important

that FOIA's scope can be maintained effectively and with proportionate effort.

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