

# **Independent Commission on Freedom of Information**

Call for Evidence

9 October 2015



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# Introduction

The [Freedom of Information Act 2000](#) (“the Act”), commenced in January 2005, provides an enforceable right to access recorded information held by around 100,000 public sector organisations. The Act’s intended objectives, on parliamentary introduction, [were](#) to: ‘transform the culture of Government from one of secrecy to one of openness’; ‘raise confidence in the processes of government, and enhance the quality of decision making by Government’; and to ‘secure a balance between the right to information...and the need for any organisation, including Government, to be able to formulate its collective policies in private’. The Act provides for oversight by an independent Information Commissioner, tribunals and courts.

The Act also provides for guidance through a code of practice to help to ensure that important records of the decision-making process are retained as part of the historic background to government. The Act does not apply to requests for environmental information as those requests are considered under the Environmental Information Regulations 2004 (or, in Scotland, the Environmental Information (Scotland) Regulations 2004), which implement the EU Directive on Access to Environmental Information. The Act also does not apply to requests for one’s own personal data as those requests are considered under the subject access provisions of the Data Protection Act 1998.

The Justice Select Committee said during its post-legislative scrutiny exercise of the Act in 2012 that it had ‘contributed to a culture of greater openness across public authorities, particularly at central Government level’ and that it ‘is a significant enhancement to our democracy... it gives the public, the media and other parties a right to access information about the way public institutions... are governed’.

The Act gives requesters a statutory right to find out if a public authority holds information and, within a framework of limits and safeguards for sensitive information, to be provided with access to it. The limits and safeguards within the Act include exemptions for certain types of information, derogations so that some information falls outside the scope of the Act, provisions to prevent requests which are too costly or which are vexatious, and a power for a Cabinet Minister, acting collectively with the rest of Cabinet, to veto the release of information.

In March this year, the Supreme Court ruled, in a judgement that concerned HRH the Prince of Wales’s correspondence with Government Ministers, that the veto could no longer be used as the Government had previously understood. It is generally understood that the circumstances in which the veto can now be exercised are extremely narrow, but there remains considerable uncertainty.

It is within this context, and after ten years of the Act's operation, that the Independent Commission on Freedom of Information was established on the 17<sup>th</sup> July. The terms of reference for the Commission were set out by the Cabinet Office:

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

The Commission is clear that its terms of reference require it to look carefully at the implications for the Act of the uncertainty around the Cabinet veto, and at the practical operation of the Act as it has developed over the last ten years in respect of the deliberative space afforded to public authorities. The Commission is also interested in the balance between transparency and the burden of the Act on public authorities more generally. The Commission is particularly focused on the following questions:

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

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

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

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

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

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

The Commission will consider the questions before it in an entirely impartial and objective manner. The Commission's interpretation of its terms of reference are that it has not been asked to consider more general questions about the Act, such as whether it has generally achieved its stated objectives, or which types of bodies should be covered by it. Therefore its scope is considerably narrower than the post-legislative scrutiny conducted by the Justice



Select Committee, which took place, in any event, before the Supreme Court's decision in respect of the Cabinet veto.

The Commission is aware of the written and oral evidence provided to the Justice Select Committee during post-legislative scrutiny, which the Commission will take into account. But since that evidence was provided the Supreme Court has ruled, and individuals or organisations may therefore wish to change or add to the evidence provided to the Justice Select Committee.

The Commission's review is expected to report before the end of the year. The Commission is chaired by Lord Burns; its other members are the Rt Hon Jack Straw, the Rt Hon Lord Howard of Lympne, Lord Carlile of Berriew and Dame Patricia Hodgson.

## Call for Evidence

In order to fulfil its terms of reference the Commission is inviting evidence from a range of interested parties. Your evidence should be objective, factual information about the impact or effect of freedom of information specifically in relation to the terms of reference above.

This and any future open calls for evidence will serve as formal inputs into the Commission's final report. All evidence will be read and considered by the Commission and used to help formulate the Commission's final analysis and recommendations. Respondents may be contacted to provide further or additional information should the Commission require it.

## How to respond

**All responses to this Call for Evidence must be received by midnight on Friday 20<sup>th</sup> November 2015.**

Please provide your response online at the following link: <https://consult.justice.gov.uk/foi-commission/call-for-evidence> or by email to the following address: [foi.commission@justice.gsi.gov.uk](mailto:foi.commission@justice.gsi.gov.uk)

or in writing to the following address:  
Independent Commission on Freedom of Information  
9.54, 9<sup>th</sup> Floor  
102 Petty France  
London  
SW1H 9AJ

## Publication of responses

The information you send may be published in full or in a summary of responses.

All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

# Call for Evidence

## Deliberative space

All information access regimes must balance the right of the public to have access to information about the decisions taken on their behalf with the legitimate need for public authorities to protect sensitive information. This tension comes into sharp relief in respect of access to information about decision making processes. It is important for accountability that the public should understand how decisions that affect them are reached and the reasons for particular decisions. On the other hand, it is difficult for organisations to have frank, internal deliberations if those internal deliberations are to be quickly made public.

The value of internal, deliberative space is that it allows for an honest appraisal of the full range of options, with proper consideration of risks. It provides a free space in which it is possible to think imaginatively without fear that comments or suggestions will be taken out of context or treated as concrete decisions. Participants can query and challenge all of the options before reaching a rational decision in an open and constructive way. If the details of that deliberation become public quickly it may make participants more cautious about challenges or expressing alternative views. It may also put those who have suggested an alternative view in a difficult position at the point at which they are defending the organisation's collective decision.

The need for public bodies, including government, to have an internal deliberative space is widely recognised. The Justice Select Committee said recently:

*“Good government requires: Ministers to be provided with full, frank advice from officials about the possible impact of proposed policy, even—or especially—where that advice acknowledges risks; Ministers and officials to be able to discuss and test those proposed policies in a comprehensive and honest way; and the records of those discussions and the decisions which flow from them to be accurate and sufficiently full...it is generally accepted that a ‘safe space’ is needed within which policy can be formulated and recorded with a degree of confidentiality.” (Justice Select Committee, Post-Legislative Scrutiny of the FoI Act, July 2012)*

There are a range of options, within the context of information rights legislation, for protecting the internal deliberative space of an organisation. One option is to exclude such matters from the scope of the legislation. For example, the BBC and other public service broadcasters enjoy a derogation under the Act so that it does not apply to their journalistic, artistic or literary activities<sup>1</sup>. The Supreme Court has decided that in respect of the BBC information falls outside the scope of the Act even if it concerns matters other than art, journalism, and literature, so long as it is also held to any significant degree for those purposes<sup>2</sup>. The Bank of England likewise enjoys a derogation which means that the Act does not apply to its monetary policy, operations to support the stability of financial institutions, or the provision of private banking services due to the need to protect the commercial sensitivity of these matters.

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<sup>1</sup> FOIA, Schedule 1 – the Act applies to the BBC in respect of “information held for purposes other than those of journalism, art or literature”

<sup>2</sup> Sugar (Deceased) v BBC & Anor [2012] UKSC 4

Another option is to allow internal deliberations to fall technically within the scope of the legislation, but to provide for an exemption of some kind. For example, in the United States federal scheme, any material that would normally benefit from “privilege” exempting it from disclosure in civil proceedings is completely exempt. The most commonly invoked privilege is the “deliberative process privilege”, the general purpose of which is to “prevent injury to the quality of agency decisions”. In order to invoke the deliberative process privilege, an agency must prove that the document withheld is both pre-decisional and deliberative. Similarly, in Denmark there is a complete exemption which covers internal documents which relate to current or potential future policy advice from officials.

In the Act, we would describe such protection as comprising a **class-based absolute exemption**. It is “class-based” because if information is, as a matter of fact, of a particular description, then it falls within the exemption. The exemptions described above are also “absolute” because there is no public interest test required to withhold information under the exemption. By contrast, exemptions which are subject to a public interest test are referred to as “qualified” exemptions.

A less strict exemption adopted by some countries is to protect internal deliberations by a **prejudice-based absolute exemption**. This means that information can be withheld if its release would harm one or more specific interests, but there is no requirement to also consider whether the public interest nevertheless requires its release. For example, in France, administrative documents are absolutely exempt where disclosure would prejudice the secrecy of the deliberations of the government and other executive authorities. In Spain, information is absolutely exempt where its disclosure would undermine the confidentiality or secrecy of decision-making. In both of these jurisdictions there is a right of appeal, but the appellate body (the “Commission on Access to Administrative Documents” and the “Council of Transparency and Good Governance”, respectively) can only make a recommendation rather than impose a binding decision on the public body.

Next, one might protect internal deliberations through a **class-based qualified exemption**, where information falling within the description is covered by the exemption, but information can only be withheld where it is in the public interest to do so. In Australia information that concerns deliberation, opinion, advice or recommendation to a minister or the government or a government agency is exempt, subject to a public interest test. In Ireland, information relating to the deliberative processes including opinions, advice and recommendations are exempt, subject to a public interest test. Likewise in Canada, information which relates to internal decision-making processes, such as the internal deliberations of government bodies, or advice to Ministers, is exempt, subject to a public interest test, although in Canada the Information Commissioner can only make a non-binding recommendation on appeal.

Under the Act, there is a **class-based qualified exemption** in section 35. This protects information that relates to the formulation or development of government policy, ministerial communications, the provision of Law Officer’s advice, or the operation of a ministerial private office. In the Act, decisions can be appealed to the Information Commissioner who can make a binding determination, but with the backstop of the Cabinet veto. Once a decision on government policy is taken, statistical information used in the decision making process does not fall under the section 35 exemption, and the public interest test is weighted in favour of releasing any factual information used to make a decision.

Finally, the weakest form of exemption for internal deliberations is a **prejudice-based qualified exemption**. This kind of exemption allows information to only be withheld where its disclosure would, or would be likely to, harm one or more specific interests, *and* where the public interest balance lies with withholding the information. Under the Act, there is a **prejudice-based qualified exemption** in section 36. This protects information which, if disclosed, would prejudice collective Cabinet responsibility, the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs, and this exemption is subject to a public interest test. It is subject to a binding appeal to the Information Commissioner, but again with the Cabinet veto as a final measure.

As is apparent, different jurisdictions have addressed these issues in different ways, and in each case their solution sits within the wider framework of the legislation, such as fees, the form of appeals offered, and the presence of a veto. It is often the case that jurisdictions need to revisit and rebalance their information access legislation. For example, Australia amended their Act in 2010, Denmark replaced their legislation with a new Act in 2013, Ireland amended their legislation in 2003 and again in 2014, Spain replaced their legislation in 2015, and New Zealand amended their legislation in 2015.

The UK's approach to these issues when the FoI Bill was introduced to Parliament was to have the exemptions at sections 35 and 36 of the Act effectively acting like absolute exemptions. Only where the Information Commissioner and/or the tribunals had agreed that information was exempt would public bodies consider the public interest. The Bill gave public authorities a *discretion* to release otherwise exempt information if they considered it to be in the public interest to do so. The Information Commissioner could make a recommendation about whether the public interest discretion should be exercised, but he could not order it, and the only means of challenge was via judicial review. This would have been similar to several jurisdictions which have adopted a model where the independent appellate body is limited to making a non-binding recommendation, such as Canada, Denmark, France, Germany, and Spain.

During the passage of the Freedom of Information Bill, the then government agreed to provide the Information Commissioner with a right to make a binding decision in respect of the public interest, but this concession was simultaneously balanced by a power for the Cabinet to veto release where it considered it necessary. A veto power of this sort does not appear to be common, although Australia had one until 2009, and New Zealand has one, but it does not appear to have been used for many years.

The Information Commissioner's approach to determining the public interest test is set out in published [guidance](#). The Commissioner recognises that there is likely to be a strong public interest in protecting the safe space for deliberation before a decision is taken, but the Commissioner considers that after a decision is taken the public interest in protecting the safe space rapidly diminishes, including the protection of pre-decisional and deliberative documents.

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

Where information is withheld under section 35 or 36, it is open to the requestor to appeal. Because the Information Commissioner, tribunals and courts may reach a different view of the public interest it has been argued that this creates uncertainty for both public authorities

and requestors about what information will, or will not, be disclosed. Some have argued that this uncertainty can then lead to officials and Ministers moving decision-making from formal to informal systems, and the weakening of the quality of official records. In its post-legislative scrutiny report, the Justice Select Committee said:

*“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, Post-Legislative Scrutiny of the FoI Act, July 2012)*

The Commission is interested to understand whether the Act is working as intended, and the impact that the Act has had on the internal, deliberative space of public bodies. The Commission would welcome evidence on whether sections 35 and 36 provide appropriate protection, and on whether the Act has led to an erosion in the public record, or in the inappropriate use of less formal means for decision-making.

**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?**

### *Collective responsibility*

A particularly acute example of where an organisation needs an internal deliberative space is that of collective Cabinet responsibility. The convention of collective Cabinet, or ministerial, responsibility is at the heart of the British system of Parliamentary government. The convention of collective responsibility is set out in the [Ministerial Code](#):

*“The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained” (para 2.1)*

It is generally accepted that the sensitivity of even Cabinet material will diminish over time. The reduction in the definition of ‘historic records’ from 30 to 20 years is being phased in, and by 2023 records will normally be transferred to the National Archives when they are 20 years old. Alongside the changing definition of ‘historical records’, the duration of the s.35 and section 36 exemptions in the Act are being lowered from 30 years to 20 years (other than for Northern Ireland). This means that the expectation will be for Cabinet minutes and papers to be made available after 20 years unless they refer to other sensitive matters, such as national security.

Other jurisdictions have been faced with the question of how to balance the important principle of collective responsibility with their access rights legislation. Some exclude such material entirely from their legislation. For example, in Australia Cabinet notebooks fall entirely outside the scope of their Act. In Canada, the minutes and papers of the Privy Council and the Cabinet are out of scope of their Act. In the United States, the Office of the President and his personal advisors are outside the scope of the legislation.

Other jurisdictions allow such material to technically fall within the scope of the legislation, but then provide for some form of class-based absolute exemption. For example, in Australia Cabinet minutes and papers are absolutely exempt, in Denmark Cabinet minutes and papers are absolutely exempt, and in Ireland Cabinet minutes are absolutely exempt.

In some jurisdictions, Cabinet material is only subject to a class-based qualified exemption. For example, in Ireland, although Cabinet minutes are absolutely exempt, Cabinet papers are subject to a qualified exemption. In New Zealand, Cabinet minutes and papers are subject to a qualified class-based exemption.

In the UK, the public interest in maintaining the convention of ministerial collective responsibility is recognised in the Act through the protection afforded for the process of collective agreement through sections 35 and 36. In particular, section 35 exempts Ministerial communications, and section 36 exempts information, the disclosure of which would prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown. Both of these exemptions are qualified, and are thus subject to a public interest test. Sections 35 and 36 are mutually exclusive i.e. they cannot both be invoked at the same time, although they can be claimed in the alternative. Any decision to withhold Cabinet material under sections 35 or 36 is subject to appeal to the Information Commissioner, tribunal and court.

The Information Commissioner recognises that there is a strong public interest in protecting the convention of collective Cabinet responsibility. Unlike the public interest in protecting safe space for policy deliberation, the Commissioner considers that the public interest in protecting the convention continues after a decision is made.

*“Whether or not the issue is still ‘live’ will not reduce the public interest in maintaining collective responsibility (although it will affect the weight of related safe space arguments). This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken” (paragraph 212, ICO guidance on section 35, FOIA)*

These exemptions have been used successfully to protect collective Cabinet material. In October 2008 the Information Commissioner upheld<sup>3</sup> a decision to withhold minutes of a Cabinet subcommittee on data sharing. In December 2008 the Commissioner upheld<sup>4</sup> a decision to withhold minutes of Cabinet meetings where reform of mental health legislation was discussed from 1998 to 2006. In June 2009 the Commissioner upheld<sup>5</sup> a decision to withhold the Cabinet minutes of the last Cabinet meeting of Margaret Thatcher and John Major. In March 2010 the Commissioner upheld<sup>6</sup> a decision to withhold Cabinet minutes and papers of the 1982 Falkland War Cabinet subcommittee. In April 2012, the Commissioner upheld<sup>7</sup> a decision to withhold Cabinet minutes relating to the Miner’s Strike in 1984-5.

But these exemptions have not always prevented the release of material relating to collective Cabinet responsibility. For example, four of the seven vetoes have concerned Cabinet material. In 2009, and again in 2012, vetoes were issued to prevent the release of Cabinet

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<sup>3</sup> Decision Notice FS50177136

<sup>4</sup> Decision Notice FS50152189,

<sup>5</sup> Decision Notice FS50117066

<sup>6</sup> Decision Notice FS50089369

<sup>7</sup> Decision Notice FS50422531



minutes from 2003 in which the Iraq War was discussed. In 2009, and again in 2012, vetoes were issued to prevent the release of minutes of the Cabinet subcommittee on Devolution to Scotland, Wales and the Regions dating from 1997. In these cases the Information Commissioner (and, in the Iraq War case, the First-tier Tribunal) accepted that section 35 applied, but the Information Commissioner (and, in the case of the Iraq minutes, the First-tier Tribunal) found that the public interest was in favour of release.

In 2005, a BBC journalist requested the Cabinet minutes and other notes of the Cabinet meeting in January 1986 where Westland was discussed (during which the then Defence Secretary resigned), and was refused. In 2009 the Information Commissioner upheld the Cabinet Office's decision on the public interest in respect of notes, but overruled their public interest decision in respect of the minutes themselves. In September 2010 the First-tier Tribunal ordered the minutes released. The Government neither appealed, nor exercised the veto, and released the minutes in October 2010.

In October 2011 the Commissioner overturned<sup>8</sup> a decision to withhold Cabinet minutes from 1988 relating to the takeover of Rowntree by Nestlé. The Commissioner's decision was upheld by the First-tier Tribunal and the Upper Tribunal<sup>9</sup> before the information was released.

The Commission is very interested to receive evidence about whether the Act provides appropriate protection for the process of collective Cabinet responsibility.

**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?**

## *Risk assessments*

Risk assessments are another particularly relevant example of the tension between the public's right to know, and the need for public bodies to have an internal deliberative space. Two of the seven Cabinet vetoes have been in respect of risk assessments.

Section 35 of the Act provides an exemption for information which relates to formulation or development of Government policy, and this section has previously been used to withhold risk assessments, which are normally associated with a policy or programme. Risk registers can be shared between Ministers, and between officials during the development of policy.

In November 2010, the Department of Health received a request for its 'transition risk register' relating to potential changes and reforms to the NHS from the then Shadow Health Spokesperson. A separate request was received in February 2011 from a journalist for the relevant 'strategic risk register'. The Department refused to release both records on the basis that they concerned the formulation or development of government policy, and thus were exempt by virtue of section 35(1)(a) of the Act. The Information Commissioner agreed that

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<sup>8</sup> Decision Notice FS50362049

<sup>9</sup> The Cabinet Office v The Information Commissioner and Gavin Aitchison [2013] UKUT 526 (AAC)

the exemption applied, but disagreed with the Department's view of the public interest (although conceding it was finely balanced).

The Department appealed to the First-tier Tribunal and evidence was given by a former Cabinet Secretary, and the Permanent Secretary at the Department for Health. The Tribunal ordered release of the transitional risk register but not of the strategic risk register. In May 2012, the then Secretary of State for Health, Andrew Lansley, exercised the Cabinet veto to prevent the release of the transitional risk register.

In May 2012, the Cabinet Office received a request for the Major Project Authority's "Project Assessment Review" (PAR) in respect of the High Speed 2 rail programme. The Cabinet Office refused on the basis that the document concerned the formulation or development of government policy. The Information Commissioner argued that the information was in fact environmental. He applied the Environmental Information Regulations 2004 (EIRs), and considered that the exception in the EIRs for "internal communications" applied, but ruled that the public interest favoured disclosure. The Cabinet Office appealed to the First-tier Tribunal, but withdrew the appeal and, on 30<sup>th</sup> January 2014, the Transport Secretary Patrick McLoughlin exercised the Cabinet veto.

In both of these cases, the information in question has consisted of candid assessments of risk to the delivery of major government projects. In both cases the Coalition Government argued strongly that a safe space is needed so that officials can prepare frank risk registers; it argued that the regular disclosure of risk registers could result in a chilling effect and that this could result in them becoming more anodyne to down play controversial issues.

If risk assessments are to be of utility, then they need to consider all of the possible risks, no matter how unpalatable, and to express clearly the consequences of those risks. If risk assessments were to be regularly released, the government argued, then they would start to be drafted as public documents, and this would lead to them becoming anodyne and uncontroversial. That would compromise their utility, undermine good administration and effective policy making. Against this, both the NHS reforms and the HS2 rail project were controversial and highly political projects, and there was a strong interest in understanding exactly what risks these programmes posed.

The question of risk assessments continues to be a live issue. The Department for Environment, Food and Rural Affairs received a request for four risk and issues logs in respect of the badger culling programme. Earlier this year the Upper Tribunal ordered that these be released. The Department of Work and Pensions has received a request for the risk and issues registers, and PAR, in respect of the Universal Credit programme, and that case is currently under appeal.

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



## The Cabinet veto

As noted above, at introduction, the FoI Bill did not contain a veto power. Where information was exempt from release, public authorities could exercise a discretion to release it where doing so was in the public interest. This public interest discretion applied not only to sections 35 and 36, but to all exemptions except for a small number of absolute ones. The Information Commissioner had no power to overrule a public authority's public interest decision on discretionary release, although a recommendation could be issued.

The enforcement of the FoI regime was a subject of considerable debate during the Bill's parliamentary passage. There were a variety of options open to the government. Most obviously it could simply have maintained the original position, with public authorities making the final decision in respect of the public interest, subject to judicial review. As noted above, this is similar to the position in Canada, Denmark, France, Germany, and Spain. Alternatively it could have given the Information Commissioner the power to determine the public interest on appeal, but made more of the exemptions absolute. This is similar to the position in the United States where exemptions are absolute and there is a binding right of appeal to the district court.

Instead, the government introduced a package of amendments at Commons Report to increase the power of the Information Commissioner, allowing him to overturn a public authority's public interest decision, but also amended the Bill to provide for an executive veto over release. The veto, in the form in which it was finalised, was intended to be used sparingly and only by a Cabinet Minister who had first consulted Cabinet colleagues. Where information related to papers of a previous administration, the relevant minister would be the Attorney General.

The justification given for the existence of the Cabinet veto is that there will be a small number of situations in which the executive will be best placed to assess the public interest, and will have the authority granted to it by the electorate to do so. In those situations it is asserted that the executive should be able to make the final decision on where the public interest lies – subject to judicial oversight to ensure that decisions are not arbitrary or irrational.

The ministerial veto has been exercised on seven occasions since 2005. As noted above, it was used twice (in 2009 and 2012) in relation to requests for Cabinet papers about the Iraq War; twice (in 2009 and 2012) in relation requests for Cabinet papers concerning the devolution settlement; in May 2012 in relation to a Department of Health risk register; in October 2012 it was used in relation to correspondence between HRH Prince of Wales<sup>10</sup> and Ministers; and in January 2014 in relation to risk assessments concerning the High Speed 2 project.

When a Cabinet Minister wishes to exercise the veto, he needs to do so within 20 days of the Information Commissioner's decision, or within 20 days of any subsequent appeal being determined or withdrawn. In that time the Cabinet Minister must consult the entire Cabinet. This consultation is normally conducted in writing, although there have been occasions when the exercise of the veto has been discussed at Cabinet. Once collective agreement to exercise the veto has been obtained, the Cabinet Minister must issue a certificate to the Information Commissioner stating that the veto has been exercised. This certificate, alongside the Minister's detailed statement of reasons, will be laid before Parliament, and the

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<sup>10</sup> Section 37 of the Act provides a class-based qualified exemption for royal communications, but in 2010 Parliament agreed to provide for a class-based absolute exemption for communications with the Sovereign and the Heir to the Throne.

requestor will be notified directly. Any use of the veto is subject to judicial oversight through judicial review. Unless the Information Commissioner upheld the public authority's decision, he will respond to any use of the veto by issuing a report to Parliament giving his views on whether its use was appropriate.

Any exercise of the veto only concerns the specific request or requests at issue. If fresh requests are made for the same or similar material, then it may be necessary to issue a fresh veto. This has happened twice in relation to Cabinet minutes. Release of the Iraq War Cabinet minutes was vetoed in February 2009. The same requestor put in a fresh request 2 years later leading to a second veto in 2012. Release of the devolution Cabinet minutes was vetoed in December 2009. The same information was requested again 6 months later, leading to a further veto in 2012.

The Justice Select Committee considered the veto in its 2012 post legislative scrutiny of the Act. It said:

*"...we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material..." (para 179, JSC post-legislative scrutiny, July 2012)*

But in March this year, the Supreme Court ruled<sup>11</sup> that the veto could no longer be used as Parliament had understood it would work when its provisions were being enacted. One consequence of the Supreme Court's judgement is that the circumstances in which the veto can be exercised are now extremely narrow, although there remains considerable uncertainty about the precise scope of the veto. This judgement raised serious questions about the constitutional implications of the veto, the rule of law, and the will of Parliament.

These lead to fundamental questions about the operation of the Act and in particular the veto. The Commission is keen to understand, given the important role played by the introduction of the Cabinet veto during the passage of the Act, how a Cabinet veto could continue to operate, and what safeguards are necessary. For example, should it only be exercisable at an early stage, either before the Information Commissioner adjudicates, or before there is any appeal from a Commissioner's decision? The Commission is also keen to understand the implications for the Act if the veto is unavailable, and in particular what implications that has for the protections under the Act, and how the information vetoed previously could otherwise be protected.

**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?**

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<sup>11</sup> R (on the application of Evans) and another (Respondents) v Attorney General (Appellant) [2015] UKSC 21

## Enforcement and appeals

Information rights schemes generally have a right of appeal against a decision by a public authority to refuse a request. The form of these appeals varies by jurisdiction. For example, in New Zealand the Ombudsman makes a binding determination and there is no onward appeal. Therefore the only way to challenge the Ombudsman's decision is by way of judicial review (or, in the case of the public sector, to use the veto).

In Australia, Ireland and Scotland there is an appeal to an independent body that can make binding determinations, and onward appeals on a point of law to the High Court or equivalent. In the United States, appeals are directly to a district court.

In Canada, Denmark, France, Germany and Spain there is an appeal to an independent body who can only make a non-binding recommendation. The public authority then reconsiders its decision in the light of that recommendation, and makes a final decision. If the public authority continues to withhold, then that decision is amenable to judicial review before the High Court.

The importance of the appeals system is in the role it plays in relation to the rest of the legal framework. For example, for schemes that leave the final decision in the hands of public authorities subject to judicial review (such as Canada), there is no role for an executive veto. Therefore in any consideration of the balance set out in the Act between transparency, accountability and the protection of sensitive material, the appeals system plays as important a role as the nature of available exemptions or the veto.

The Commission is interested to understand whether the existing appeals system is working effectively, and how it does, and should, interact with the protections available in respect of sensitive information, and in particular material relating to internal deliberation.

The UK appeals system is unusual in having a significant number of potential appeal steps. These multiple layers of appeal have their strengths: they provide multiple layers of oversight, and ample opportunities for public authorities to reconsider their position. These multiple steps also help to ensure that any mistakes made at an earlier stage in the process are rectified.

The drawback of such a layered appeal system is that it is expensive to operate for both public bodies and requestors, and an appeal can be a lengthy, drawn-out process in some cases. Cases that are not resolved can take years to complete all of the appeal stages, by which time the information may have ceased to be of value to the requestor.

In addition, because of the way that the appeals system operates, it is the Information Commissioner's decision which is the focus of any onward appeals, and not the public authority's decision to withhold. Where the Commissioner overturns a decision of a public authority and that public authority appeals, the original requestor sometimes ceases to play an active part in the proceedings. Where this happens it can be unclear, at the culmination of the appeal or any onward appeal, whether the requestor is even still interested in the requested information.

### ***The UK appeal system***

Under the Act, where a requestor is dissatisfied with the way that a public authority has handled their request, the [Code of Practice](#) under section 45 of the Act makes clear that a complaints process must be in place. Such complaints are commonly known as 'internal

reviews', and they usually involve a different group of officials looking afresh at the request and the public authority's decision.

If the requestor remains dissatisfied they have a right to appeal to the Information Commissioner. The Commissioner carries out a merits-based review of each complaint. Frequently he succeeds in resolving matters informally, but where this is unsuccessful he issues a formal decision notice. Statistics on appeals are set out in **Annexes A and B** below.

In 2014-15, the Commissioner issued 1305 formal decision notices on Fol and EIRs. The Commissioner's decision notices are not legal precedents, but are informative of the approach he is likely to take. In cases resolved in 2014-15, the Commissioner upheld 62% of public authority decisions, and partially upheld a further 14%. In relation to central government departments and agencies, the Commissioner upheld 81% of their Fol decisions, and partially upheld a further 7.2%, for appeals resolved in 2014-15.

If either the requestor, or the public authority, are dissatisfied with the Information Commissioner's decision, they can appeal to the First-tier (Information Rights) Tribunal<sup>12</sup>. The First-tier Tribunal, usually comprising a tribunal judge and two lay members, is not a superior court of record, and its decisions do not create legal precedents. The First-tier Tribunal carries out a merits-based review of the Information Commissioner's decision, and thus it performs a similar role to that of the Information Commissioner.

Where the appeal had been brought by the requestor, the Information Commissioner is always a party to the appeal, but public authorities are also often joined as a party to the proceedings (as they are the ones holding the information).

In 2014-15, 263 appeals in relation to the Act were determined by the First-tier Tribunal. Of those, 13% were brought by public authorities and 87% were brought by requestors. The vast majority of appeals are dismissed or withdrawn, with the Commissioner's decision continuing to stand in 77% of cases. In 2014-15, 21% of appeals by requestors were upheld or partially upheld, and 38% of appeals by public authorities were upheld or partially upheld.

If any party is dissatisfied with the decision of the First-tier Tribunal, it is open to them to appeal on a point of law to the Upper Tribunal, which is a superior court of record and establishes legal precedents. In 2014-15, the Upper Tribunal decided 39 appeals in relation to the Act, of which 5 (13%) were brought by public authorities and 34 (87%) were brought by requestors.

Of the appeals brought by requestors, 68% were refused permission to appeal, and 20% were dismissed or withdrawn. Of the appeals brought by public authorities, all of them were granted permission, but 80% of them were dismissed or withdrawn.

There have been several occasions where the Upper Tribunal overturns the decision of the First-tier Tribunal, but rather than finding in favour of one of the appellants it instead remits the case back to the First-tier Tribunal for it to make a fresh decision. This obviously adds even more potential delay and costs to the appeal.

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<sup>12</sup> The Government is currently consulting on introducing fees for the General Regulatory Chamber of the First-tier Tribunal, in which sits the First-tier (Information Rights) Tribunal.

From the Upper Tribunal, further appeals on a point of law are possible to the Court of Appeal and Supreme Court, although there are only very small numbers of these.

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

## Burdens on public authorities

The Act is broad in its scope and applies to over one hundred thousand public sector bodies; including, local and central government, police forces, schools, colleges, universities, and the National Health Service.

There is provision in the primary legislation for fees to be charged for requests made under the Act to public authorities (as they may be for data subject access requests). In the event, a later decision was made by government not to introduce charging regulations, though the power remains on the statute book.

The Government produces annual and quarterly statistics on the use of FOI in 41 central government bodies (comprising 21 Departments of State and 20 'other monitored bodies'). The statistics show a significant increase in the volume of requests since the Act came into force in 2005, although in 2014 there was a fall in requests for the first time since 2007.

Year	Initial requests	Internal reviews requested	Appeals to the ICO
2005	38,108	1267	127
2006	33,688	1085	384
2007	32,978	857	222
2008	34,950	959	153
2009	40,548	1502	206
2010	43,921	1729	228
2011	47,141	2114	350
2012	49,464	2724	351
2013	51,696	2832	408
2014	46,806	2615	395

Source: MoJ FoI national statistics: <https://www.gov.uk/government/collections/government-foi-statistics>  
 These figures cover all requests and not just those where sections 35 and 36 of the Act are engaged

In October 2006, Frontier Economics produced a [report](#) on the cost burden of FoI. It found that in central government the average cost of staff time in dealing with each request was £254, representing 7.5 hours work. It estimated that the overall cost to central government was £24.4m annually (of which £8.6m was staffing costs), based on 34,000 requests annually. It estimated that the wider public sector received 87,000 requests each year at a cost of £11m. The report noted that some requests were disproportionately costly: 5% of central government requests cost in excess of £1000. The Frontier Economics research

found that 60% of requests to local authorities came from private individuals, 20% came from commercial entities, and 10% from journalists (and 10% other).

In 2010, [research](#) by the UCL Constitution Unit found that councils received nearly 200,000 requests at a total cost of £31.6m per year. It also estimated that the most frequent users of the Act were private individuals, businesses and journalists.

In December 2011 the Ministry of Justice submitted a [memorandum](#) to the Justice Select Committee at the start of its post-legislative scrutiny of the Act. Annexed to this was research conducted by Ipsos-Mori on the impact of FoI. The research estimated that in 2009, the wider public sector received 165,000 requests at a cost of at least £36.7m. The research also reported that in 2010, 11% of requests to the Northern Ireland Executive, 17.6% of requests to Solihull Council, and 35.8% of requests to Teignbridge Council were from businesses. It also found that in 2010, 9.5% of requests to the Northern Ireland Executive, 28.9% of requests to Solihull Council, and 27.3% of requests to Teignbridge Council were from the media.

In March 2012, the Ministry of Justice published further [research](#) from Ipsos-Mori on the costs of FoI. This found that each FoI request submitted to a central government department cost an average of £184 in staff time to resolve. Requests took an average of 6 hours and 10 minutes to complete. Requests to other public authorities cost an average £164 in staff time, and took 5 hours and 21 minutes to complete. They estimated the total cost to central government at £8.5m, based on a volume of approximately 46,000 requests. Although these average costs are lower than those in the 2006 Frontier Economics report, Ipsos-Mori said

*“Analysis attempting to control for...differences suggests that the average time and staff cost of responding to a central government FOI request remains at a similar level to that calculated in this previous research” (p.i)*

The report highlighted that some requests were disproportionately costly: 1% of requests to central government cost over £1000. 8% of requests cost over £500, but accounted for 32% of the total costs.

Misgivings about the cost of FoI have been expressed by public bodies. During post-legislative scrutiny of the Act, several councils gave evidence. Kent County Council [said](#):

*“The number of requests for information...has increased dramatically year-on-year, from 504 requests in 2005 to 1,819 in 2011. Sadly, the resources to deal with these requests have not increased and there is concern that the pressure that FOIA puts on local authorities that are already under budgetary constraints is diverting valuable resources away from arguably more important council services, such as social care, education and highways.”*

The Foundation Trust Network (now NHS Providers) also submitted [evidence](#) during post-legislative scrutiny. It highlighted concern that:

*“...the Freedom of Information Act (FOIA) provisions were being used for commercial purposes rather than for scrutiny of issues in the public interest...there were also concerns raised about...the number of requests growing rapidly to the point of being overwhelming...the level of resource that was necessary to give over to these requests, including administrative time, but also front-line clinical time”*



## ***Addressing burdens***

The Act already includes provisions intended to prevent requests imposing disproportionate burdens on public bodies. These provisions potentially apply to any request under the Act (and not just those engaging sections 35 or 36, for example). Section 12 of the Act provides that a public authority is not obliged to comply with the duty to publish information if the cost of compliance exceeds the appropriate limit. The appropriate limit is governed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 which sets the cost at £600 for central Government and £450 for other public authorities. This translates as 24 and 18 hours respectively based on a standard charge of £25 per hour, regardless of the actual cost of the staff time taken. Public bodies can still choose to respond to requests that exceed this limit, but in that case they are able to charge for the full costs (including staff time) of doing so.

However, for the purposes of estimating the total cost of a request, an authority can only take into account the costs in relation to: determining whether it holds the information; locating the information, or a document which may contain the information; retrieving the information, or a document which may contain the information; and extracting the information from a document containing it. The permitted activities that may be taken into account in estimating the total cost only cover the activities required to bring the relevant information together. Once the relevant information is collated, no further activities can be counted. Therefore, time taken to, for example, read, redact, or consider the information cannot count towards the cost limit. This is the case even though, for example, public authorities are under a legal obligation to protect personal information.

Separately, section 9 of the Act provides a wide power for fees to be charged for responding to requests. During the passage of the FoI Bill, there was an expectation that a fee would be charged for making a request, but that was not implemented.

Fees for information requests are quite common in other jurisdictions. In Australia, the fee is around \$15 per hour to search and retrieve documents. There is then no charge for the first five hours spent deciding whether to grant or refuse a request, including examining documents, consulting with other parties, making deletions or notifying any interim or final decision on the request, but after the first five hours the cost is \$20 per hour. In Canada, there is a fee for making a request of \$5. Canadian public authorities can also charge \$2.50 per person per quarter hour for every hour in excess of five hours that is spent by any person on search and preparation.

In Germany, there is no fee for making a request, but requestors are charged for the costs imposed on the public body in providing the information. Simple written responses are free of charge, but otherwise the typical fee is around €50-100, although up to €500 can be charged. In the Republic of Ireland, where a revised fee structure was introduced in 2014, requesters do not have to pay to submit a request, but a subsequent internal review is €30, and a referral/review to the Information Commissioner is €50. In New Zealand, requesters normally won't be charged for the first hour of time spent locating and reading the requested information, but up to \$38 can be charged per 30 minutes thereafter. In the US, each federal agency can levy a charge for complying with requests which must be limited to "reasonable standard charges for document search and duplication". No fee is chargeable if the body fails to comply with the 20-day time limit, or if the requestor qualifies for a fee waiver. There appear to be no fees charged in Denmark, France, or Spain.

Fees are charged in the UK in relation to similar information access schemes. For example, there is at present at £10 [fee](#) for making a 'subject access request' under the Data Protection Act 1998 for one's own personal data, a [fee](#) of £1 per document for company information downloaded from the Companies House web service, and the Land Registry [charges](#) between £3-£7 per document for its information services.

**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 Fol 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?**



## ANNEX A: Appeal National Statistics

These statistics are those published annually by the Ministry of Justice until 2015. Only central government departments and agencies are monitored and included in these statistics, although the Act applies across the entire public sector.

<b>Requests were received by central government bodies 2014-15</b>	
Total number of requests	46,806
“on hold” or “lapsed” awaiting a fee payment	215
<b>Number of active requests received</b>	<b>46,591</b>
requests where it was possible to give a substantive decision	34,623
information not held	8,850
requests requiring clarification	3,118

<b>Outcome of central government requests where it was possible to give a substantive decision</b>	
Total	34,623
granted in full	17,315 (50%)
withheld in full	11,558 (33%)
withheld in part	5027 (15%)
not yet received a substantive response	723 (2%)

The 16,585 requests that were withheld in part or full gave rise to 2615 internal reviews. Of these 2615, 2417 were resolved during 2014.

<b>Outcome of central government internal reviews resolved during 2014-15</b>	
Total	2417
public authority decision upheld	1906 (79%)
public authority decision partially upheld	316 (13%)
public authority decision overturned	195 (8%)

So the public authority reaches a different decision in 21% of internal reviews. Of the 2222 requests where the public authority confirms, in whole or in part, its original decision to withhold information, 395 requests led to an appeal to the Information Commissioner. Of these, 263 were resolved in 2014.

<b>Outcome of central government appeals to ICO resolved in 2014-15</b>	
Total	263
public authority's decision was upheld	213 (81%)
public authority's decision was overturned	31 (11.8%)
public authority's decision was partially upheld	19 (7.2%)

The Information Commissioner upholds the public authority's decision in the vast majority (81%) of cases. In a small proportion of cases (19%) the public authority's decision is overturned in whole or part, which comprised just 50 cases in 2014.

## ANNEX B: Information Commissioner's Statistics

The Information Commissioner issued 1305 decisions notices in 2014-15, so central government cases make up a minority of the appeals heard by the ICO. According to the ICO's 2014-15 [Annual Report](#), central government cases make up just 18% of their appeals workload. The 1305 decision notices comprised 1140 FoI appeals and 165 EIR appeals.

Outcomes of ICO public sector FoI and EIR decision notices issued in 2014-15	
Total	1305
public authority's decision was upheld	809 (62%)
public authority's decision partially upheld	189 (14%)
public authority's decision overturned	307 (24%)

Comparing these statistics with the national statistics for central government bodies above, it appears that the decisions of central government bodies appear to be upheld by the Information Commissioner significantly more often than public bodies in general (81% vs. 62%).

Roughly speaking, about 75% of cases stop at the Information Commissioner stage. Of the 1140 FoI decisions issued in 2014-15, only 269 FoI decisions were appealed to the First-tier Tribunal. Of the 269 FoI appeals, 41 (15.2%) were brought by public authorities, and 228 (84.8%) were brought by requestors.

263 FoI appeals were decided in 2014-15. 34 (13%) of the decided appeals were brought by public authorities and 229 (87%) of the decided appeals were brought by requestors.

First-tier Tribunal FoI appeals decided in 2014-15	
<b><i>Appeals brought by public authorities</i></b>	
Total	34
upheld	3 (9%)
partially upheld	10 (29%)
dismissed / withdrawn	21 (61%)
<b><i>Appeals brought by requestors</i></b>	
Total	229
upheld	25 (11%)
partially upheld	22 (10%)
dismissed / withdrawn	182 (79%)

Therefore in 2014-15 the ICO's decision continued to stand in 77% (203 of 263) of the decided appeals at the First-tier Tribunal.

There were 49 FoI appeals to the Upper Tribunal in 2014-15. 11 of these (22.4%) were brought by public authorities, and 38 (77.6%) were brought by requestors.

39 FoI appeals were decided in 2014-15, of which 5 (13%) were brought by public authorities and 34 (87%) were brought by requestors.

<b>Upper Tribunal FoI appeals decided in 2014-15</b>	
<b><i>Appeals brought by public authorities</i></b>	
Total	5
permission to appeal refused	0
upheld	1 (20%)
partially upheld	0
dismissed / withdrawn	4 (80%)
<b><i>Appeals brought by requestors</i></b>	
Total	34
permission to appeal refused	23 (68%)
upheld	4 (12%)
partially upheld	0
dismissed / withdrawn	7 (20%)

There were only 3 FoI appeals to the Court of Appeal in 2014-15. Two of these were brought by public authorities and one by a requestor.

6 FoI appeals to the Court of Appeal were determined in 2014-15. Of the 5 appeals brought by requestors, 80% were dismissed. The one determined appeal brought by a public authority was dismissed.

The only FoI case to reach the Supreme Court in 2014-15 was the case concerning HRH the Prince of Wales' correspondence.



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