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House of Commons Justice Select Committee
Inquiry into Post-Legislative Scrutiny of the Freedom of Information Act
Evidence from Nuclear Information Service

Executive summary

1. Nuclear Information Service has used the Freedom of Information Act 2000 extensively to obtain information from public authorities as part of our research into the UK's nuclear weapons programme. In general we consider that the Freedom of Information Act works effectively although its effectiveness is limited by interpretation of exemptions to the Act by public authorities, the Information Commissioner, and the Information Tribunal. Information disclosure in response to our requests has not always been as comprehensive as we would wish, especially in relation to cost issues (section 43 exemption). We also have concerns about the use of sections 35 and 36 of the Freedom of Information Act by central government departments.

2. The strength of the Freedom of Information Act lies in the legal duty it imposes upon a very wide range of public authorities to provide information to members of the public upon request. We support extension of the act to cover relevant activities of private companies which have been contracted to provide public services and major government infrastructure schemes. The Act's principal weaknesses lie in the complexity of its appeal processes and the inadequacy of these processes in resolving appeals promptly, and in low standards of regulation and enforcement.

3. The costs of administering the Freedom of Information Act are reasonable and proportionate to its benefits. Public authorities are well aware of the provisions of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and do not hesitate to apply the regulations to limit the scope of complex or extensive requests for information. There is no need for a change to the charging basis for the scheme, which as it stands is clearly defined and offers incentives for public bodies to take an open approach to information management. The Act already provides sufficient powers to allow public authorities to define and deal with vexatious requests, and no change is needed to the legislation in this respect.

4. A pro-active and open approach to information disclosure and provision of justifications for decision-making through publication of data and decision documents should help to reduce the reactive workload for a public authority in handling requests for information. Public authorities could do more to reduce their workload in handling reactive requests for information by putting more effort into clearly signposted publication schemes and internet resources. A 'right first time' approach would also help public authorities in limiting the costs of dealing with requests for information.

5. We conclude that the Freedom of Information Act has been a success and the benefits it has produced far outweigh the costs of its implementation. It would be a backward step to try to limit the scope of the Act or place further restrictions on the accessibility of information. In contrast, we would support steps to further extend the scope of the Act to cover a wider range of bodies.

Evidence to the Committee

6. Nuclear Information Service (NIS) is a not-for-profit, independent information service which works to promote public awareness and debate on nuclear weapons and related safety and environmental issues (see http://nuclearinfo.org for more information). Our research work is supported by funding from the Joseph Rowntree Charitable Trust.

7. To assist our research into the UK's nuclear weapons programme we use the Freedom of Information Act 2000 extensively to obtain information from public authorities. Over the last three years we have submitted between 30 – 50 requests each year under the terms of the Act to a wide range of public bodies: central government departments, non-departmental public bodies, police forces, health service trusts, and local authorities.

8. Many of the areas in which we are interested are by their nature sensitive, and in response to our requests we have frequently found that requested information is withheld under the terms of various exemptions under the Act. We accept that there will be certain types of information which it is not in the public interest to release, but it is our policy to challenge decisions where we consider that an exemption has been applied unreasonably or too restrictive a view has been taken in applying an exemption. We therefore have experience of using the internal review process for a number of public authorities; the section 50 appeal process to the Information Commissioner; and the appeal process for the First Tier (Information Rights) Tribunal.

9. Our evidence addresses the three questions asked by the Select Committee, using examples from our own experience. We are happy to provide further information on any of the matters covered in our submission if requested to do so by the Committee.

Question 1. Does the Freedom of Information Act work effectively?

10. In our experience public authorities show a mixed performance in their application of the Freedom of Information Act. From across the spectrum of different types of public authority we have received in response to requests for information both carefully considered, high quality responses and poor quality responses which do not comply with the Act's requirements. In general, understanding of the requirements of the Freedom of Information Act appears to be good at the corporate core of public bodies, but more hazy, without a good grasp of the scope of exemptions or arrangements for charging fees, further towards their peripheries.

11. In general we consider that the Act has been successful in promoting openness, transparency, and accountability in government by shining a light on how decisions are made. It has perhaps been less successful in improving decision-making and public involvement in decision-making. This is because in some areas of public policy (nuclear weapons are a good example of this) decisions are made principally on the basis of

political dogma rather than costs, benefits, or strategic needs, and access to information will not on its own be sufficient to change this.

12. The Freedom of Information Act has been invaluable in Nuclear Information Service's work to unveil the scope of the costs of the programme to replace Trident nuclear weapons – a controversial high cost and high risk programme about which the government has been less than forthcoming. As an example, we have used the Act to investigate the Ministry of Defence's Nuclear Weapons Capability Sustainment Programme. This is a major programme of infrastructure investment work at the Atomic Weapons Establishment, the UK's nuclear weapons factory, which will extend over the best part of two decades, currently costing around £0.5 billion per year. Other than two brief written Ministerial statements[1], the government has made little effort to pro-actively inform the public about this programme and the costs and risks associated with it. The Atomic Weapons Establishment is operated by private contractors who claim that Freedom of Information legislation does not cover their activities. However, following a number of requests under the terms of the Freedom of Information Act made by Nuclear Information Service, the Ministry of Defence has released information about the inception and scope of the Nuclear Weapons Capability Sustainment Programme and individual projects within the programme, and has provided limited information about safety issues associated with individual projects and construction costs for projects where contracts have been awarded[2].

13. Work undertaken by other researchers using the Freedom of Information Act has exposed serious issues about reactor safety on board the Royal Navy's nuclear powered submarines and shortages of suitably qualified and experienced personnel to run the Ministry of Defence's nuclear programme[3] – important concerns in the light of last year's nuclear emergency at Fukushima in Japan. The public have a right to know about potential shortfalls in nuclear safety arrangements and there is a clear public interest in using the Freedom of Information Act to highlight potential concerns and press for action to resolve them.

14. Information disclosure in response to our requests has not always been as comprehensive as we would wish, especially in relation to cost issues. Although programme costs are aggregated across a number of projects, meaning it is not possible to draw inferences about individual contracts, the Ministry of Defence has consistently refused to release information about the full programme costs of the Nuclear Weapons Capability Sustainment Programme. Information about spending on Ministry of Defence contract costs has also been withheld from public scrutiny by the department through a high level policy decision. Despite a commitment in the Coalition Agreement to require full online

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[1] Atomic Weapons Establishment: House of Commons written ministerial statement by the Secretary of State for Defence. Official Report, 19 January 2005, Column 59WS. Atomic Weapons Establishment: House of Commons written ministerial statement by the Parliamentary Under-Secretary of State for Defence. Official Report, 9 September 2009.

[2] See for example 'MoD spends £2 bn on nuclear weapons ahead of Trident renewal decision'. Rob Edwards. 'The Guardian', 27 November 2011. http://www.guardian.co.uk/uk/2011/nov/27/mod-trident-nuclear-weapons-spending 'Britain's nuclear spending soars amid defence cuts'. Jamie Doward. 'The Observer'. 2 October 2011. http://www.guardian.co.uk/uk/2011/oct/02/ministry-of-defence-nuclear-spending-project-pegasus

[3] See for example 'Nuclear safety getting worse in military facilities, says MoD study'. Rob Edwards. 'The Guardian', 25 August 2011. http://www.guardian.co.uk/world/2011/aug/25/nuclear-safety-military-mod-study

disclosure of all central government spending and contracts over £25,000[4], the Ministry of Defence maintains that EC guidance on procurement of 'war like stores' allows the costs of major equipment projects such as new Queen Elizabeth class aircraft carriers, Typhoon aircraft, and 'Successor' Trident replacement submarines to be withheld from the public[5]. A 'temporary' exemption from disclosure has been granted by the Cabinet Office, which the government has "no immediate plans to lift"[6]. As a result spending on the most controversial, high risk government spending projects run by the department with the worst record for contract overspending has been hidden from public view.

15. In general, therefore, the Freedom of Information Act works effectively although its effectiveness is limited by interpretation of exemptions to the Act by public authorities, the Information Commissioner, and the Information Tribunal.

Question 2: What are the strengths and weaknesses of the Freedom of Information Act?

16. The strength of the Freedom of Information Act lies in the legal duty it imposes upon a very wide range of public authorities to provide information to members of the public upon request. This has established firmly the principle that public authorities in the UK must operate in an open and transparent way. The Ministry of Justice has proposed the possibility of extending the Freedom of Information Act to cover a wider range of public bodies. We would support extension of the Act to cover relevant activities of private companies which have been contracted to provide public services and major government infrastructure schemes.

17. The Freedom of Information Act's principal weaknesses lie in the complexity of its appeal processes and the inadequacy of these processes for resolving appeals promptly, and in low standards of regulation and enforcement.

18. The Act does not set a binding timescale for public authorities to conduct internal reviews of contested requests, nor for the Information Commissioner to issue a decision notice on an appeal case. In our experience it is common for internal reviews and appeals to the Information Commissioner to take well over a year. If handling of the original request for information has been slow, this can result in a delay of well over two years before a final decision is made, by which time the interest (although not value) in public disclosure of the information requested may have faded as an issue loses its immediacy. We therefore suggest that the Freedom of Information Act is amended to set binding timescales for public authorities to complete internal reviews and for the Information Commissioner to issue decision notices. Scottish Freedom of Information legislation provides for public authorities to deal with internal reviews within twenty working days[7] and as a result the performance of Scottish public authorities in dealing with internal reviews promptly is significantly better than that for the rest of the UK.

19. Although the Information Tribunal represents a means of appeal against decisions made by the Information Commissioner, in our experience the Tribunal's workings are complex

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[4] 'The Coalition: Our programme for government'. HM Government, May 2010. Page 21.

[5] For more details and supporting information please see 'Secrecy over military equipment costs 'makes a mockery of government openness claims''. Nuclear Information Service, 20 September 2011. http://nuclearinfo.org/view/policy/government/a2157

[6] Parliamentary Question on Defence: Procurement by Paul Flynn MP. Official Report, 10 Nov 2011 : Column 454W.

[7] Section 21, Freedom of Information (Scotland) Act 2002.

and arcane[8]. To most lay participants there will be little difference between the procedures and complexities of the Information Tribunal and the court system. The Tribunal is run according to formal legal procedures and many of the Tribunal judges are themselves from a legal background. The complexities of the Information Tribunal are a formidable barrier to participation by most lay participants – particularly so as they will be facing experienced professional advocates engaged by the Information Commissioner and the public authority defending the appeal. We recommend that if an opportunity arises, the procedures of the Information Tribunal should be simplified. Consideration should also be given to levelling the balance between public authorities represented by legal advocates and lay participants at the Tribunal by providing limited legal support and advice to lay participants by means of a 'Counsel to the Tribunal' with a brief to advise individual appellants on points of law and act as advocates on their behalf.

20. We are disappointed in the standard of regulation for the Freedom of Information Act provided by the Information Commissioner. As well as being slow in dealing with casework, in our experience the Information Commissioner adopts low quality standards in reviewing cases and takes a timid approach to using its enforcement powers against public authorities which are not complying with their duties under the Freedom of Information Act. As an example, Nuclear Information Service asked the Information Commissioner to issue a decision notice in respect of a request we had made to the Ministry of Defence for information on co-operation between the US and UK governments on design of a new nuclear weapons production facility at the Atomic Weapons Establishment. The decision notice issued by the Commissioner neglected to address major issues, central to the case, which we had made in our submission and did little more than repeat the case made by the public authority involved in the case – the Ministry of Defence. As a result, Nuclear Information Service referred the case to the Information Tribunal[9]. Shortly before the Tribunal hearing the Ministry of Defence conducted its own further review of the case and voluntarily agreed to release large portions of documents which had previously been claimed as exempt from disclosure. In a second example of what we consider to be inadequate regulation, Nuclear Information Service and a number of other researchers have complained to the Commissioner on a number of occasions about very slow response times within the Ministry of Defence in responding to requests for information. Rather than take formal enforcement action the Commissioner has taken the approach of monitoring and reviewing the Ministry of Defence's handling of cases and seeking an undertaking from the Ministry that performance will improve[10]. In our view the department's performance in handling requests has been slow to improve as a result of this approach and has not yet reached an acceptable standard. No doubt the performance of the Information Commissioner as a regulator is in part determined by the resources at its disposal – and we would endorse calls for the staff resources available to the Commissioner to be increased – but there also

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[8] For an account of the frustrations of dealing with the Information Tribunal's processes for a lay appellant please see 'Freedom of information appeals: the requester's perspective. A talk at the Centre for Freedom of Information, University of Dundee.' Rob Edwards, 19 October 2011.
http://www.robedwards.com/2011/10/freedom-of-information-appeals-the-requesters-perspective.html

[9] Information Commissioner Decision Notice FS50263570 and Information Tribunal appeal number EA/ 2011/0004.

[10] Freedom of Information Act 2000 and Environmental Information Regulations 2004. Undertaking. Public Authority: Ministry of Defence. Information Commissioner's Office, reference FPR0219435, June 2011.
http://www.ico.gov.uk/what_we_cover/taking_action/~/media/documents/library/Freedom_of_Information/Notices/mod_foi_undertaking.ashx

appears to be a reluctance on behalf of the regulator to challenge public authorities in any serious way.

Question 3: Is the Freedom of Information Act operating in the way that it was intended to?

21. Our response to this question highlights specific sections of the Freedom of Information Act which we feel are open to abuse by public authorities and addresses issues around the costs of handling requests and dealing with vexatious requests which have been raised by the Ministry of Justice[11].

22. By its nature, some of the information which has been requested by Nuclear Information Service using the Freedom of Information act has been deemed to be exempt from release under the terms of section 24 of the Act (national security). As there is no government definition of 'national security', it is impossible to establish whether information is being withheld judiciously or arbitrarily under such circumstances. Guidance on use of the section 24 exemption should therefore be amended to include a working definition of 'national security'.

23. We also have concerns about the use of sections 35 and 36 of the Freedom of Information Act by central government departments. Section 35 applies to certain defined classes of information and is aimed at protecting the government policy-making process in order to maintain the delivery of effective government. Section 36 aims to enable the free and frank provision of advice and exchange of views for the purposes of deliberation and prevent prejudice to the effective conduct of public affairs. This is a fairly subjective area, making it difficult for an outsider to challenge the grounds on which it has been used by a government department. Aware of such concerns, the Scottish Information Commissioner has taken the view that use of the exemption on prejudice to the effective conduct of public affairs (section 30 of the Freedom of Information (Scotland) Act 2002) should only be used if the damage to the public interest has to be real and that it cannot be used as a 'class exemption' – every case has to be considered on its merits[12].

24. Whereas the Scottish Information Commissioner appears to have taken a robust line in dealing with ill-defined claims that information is exempt on such grounds, the Information Commissioner for the rest of the UK seems less inclined to challenge public authorities on this issue. We have encountered examples of government departments claiming that information is exempt under one or both of these exemptions long after decisions have been announced by government departments, and well after the period when policy-making discussions can be expected to have concluded. We recommend that guidance is introduced to place a time limit (we would suggest one year after a decision has been announced) on the period when section 35 and 36 exemptions can be considered valid and specify that use of the exemption can only be based on concrete and specific concerns.

25. We would also recommend that section 43 of the Act is reviewed to reduce the scope of the 'commercial interests' exemption so that it cannot be used to withhold information

[11] 'Memorandum to the Justice Select Committee. Post-Legislative Assessment of the Freedom of Information Act 2000'. Ministry of Justice, December 2011.

[12] 'Prejudice to effective conduct of public affairs.' Briefing by Scottish Information Commissioner. http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.asp

about the projected costs of government contracts above a certain limit (we suggest £25,000, in line with the limit chosen by the government for disclosure of spending on government contracts[13]). In our experience the section 43 exemption is frequently used to withhold information about the costs of government projects where there is a clear public interest in revealing the scale of expenditure which will be funded by taxpayers. Claims that disclosure of such information would prevent the government from receiving value for money from contractors do not, in our view, stand up to scrutiny in an environment where competitive tendering is the norm and government departments may themselves be dependent upon contractors for developing project cost estimates.

26. The Ministry of Justice has expressed concern about increasing request volumes and the potential cost to public authorities and impact on resources which may result[14]. In our view increasing volume of requests is an indicator of the success of the Freedom of Information Act and should be a cause for satisfaction in government, not concern. As well as there being a cost to the authority in providing information, there is also a cost to the requester in terms of the time required to make a request for information. Meaningful requests must be often be carefully defined in order to ensure that they remain within the cost limits for handling requests for information, and in cases where there is a need to follow through an initial request using the appeals procedure, the process can be long and drawn out. Unlike the paid professionals tasked with responding to requests for information, those submitting requests are usually unpaid amateurs.

27. A pro-active and open approach to information disclosure and provision of justifications for decision-making through publication of data and decision documents should help to reduce the reactive workload for a public authority in handling requests for information. Public authorities could do more to reduce their workload in handling reactive requests for information by putting more effort into clearly signposted publication schemes and well structured internet resources which direct the enquirer to already published sources of information. Few public authorities have developed anything more than rudimentary publication schemes, and in many cases publications schemes do not appear to have been adequately updated and maintained since the Freedom of Information Act first came into force.

28. A 'right first time' approach would also help public authorities in limiting the costs of dealing with requests for information. In our experience authorities will often refuse to disclose information which is considered sensitive upon an initial request. Following an internal appeal a portion of the information is usually released, and an appeal to the Information Commissioner results in yet more of the contested information being released. A more considered approach at the earlier stages of the process, with greater regard being taken to the legal duties imposed by the Freedom of Information Act and a proper consideration of the risks resulting from releasing information, would enable public bodies to deal with requests for information in a cost-effective manner and avoid time-consuming appeals with their opportunity costs.

29. It is unreasonable to blame members of the public who exercise their rights to information for an increase in costs when public authorities do not handle information requests in a cost-effective and considered manner. Evidence presented in the Ministry of Justice memorandum to the Justice Select Committee[15] gives undue attention to a small

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[13] 'The Coalition: Our programme for government'. HM Government, May 2010. Page 21.

[14] 'Memorandum to the Justice Select Committee. Post-Legislative Assessment of the Freedom of Information Act 2000'. Ministry of Justice, December 2011. Paragraphs 172 – 189, pages 49 – 53.

[15] For example, paragraph 187, page 52.

number of individual cases which have required significant resources to resolve and does not consider whether or how the bodies in question could have dealt with the case differently so as to have reduced the workload involved.

30. In our experience public authorities are well aware of the provisions of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and do not hesitate to apply the regulations to limit the scope of complex or extensive requests for information. In such situations, a number of the authorities we have submitted requests to have adopted the good practice of providing advice under section 16 of the Freedom of Information Act on how a request could be redefined or reduced in scope to bring it within the scope of the cost limits.

31. Discussing the costs of administering the Freedom of Information Act, the Ministry of Justice argues that "there is something of an opportunity cost involved in that each hour spent by a staff member responding to an FOI request was an hour not spent on their 'day job'"[16]. However, as the Director of a non-departmental public body said to us, "When staff complain to me that dealing with Freedom of Information requests is getting in the way of their day jobs, I tell them that dealing with Freedom of Information requests is part of their day job. It's part of our duty as a responsible government agency to be open and transparent and push forwards standards of openness across the sector". The view that providing information to the public is not part of a public servant's job is ultimately based on the archaic attitude that the public should not have the right of access to government information – a view which is fundamentally opposed to the central principle underpinning the Freedom of Information Act: that there is a general right of access to information held by public authorities[17].

32. Opening access to information and, when necessary, responding to requests for information has become part of the 'way things are done' in progressive and efficient public authorities in accordance with the requirements of the Freedom of Information Act and the principles of open government. There is no excuse for other authorities to take a more reluctant approach to the disclosure of information. In our view the costs of administering the Freedom of Information Act are reasonable and proportionate to its benefits. There is no need for a change to the charging basis for the scheme, which as it stands is clearly defined and offers incentives for public bodies to take an open approach to information management. Moves to increase the costs of information to those making requests it would be contrary both to the direction of travel proposed by the government in the reforms to Freedom of Information law outlined in the Coalition Programme for Government and to broad principles of liberal democracy.

33. Concerns have also been expressed by the Ministry of Justice about the difficulties in dealing with vexatious requests for information made under the terms of the Freedom of Information Act[18]. In our view the Act already provides sufficient powers to allow public authorities to define and deal with vexatious requests, and no change is needed to the legislation in this respect. We consider that sensible handling of requests for information, with the authority making an effort to understand and clarify the scope of a difficult request, and accepting its duty under section 16 of the Act to provide advice and

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[16] 'Memorandum to the Justice Select Committee. Post-Legislative Assessment of the Freedom of Information Act 2000'. Ministry of Justice, December 2011. Paragraph 185, page 52.

[17] Section 1, Freedom of Information Act 2000.

[18] 'Memorandum to the Justice Select Committee. Post-Legislative Assessment of the Freedom of Information Act 2000'. Ministry of Justice, December 2011. Paragraphs 95 – 100, pages 26 – 27.

assistance to the requester, will prevent the vast majority of requests from becoming vexatious. It should be remembered that there is a difference between a genuinely vexatious request and a request which is inconvenient, difficult, or irritating for a public authority to handle, and the threshold for identifying a vexatious request should therefore be set at a reasonably high level. The fact that powers to deal with vexatious requests have been used infrequently by public authorities suggests that a relatively small number of genuinely vexatious requests are received under the Freedom of Information Act and that public authorities have adequate powers to deal with such situations.

34. We conclude that the Freedom of Information Act has been a success and the broad benefits it has produced far outweigh the costs of its implementation. It would be a backward step to try to limit the scope of the Act or place further restrictions on the accessibility of information. In contrast, we would support steps to further extend the scope of the Act to cover a wider range of bodies.