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Submission to the Independent Commission on Freedom of Information

Submitted 4 November 2015
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The Independent Commission on Freedom of Information has called for evidence on six questions about the use and operation of the Freedom of Information Act 2000, which came into force in 2005. Given the very short timescale announced by the Commission, this submission will focus on just one of those questions – Question Six – as that is the one of which we have most direct experience and expertise as journalists, researchers, teachers and indeed as citizens.

However, we do make the wider point that it is far too soon to be able to draw any firm conclusions about how the FOI Act is working. It is certainly inappropriate to be seeking ways of watering it down rather than extending its scope. When introducing the Bill in parliament, the Home Secretary argued that FOI would: "help to transform the culture of government from one of secrecy to one of openness. It will transform the default setting from 'this should be kept quiet unless' to 'this should be published unless'." (House of Commons, 7 December 1999, http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo991207/debtext/91207-12.htm.) The Commission ought to have no need to be reminded of the strength of that argument, given that the Home Secretary in question was Jack Straw, one of the Commission's members. Some organisations have expressed concerns that the former Home Secretary may now believe the FOI Act to have made too much information too free (see letter to the Prime Minister by the Campaign for Freedom of Information and others, 21 September 2015, https://www.cfoi.org.uk/wp-content/uploads/2015/09/FOI-letter-to-PM.pdf). We merely observe that it is extremely unrealistic to expect to have transformed a centuries-old culture of "secrecy" to one of "openness" in just 10 years.

Question Six of the Commission's Call for Evidence asks:

"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 question itself is one-sided in talking only – and repeatedly – of "burdens". The Commission does not appear to have called for evidence of public "benefits" brought about by use of the Act. Even if the public good is restricted to benefits that can be expressed in monetary terms, how much money might those using FOI have already helped save public authorities by uncovering incompetence and wrongdoing, by encouraging the tightening up of procedures, or by acting as a deterrent to wrongdoing? The amount of money saved is probably incalculable, not least for the reason that the Act has only been operational for such a relatively short period of time. But the fact that the question does not even form part of the Commission's call for evidence seems to suggest that the starting point is to view use of the Act as a problem requiring a solution.

Similarly, Question Six asks if "controls" are needed. Yet there are already myriad controls in the form of absolute exemptions, qualified exemptions, data protection, time-based cost limits and the ability to refuse certain requests as vexatious. Many people with experience of using the Act would argue that there are too many controls rather than too few. However, this issue does not form part of the Commission's Call for Evidence.

The Call for Evidence document appears to argue the case for fees to be introduced to reduce the "burden" on public authorities by reducing the number of requests. In support of what would amount to a tax on information the Commission states: "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." If there was such an expectation among certain people in positions of power at the time, there was certainly no such expectation among those who had spent decades arguing for the introduction of freedom of information measures as a public good. Had charges been proposed it would have been a highly controversial move. And had charges actually been introduced they would have reduced the effectiveness of the legislation from the outset.

Since the Act came into force journalism students at the University of Sheffield have been taught how to use it to uncover information in the public interest. They are taught to use it responsibly, not frivolously, and as an additional mechanism for seeking and checking information rather as a substitute for other reporting methods. As a result of their use of the Act they have revealed important information, first as students, then as students on work experience in newsrooms, and subsequently in their careers as journalists. (For some examples and background, see 'Universities as evangelists of the watchdog role' by Mark Hanna in *Investigative Journalism*, edited by Hugo de Burgh, Routledge, second edition, 2008.) One of our graduates has gone on to become a freedom of information specialist, establishing the FOI Directory as a public resource (see www.foi.directory). The development of such expertise in using the Act to uncover information in the public interest would have been severely hampered, if not rendered impossible, by the introduction of fees for FOI requests. The same applies to the imposition of charges for internal reviews, appeals to the Information Commissioner and so on, as this is an integral part of how the Act operates.

Within the journalism industry FOI has been used effectively by journalists working for news organisations that have no budget for investigative journalism. They have been able to use freedom of information to explore important issues and bring them to public attention precisely because there was no fee for making an FOI request. To give just one example, a South Yorkshire journalist at a cash-strapped weekly newspaper with no budget for investigative journalism managed to use FOI requests to a range of relevant authorities over an 18-month period to investigate alleged misuse of public money, eventually winning the Paul Foot Award for her efforts. Without FOI she would not have been able to find the evidence to have put the story into the public domain, and if charges were introduced it would render such careful and evidence-based reporting much less likely in the future. (For details see Chapter Five of *Journalism: Principles and Practice* by Tony Harcup, Sage, third edition, 2015.)

Over the past decade journalists working for organisations large and small, at a national or local level, have used the Act to place hundreds of stories into the public domain, many of which would not have seen the light of day if charges had been introduced. For numerous examples see the following selections:

www.pressgazette.co.uk/freedom-information

www.holdthefrontpage.co.uk/category/foi/

www.bbc.co.uk/news/correspondents/martinrosenbaum

www.foi.directory/category/updates/local-2/

Which of these stories would it have been in the public interest to have stifled at the outset by imposing charges on FOI requests or subsequent reviews and appeals? And which might be regarded as being a misuse of the Act, in the unfortunate phrase used during the current period of consultation by Leader of the House of Commons Chris Grayling, when he said of FOI: "It is, on occasion, misused by those who use it as, effectively, a research tool to generate stories for the media, and that is not acceptable" (http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151029/debtext/151029-0002.htm)?

It is true that a few of the largest news organisations may not be dissuaded from using FOI by the introduction of charges. But the reality for most journalists is that a charge will effectively prevent them from accurately reporting many things that it is in the public interest for us to know. That is particularly likely to be the case in the beleaguered local and regional media, meaning that the very news organisations closest to the hearts of local communities will be denied one of their most valuable means of serving such communities. How could that be argued to be in the public interest?

If journalists working for mainstream news organisations are likely to be inhibited from using FOI by the introduction of charges, it is even more likely that those people producing local and "hyperlocal" news services online will be priced out of making FOI requests. Such sites are often run by interested citizens giving up their time and receiving little or no income, performing a valuable function on behalf of local communities that has been described as

"monitorial citizenship". Key to those sites that produce evidence-based reporting on public matters has been FOI, and it would seem to run counter to the public interest to take this crucial tool away from them after they have had such a brief opportunity to make use of it. (For details of how such sites use FOI to serve the public see 'Alternative journalism as monitorial citizenship? A case study of a local news blog' by Tony Harcup, *Digital Journalism*, 2015; and 'Deliberative manoeuvres in the digital darkness: e-democracy policy in the UK' by Giles Moss and Stephen Coleman, *British Journal of Politics and International Relations*, 2014.)

Evidence from the Republic of Ireland suggests that the imposition of a fee will put people off using freedom of information legislation, which is one of the reasons that Ireland scrapped its 15-euro charge in 2014. Announcing that move, the Minister for Public Expenditure Brendan Howlin said that removing the charge would "allow our citizens access to information on a level par with best practice across the OECD. After all, information and data are the currencies of the new age." (See http://www.rte.ie/news/2014/0701/627761-freedom-of-information/.) Does the Commission really wish to travel in the opposite direction?

The imposition of a charge will clearly act as a deterrent for many general citizens as well as for many journalists, particularly those working for regional, local and hyperlocal media and in specialist areas as such health and the environment. The users of the Act least likely to be hampered by the imposition of charges are commercial users requesting information for commercial reasons. Would it not be a sad state of affairs if freedom of information only applied to those who could afford to pay?

A similar point applies to any plans to impose charges on reviews and appeals, which are sometimes vital to the process of teasing out what information ought to be released and what might genuinely be confidential. Restricting reviews and appeals to those who can pay is unlikely to deter commercial users – or publicly-funded authorities appealing against an Information Commissioner decision in favour of disclosure – but is going to hit other citizens, including journalists researching stories in the public interest.

Our experiences and observations as practitioners, scholars and teachers of journalism is that the first decade of the FOI Act has resulted in countless revelations in the public interest and that this form of journalism will be greatly diminished by the imposition even of "modest" charges.

There is little or no research into users' experience of using the Act, and our experience (and that of the ICO) is that some public authorities - including Ministries - are not in all instances complying with the current FOI law in terms of responses and offering "advice and assistance" under section 16 of the Act. So to weaken the law in terms of their obligations to provide information or such advice could well mean that those recalibrated, less onerous obligations are not met either. If the Act's requirements on public authorities to release information are weakened, there is a risk that all their information management systems will decline in quality. At present the knowledge that a broad range of information is regularly asked for under FOI causes them to publish such material routinely anyway, but if FOI requests become less frequent because of charges levied or because the law is changed to

give them less likelihood of success, then public authorities will have less incentive to keep their information management systems of good quality, and less information will be published routinely. Therefore the public would experience a "double whammy" in terms of loss of transparency.

The Government has no electoral mandate to weaken FOI law. In fact, the Conservative manifesto said: "Transparency has also been at the heart of our approach to government." It did not mention any plan to weaken FOI law (https://www.cfoi.org.uk/2015/04/foi-manifesto-commitments/). The manifesto also said that press freedom would be defended. But to introduce charges for FOI requests would mean that many local newspapers, which already face tough economic conditions to survive, would cease to make such requests or make fewer of them.

The public should not be charged for making an FOI request if it does not require more than 18 hours work from a local public authority to find the information. That is the current law. The public already pays in taxes for the collection and storage of such information, in that one way or another it funds all public authorities.

Finally, if complying with the Act is placing a burden on public authorities then one of the most effective ways of reducing such a burden is for them to publish as a matter of routine far more of the information they hold, thereby rendering FOI requests unnecessary in many cases. This ought to be happening if the shift in default setting envisaged during the passage of the original Bill is becoming reality. But the evidence suggests that 10 years is far too short a time for such a shift to have happened fully.

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