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15 February 2007

Dear Sirs,

FoI Fees Regulations

Thank you for inviting our comments on the proposed regulations. In this response we focus on the proposals to include reading, consideration and consultation time in calculating the cost of applications under FoIA.

Before addressing the options and the specific points you seek comments on in questions 1, 2 and 3, we do ask the Government to reconsider whether there is any good or sound reason to amend the fee regulations to include reading, consideration and consultation time. As explained below, the Government appears to have ignored the benefits of FoIA applications and to have overstated the cost savings of these proposals.

Ignoring the benefits

The Government asked the independent consultancy Frontier Economics to assess the costs of complying with FoIA and to consider four options to reduce those costs. At no stage has there been any corresponding attempt to assess the benefits of FoIA. Yet these benefits are not disputed by Government as is clear from the statement of DCA minister, Baroness Ashton, to the Press Gazette this month that the £25 million spent on FoIA by central government was "money well spent". When the Chancellor of the Exchequer accepts that £21.5 billion of public money is not well spent¹, we do not understand why it is now thought appropriate or desirable to try and find cost savings on a part of public funds that it is accepted is well spent.

The Frontier Economics study builds its case on two examples of expensive requests to justify the proposal to include the costs of reading, consideration and consultation time. One of the two is "*a request to the DTI relating to unpublished reports, analyses and statistics on the impact of reductions in carbon emissions on the economy. The request took more than 20 hours of officials' time to complete*". When the Prime Minister wrote this October that the Stern Review into the Economics of Climate Change was "the most important report on the future ever published by this government"², it must be obvious that there will be real benefits from the publication of such information and yet these have not even been considered. The proposal that the public should now be denied such information simply because of the cost of the time officials spent reading, considering and consulting on it seems to fly in the face of reason.

¹ Chancellor of the Exchequer, Hansard HC, 13 July 2006, col 1470

² PM's article in The Sun 30 October 2006

In our view it is not just benefits such as these which the Prime Minister says the country must now focus on that should be considered in a reliable cost-benefits analysis. Other – albeit some more intangible - benefits to be evaluated and weighed against the costs of FoIA applications include those of a stronger democracy, a more customer focussed and enlightened bureaucracy and a more informed public.

In particular, when looking at the benefits it is important to recognise that freedom of information requests bring real and substantial savings to the public purse. This is because they deter waste, inefficiency and fraud across the public sector. One example from the wider public sector mentioned in Don Touhig's Commons debate on 7 February was the Yorkshire Post's story about a shower for the Chief Constable that cost £28,000³.

One example from central government - as shown in the appendix - is our own request for information about tackling fraud in Whitehall. The evidence is very clear that the eventual release of this information helped deter and detect fraud in Whitehall as in the two years after publication of the information there was a 31% increase in the number of frauds reported and the value of reported frauds fell by £1.6 million as they were detected earlier. Yet such an application as ours would be rejected under these proposed costs rules, without any consideration of the benefits of or the public interest in deterring fraud in Whitehall.

This particular case also demonstrates the intangible benefits of the 'resource intensive' applications that the proposals now seek to curtail. As the then Permanent Secretary of the Treasury told the Commons, being put "*through the wringer (during)... this incident has probably done more to alert people in the Treasury to their obligations than all of the reminders that we have sent them. Learning from experience is a very powerful process.*"

We urge the Government to consider both these tangible benefits and the intangible ones so it can reasonably assess how the costs of the current regime relate to the benefits it brings. As the Frontier Economics study has already looked at the costs, this can best be done by an independent evaluation of the benefits of the FoIA regime.

Overstating the likely savings

Regrettably, it also seems to us that the Government has overestimated the savings these proposals are likely to bring.

First, as the Frontier Economics report says at page 1 of its report: "public bodies incurred costs in responding to information requests prior to the introduction of the Act and these would need to be subtracted to arrive at the true additional costs of FoIA". Yet no such consideration has been made before drawing up these proposals.

Secondly, the example of the expensive request for information about carbon emissions is not one on which these draft regulations can safely be built. As it is hard to imagine how it could have taken 20 hours of officials' time to handle the request when the overriding public interest is so clear, it is likely to be the case that officials either (a) misapplied the tests in FoIA or (b) this time was spent locating the information - in which case it is already calculated under the present fees regime. Finally, as this request would have been considered under the EU Environmental Regulations, no fees for reading time and consideration could be included under these draft regulations. So for three separate reasons, this is not an example on which these proposals or costs savings can sensibly or safely be built.

³ Hansard HC 7 Feb 2007 col 305WH

Thirdly, as officials are only now becoming familiar with FoIA and the current fees regime, it will be the case that the costs of implementing the proposed regulations will, at least initially, exceed any expected costs savings. This is because officials across the public sector will need to be briefed and trained and they will need to read the new rules and guidance and consider it. Taking as a basis the figures used in the Frontier Report that it costs between £1 and £2 for each official to read a page⁴, each time an official reads this 48 page consultation paper and the regulations the mean cost will be £72. [NB. We reasonably assume that the regulations and detailed guidance will be as least as long as this consultation paper]. Assuming only one official in each of the 100,000 bodies covered by FoIA has to read this much paper, the cost will be £7.2 million. Assuming that each official then considers the application of the proposed regulations and detailed guidance for a further hour, and briefs one colleague on it for half an hour, the cost will well exceed a further £5 million. These conservative estimates suggest the initial cost of these regulations will be £12.2 million across the public sector. The consultation paper does not put a figure on this cost simply describing it (in para 54) as “minimal.” Be that as it may, when the combined annual savings of these proposals is expected to be £9.9 million and the start-up costs of introducing them will be over £12 million we urge the Government to revisit and revise its Partial Regulatory Impact Assessment.

Fourthly, compliance with these proposed regulations and the detailed guidance will in itself cost significant sums as officials will have to assess the material, whom they might consult, how many officials might need to consider each point and how long it will take to evaluate any exemption or the public interest test. Additionally, as the DCA Minister Vera Baird QC confirmed in the Commons on 7 February officials will be under a duty to assist applicants to refine their request so it comes within the proposed new costs regime. We think it a reasonable estimate that on each of the 1,346 applications to central government that the Government expects to fall under these proposals officials will spend four hours considering these issues and assisting applicants. This will incur actual costs of £183,056. Assuming one half of the 1,346 applications that are rejected on cost grounds are taken to internal review, this will cost an additional £812,984. Looking only at central government – and using these figures from the DCA - the claimed annual savings each year will not be £3.2 million but £2.2 million. As we point out above, the DCA figures overestimate the savings and so it seems likely that the annual costs of implementing these proposals will exceed the actual savings. This is before any benefits are considered.

A two edged sword

We believe that charging for reading, consideration and consultation time will prove a serious mistake - if not a dangerous precedent - for a number of reasons. First, as to any live file, we would have imagined there need be no reading time as a relevant official will be up to speed with the issue when he or she first receives the application. Secondly, it is not as if government is a commercial organisation that needs to recover its costs – the public have already paid for all the costs and there is no evidence at all that the public is unhappy about that part of its money that goes on FoIA and is, in the words of the Minister, “well spent”. Thirdly, as many people in and outside government are able to read and consider at the same time, we think the proposal to separate out the costing of these two activities will subject officials to ridicule. Fourthly, in our experience over twenty years of dealing with Whitehall, officials work in teams and it has been a rare meeting where the ratio of official to outsiders has been less than 3 to 1 and a rare one where someone other than the senior official has added, or been allowed or feels authorised to add, value. If the

⁴ Frontier Economics Report, page 8

time of each official in the team is to be costed individually every time a discussion is had, a briefing prepared and a meeting attended, this serious and serial inefficiency will be laid bare and further damage public confidence.

Whether or not the Government see merit in these points, we do think it is creating a precedent that may rebound on it and the political process. With so many media organisations under financial pressure, some may ask why they should not charge their journalists at similar rates when they read and consider press releases and reports from public bodies before they decide whether they warrant coverage. If and when they do, the Government will find it difficult to take the high moral ground and say such a move will be unreasonable or damaging to the body politic.

The Options

Of the four options addressed in the paper, we have no doubt that option 1 – do nothing – is the correct one until and unless there is also an evaluation of

- a) the benefits of FoIA applications, and
- b) a realistic reassessment of the costs and savings of any new proposals.

We do not understand why the Government did not also include an option of introducing primary legislation to allow the fees regime to be considered in its totality. While Frontier Economics were asked specifically to comment on the four cost-cutting measures the Government put to it, they went out of their way to recommend (page 2) that – though it would require primary legislation - it would be worthwhile considering introducing a charge for the review and appeals processes, which would be payable where the applicant lost.

Whether or not that is something Government or Parliament thinks desirable or sensible to adopt, in our view if there is to be a more onerous or complex fees regime, we think it right that Parliament should at that same time have the opportunity to consider whether section 13 should be amended. At present this provides that there is no right to the information even if the applicant were prepared to meet such costs as took it over the fees threshold.

The Questions

1 Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (i.e. a 'ready reckoner') for how long a page should take to read be included in the Regulations or guidance?

If it remains the Government's view that these proposals should be taken forward, we think the regulations should make clear that no reading time can be included as regards information that has been read by an official in the Department in the past 18 months. This is just and right because it will not require the same, if any more, time or attention as an unread or aged document. It is also desirable as a clear rule like this will be applied readily and efficiently.

If the Government is to introduce any ready reckoner, this should be calculated so as not to encourage an errant or underperforming official to separate out his or her reading time from the consideration time.

Additionally, any ready reckoner should distinguish information that is searchable electronically from that which is not. By using a good search engine the time spent to locate a document and assess whether it may have anything that should not be disclosed or that needs to be properly considered can be very much briefer. Unless there is such a

provision the draft regulations will not sit well with the move to e-government and improved efficiency.

Draft regulation 6(3) provides that examination and reading time can only be counted once. This provision should be extended to ensure that when a public body considers or consults on any issue, only the time spent by the most senior official should be calculated. This will promote accountability and efficiency across the public sector. It will also mean that the fact that the public sector works in teams is not used to inflate the consideration and consultation time irrespective of whether those in the group brought any value to the issue.

2 *Does the inclusion of thresholds in the regulations provide sufficient flexibility, taking into account the differing complexity of requests received?*

Although such provisions are clearly necessary in such scheme, we do find them inevitably complex. We restate that the cost of complying with this scheme will wipe out any long term savings it is hoped they might achieve.

We agree that if the costs of consulting those outside the public body handling the request are to be included, the draft regulations are correct to provide that the costs of those being consulted – whether in another public body or not – are not to be considered in these calculations.

3 *Are the thresholds the right ones to make sure the balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?*

As we have said above, the regulations should provide that it is only the time of the most senior official under the provisions in both reg 6(4)(a) and (b) that should be calculated. Not only will this encourage efficiency and accountability, it will also reduce the complexity of the calculations and the costs of complying with these proposals.

Summary

We do not consider the Government should proceed with these or any proposals to amend the fees regime under FoIA without first carrying out an evaluation of the benefits of FoIA applications and a realistic assessment of the costs of any new proposals.

If there is then a case to amend the regime we believe Parliament should also be given the opportunity to consider (a) the proposal of Frontier that some charges might be paid by applicants who lose a review or appeal and (b) the operation of section 13.

If these proposals are to be pursued notwithstanding the above points, a number of amendments need to be made and provisions clarified in the regulations and detailed guidance to reduce complexity, spur efficiency and promote accountability. These include:

- a) providing that no time can be counted for reading information that has been read in the previous eighteen months;
- b) recognising that officials can read and consider an issue at the same time;
- c) including only the time of the senior official considering that issue; and
- d) providing that the benefits of new technology are fully taken into account when calculating the time that should be taken to respond to FoIA applications.

Finally, if we are mistaken and the Government has conducted an evaluation of the benefits of FoIA in the course of preparing these proposals, we ask that we be supplied a copy.

Should you have any questions on these points - which address only the proposals to include reading and consideration time – or should you wish to meet with us to discuss this matter, we will be happy to provide such assistance as we can.

Yours sincerely,

Guy Dehn

Guy Dehn
Director

Please note this is not a confidential response and that we will be supplying a copy to the MPs who attended Don Touhig's debate on 7 February and to the Campaign of Freedom of Information and will make it available to the media.

Fol and Fraud in and on Government

In 1994 Public Concern at Work asked the Treasury to send us a copy of their report on the level and types of frauds occurring in Government. After an initial refusal, we made a formal request under the Code of Practice on Access to Information. After consulting with the Cabinet Office⁵ and considering the matter carefully, they refused our request on the basis that it would prejudice law enforcement in that it would provide potential hints to fraudsters. We appealed arguing there were overriding public interest grounds for publication as it would give a clear message (a) to potential fraudsters that departments were vigilant and that there was every likelihood that fraudsters would be detected and (b) that financial malpractice in Government would not be tolerated. As we had not had a reply from the Treasury some months later, Alan Howarth MP tabled a Parliamentary Question asking that the report be placed in the library of the House. This was refused on 22nd March 1995 as publication “could prejudice current fraud investigations”.

We then went to the Ombudsman and his intervention encouraged the Treasury to review, and eventually change, its decision. As the Permanent Secretary to the Treasury subsequently said⁶: “In this case the things we were worried about were whether or not it would not only deter but it might encourage fraud and the extent to which it might disclose information about individual cases that we did not want to be disclosed.”

That this application centred on balancing the public interest was also clear when the Treasury wrote to us on 14th September 1995 that the Report would in future⁷ be published. The reasons they gave for this change were that “because of our objective of improving fraud awareness in central government we have been considering how we can disseminate information on fraud more widely while minimising the risk of providing information which could help potential fraudsters or prejudicing fraud investigations.” The Ombudsman wrote to Alan Howarth MP on 15th September saying that he had agreed that the Treasury could make “very minor excisions from the version of the report” (*his emphasis*) to obscure the gender of the person involved and, in two cases only, some of the detail of the fraud perpetrated.

The Report revealed that over the previous three years £5.2 million of public money had been defrauded by staff in Government departments, of which £1 million had been cash stolen and £2 million had been defrauded due to the lack of proper controls. The report⁸ noted that “staff in senior positions of authority continue to feature. Their positions have allowed them to circumvent controls.”

If such an application were made under FoIA, the Treasury’s refusal to publish would be based on section 29, in that disclosure would or would be likely to prejudice the prevention of crime. The Treasury would then have to assess whether the public interest in disclosing the information was outweighed by the public interest in preventing crime. As the Treasury maintained that the disclosure of information about how easily civil servants were defrauding the public might provide helpful tips to other potential fraudsters in Whitehall

⁵ Open Government 2nd Report of Select Committee on the Parliamentary Commissioner (1995-96) page 85, para 364

⁶ *ibid*, page 84 para 357

⁷ When the report was published the Treasury indicated that it had intended to publish the report at an unspecified date in the future. Although this was not a point they had mentioned to us [or apparently to the Ombudsman (*ibid*, page 84, para 355)], this would have been a further ground to refuse to release the Report under clause 17 of the draft Bill.

⁸ para 8, Accounting Officer letter dated 13 December 1994

and as this was not an unreasonable view, one cannot safely assume that they would have refused to see the disclosure as in the public interest. Having cleared their original decision at a senior level in the department and with the Cabinet Office, we think it inevitable that the decision to refuse release would be confirmed.

As this brief summary of this saga illustrates, under these proposed fees regulations, this application would not even have been considered. This is clear from the consideration of this issue by the Select Committee on the Parliamentary Commissioner on 13th December 1995 when Sir Terence (now Lord) Burns GCB, Permanent Secretary to the Treasury, gave evidence. When asked whether he felt that the culture of secrecy was changing, albeit slowly, Sir Terence replied

“Yes, I am. Each time there is an example like this where to a degree you are put through the wringer in terms of being questioned about why one’s instinct is in this direction, I think it does have a substantial spill over into lots of other things and it gradually changes the way in which people approach them. The key thing I observe about openness is that it is something that you have got to think about in advance. It is very difficult when you are suddenly challenged and asked to release a document that has been prepared for another purpose, you ask ‘Will you let anybody now see that’ and you wince slightly because very often there are things in it that you would have not put in if it was going to have a wider audience. If you start from the notion that there is a presumption that documents of this kind should see the light of day when you are preparing them you filter these things out in your mind and make sure that the things that might be an obstacle are no longer an obstacle.”⁹

The Permanent Secretary went on to remark “I would say that this incident has probably done more to alert people in the Treasury to their obligations than all of the reminders that we have sent them. Learning from experience is a very powerful process.”¹⁰

⁹ note 12, page 84, para 358

¹⁰ *ibid*, page 85, para 364