

Submission to DCA Consultation on proposed Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

About us

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If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

The Open Rights Group is a digital rights advocacy group based in the UK. It aims to increase awareness of digital rights issues, help foster grassroots activity and to preserve and extend civil liberties in the digital age.

Preliminary remarks

Public consultations are welcome and worthwhile when evidence submitted is used as basis for policy formation.

Public consultations improve the process and quality of legislative reforms to the extent that evidence submitted is used as a basis of policy formation. We welcome this opportunity for affected stakeholders to contribute to and indeed shape government thought on the Freedom of Information Act 2000 ('the Act').

There is significant parliamentary opposition to the Proposed Regulations

EDM 845¹ asks the Government to not proceed with the proposals, stating the Proposed Regulations “undermine the Act's contribution to increased discussion of public affairs, accountability and trust in the work of public authorities.” In addition, Alan Beith MP as Chair of the Constitutional Affairs Committee argues the Proposed Regulations “fly in the face of the Government's stated desire of encouraging an open culture and have the potential to block important requests where it would be in the public interest to disclose information.”²

Financial cost is one of but not always the most important criteria by which to determine the validity of Freedom of Information requests. In this regard the public interest deserves equal status.

Disproportionate emphasis on economic concerns in the proposed Regulations, resulting from the narrow scope of the government-commissioned independent review of the Freedom of Information Act 2000, precludes consideration of other valid public policy objectives, in particular the public interest. Economic concerns are of course important considerations for government activities, and especially so in terms of justifying refusal of frivolous or imprecise requests.

Yet such concerns should not invalidate complex or politically contentious requests³, which are by their very nature time-consuming so likely to exceed the revised restrictions in the proposed Regulations, where disclosure is in fact supported by the public interest. This factor, apparently absent from government thinking on Freedom of Information, should be accorded equal stature with economic concerns in terms of publicising government-held information.

No dramatic changes to this legislation should take place before users and the administration are fully acquainted with its operation.

The suggested amendments to the practical operation of the Act are premature. Whilst a review of operations was correctly scheduled for 12 – 18 months after introduction, such dramatic change is unjustified before the scheme is more fully observed in its routine function. We recommend consulting again on a further set of Draft Proposals once this round of submissions have been considered, before effecting changes.

¹ <http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=32548&SESSION=885>

² http://www.parliament.uk/parliamentary_committees/conaffcom/cac161006pn38.cfm

³ See Maurice Frankel of the Campaign for Freedom of Information's 'Ashton Letter' for further analysis http://www.cfoi.org.uk/pdf/ashton_letter.pdf

Consultation 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?

As suggested in our preliminary remarks, operations should continue to be reviewed without dramatic amendments to the Act at this stage. Any future amendments should be made within a framework that affords the public interest equal status with economic concerns.

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

No. The inclusion of thresholds as suggested in the draft proposals does not guarantee requests made in the public interest will be serviced.

Irrespective of their complexity, requests should be granted where it is in the public interest to provide a response. Where the costs are significantly higher than the appropriate limit, there may be some instances in which it would be proper for costs to be shared between public and private sources.

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?

While there is a rationale in the use of thresholds in the context of the rightful use of public funds, costs of a request do not trump other public policy considerations. The validity of refusing a request on the grounds that it involves excessive consideration or consultation time depends largely on the public interest in serving that request.

The draft proposals appear to operate a form of cost-benefit analysis, yet ignore the benefits to be had in terms of the public interest.

4. Are the regulations as drafted the best way of extending the aggregation provision?

No. Extending the aggregation provision in this way risks bringing harm to the public by preventing journalists and campaigners from examining government activities.

During the short time of the Act's operation, instances where it has served the public interest have been numerous⁴. Such activities encourage transparent government and dialogue between citizens and the authorities. This reflects the spirit of the Act and the needs of a modern United Kingdom. These requests should be encouraged.

The draft proposals are not sophisticated enough to prevent frivolous or self-interested requests without also snaring requests of benefit to the public interest.

5. Do the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the regulations or can this be dealt with in the guidance?

If 'reasonableness' factors that are included in the regulation are legally binding, whereas those in guidance have no such binding force, then the factors should be included in the regulations. Otherwise, dissatisfied requesters will not be able to rely on the factors should they complain to the Information Commissioner.

6. Are these the right factors?

No. These factors specifically relate to the identity and conduct of a requester. Decisions on requests should be 'applicant / purpose blind' – that is dependent on the consequences of disclosing information, not the identity or conduct of the requester.

These factors would disadvantage some of the main beneficiaries of the Act – journalists, campaigners, and the public they serve – who may be restricted to a single request per quarter. This effect would be felt still more acutely by organisations of regular-requesters (e.g. newspapers or campaign-groups), who may themselves be restricted to making a single request that quarter.

7. What guidance would best help public authorities and the general public apply both the EIRs and the Act effectively under the new proposals?

Just as the Freedom of Information Act should maintain its focus on the spirit of open government and the public interest, so should any effort to increase public understanding of the Act. This would make it extremely difficult to promote the Act effectively under the new proposals.

⁴ '500 Stories from the FOI Act's first year' Available at <http://www.cfoi.org.uk/pdf/FOI%20Disclosures.pdf>