

# Freedom of Information: Designation of Additional Public Authorities

## Response of the Open Rights Group

### Detail of Respondents

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### Response

#### About the Open Rights Group

The Open Rights Group is a grassroots digital rights advocacy group based in the UK. We aim to increase awareness of digital rights issues, help foster grassroots activity and preserve civil liberties in the digital age. We are funded by individual donations and small grants. Further information on our staff, corporate structure and community is online.<sup>1</sup>

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<sup>1</sup> <http://www.openrightsgroup.org/>

## **We are delighted that open government is being fostered rather than suppressed**

ORG welcomes the line this consultation draws underneath attempts in 2007 to reduce the utility of the Freedom of Information Act (Fol), such as the 'fees and limits'<sup>2</sup> consultation and MPs' efforts to exempt themselves from the legislation<sup>3</sup>. Fol has been in force for only three years but has contributed significantly to civic engagement in that short period<sup>4</sup>.

## **Fol requests should be seen as an opportunity rather than a cost**

Although Fol publication can be resource intensive, the opportunities for meeting voter expectations and improving public services are quite profound; journalists' high profile use of publication is just one aspect of this emerging culture. Another and potentially more important aspect is a kind of peer review process that would improve organisational performance<sup>5</sup>. Extension of Fol and promotion of its practice will encourage interested parties from a wide range of backgrounds to examine and comment constructively on the workings of public services to improve their functions. To encourage the extension of Fol we should also seed more projects that simplify the processing of requests and amplify the results of Publication Schemes<sup>6</sup>. Also, there should be more emphasis on academic research on projects that examine how Fol scrutiny improves organisational performance.

## **The extension of Fol should include the entire political process**

In keeping with the spirit of the legislation and to further the culture of open government, Fol should be extended to all organisations engaged in the political

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2 Our submission to the consultation on the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 is available for download at <http://www.openrightsgroup.org/wp-content/uploads/orgresponse-1.pdf>

3 As covered on our blog <http://www.openrightsgroup.org/2007/05/21/mps-vote-themselves-above-freedom-of-information/>

4 The most comprehensive resource detailing the successes of Fol is still '500 Stories from the FOI Act's First Year' available at <http://www.cfoi.org.uk/pdf/FOI%20Disclosures.pdf>

5 Given enough eyeballs, all bugs are shallow (Linus' Law)

6 For example, mySociety – a charity for online civic engagement – are developing a web-tool "that will allow users to both submit Freedom of Information requests to public bodies with extreme ease, as well as publishing the data that the government responds with for public interest. For more information, see <http://www.mysociety.org/2006/09/27/the-mysociety-call-for-proposals-the-winner-and-runners-up/>

process. The existing publication obligations offer one perspective of the machinery of government but extending this to all actors engaged in the political process would provide a deeper, broader view.

**Question 1: Do you support extending the coverage of the FoI Act to organisations that carry out functions of a public nature and to contractors who provide services to a public authority whose provision is a function of that public authority?**

Yes, strongly. We commend the reasons stated for reviewing coverage of the act but note there are also other compelling arguments for extending the legislation's coverage. For example, we expect users to develop greater trust in their public services once transparency has been improved, which should in turn improve the perception of public services.

In terms of ensuring uniform application of FoI across different locations, where some authorities provide services themselves and others contract out their public functions, it is the public nature of the service that is important rather than its formal basis. Outsourcing should not preclude application of FoI where the contract provides for functions of a public authority.

We also note the pragmatic reasons provided against extending FoI. These concerns should be mitigated by providing greater support with developing Publications Schema, especially to SMEs that will find it harder to absorb additional costs. To this end the public sector's FoI experience over the last three years should be analysed and shared with any newly-obligated private sector firms.

With regard to applying fees for certain requests, this may be necessary in some cases but it remains unclear who should pay these fees. Public Authorities should be prepared to indemnify contractors for these costs.

**Question 2: Of the five proposed options, which do you consider the best option? Or would some other option, or combination of options, be preferable? Please explain your reasoning.**

In our opinion Option 2 (Self Regulation) should not be pursued as a general technique because, as the consultation document suggests, lacks the teeth to compel the 'bad' actors (failing services) in need of public scrutiny.

Similarly, Option 3 (Contractual obligations) is least preferable because – in addition to

the problems noted in the consultation document – of the increased cost of individually negotiating contracts for public services.

We believe the best option is Option 5: a 'prioritised' expansion based on further evidence-gathering. Given the FoI regime has operated for only three years in the UK it is hard to predict the implications of its expansion to the private sector although as noted above there are clear reasons for extending the purview of the legislation.

**Question 3: Should some form of public funding be essential in order for an organisation to be considered for inclusion in a section 5 order, or should this be just one of a number of relevant factors to be considered?**

Public funding is a sufficient but unnecessary condition for FoI obligations. All publicly funded organisations should be covered by FoI and some organisations without public funding may in addition prove suitable for the extension of FoI. Also, we note that the factors identified from Human Rights Act jurisprudence seem suitable for application in this context.

**Question 4: Are there any organisations or categories of organisations that do not receive public funding but that you believe should be covered by the Act? Please explain why.**

Broadly, all organisations involved in politics – especially the lobbying profession – should submit to FoI obligations, either voluntarily or under a section 5 order. In particular, all trades union and trade representative bodies should be covered by the Act.

**Question 5: Do you agree that the balance between the public interest and the potential burden of FoI is an appropriate consideration when deciding whether to cover an organisation?**

It is contrary to the public interest to burden an organisation in such a way that they cannot continue to provide public services, even where these obligations address the public interest in transparency and scrutiny. One solution would be to ease the burden by offering support and guidance with Publication Schemes, considering possible fees for requests and denying frivolous or malicious requests.

**Question 6: To what extent do you think that the factors listed, or any other factors, should be taken into account in determining whether organisations performing public functions should be brought within the ambit of the Act?**

Each of the factors identified seems highly relevant. There should be a presumption that organisations performing a public function are to be brought within the Act.

**Question 7: Do you agree that the coverage of Fol should extend to contractors who provide services under contract with a public authority whose provision is a function of that authority? If you disagree, please give your reasons.**

Yes, we agree strongly. The purpose of Fol is to aid transparency, accountability and scrutiny of public services. This purpose remains valid regardless of the legal authority of the service provider, whether the obligation is contained in statute or another legal instrument. Concerns that contractors will be discouraged from taking on future public service obligations should be mitigated by encouraging a culture (see above) where Fol improves delivery and practice in public services. We accept there are difficult cost recovery questions but submit that these are edge cases that should not prevent a presumption in favour of extending coverage of Fol to public service contractors.

**Question 8: Do you agree that information relating to an organisation's administration of a public service or function, for example in the areas listed in paragraph 33, should be subject to Fol? If not, please give your reasons.**

Yes, we agree strongly. Subjecting an organisation's administration of a public service or function to Fol encourages transparency, accountability and scrutiny in every layer of that public service or function.

**Question 9: Which organisations, or types of organisations, do you believe should be considered for inclusion in any extension of Fol under s.5 of the Act, and why?**

Open Rights Group made around 11 Fol requests in May 2007 concerning the management and specification of electronic counting and electronic voting trials. The

substance of the responses varied significantly. Some councils provided extensive and useful responses whereas others withheld the requested information on various bases, including commercial confidentiality. It is frustrating, if predictable, that different authorities interpret the law differently. It is however unacceptable for the councils and contractors that provide the very machinery of democracy to hide behind contracts and formalities to frustrate the spirit of FoI. The vendors providing these trialled voting machines should certainly be included in an extension of FoI.

It would be unsound to formulate a more general principle on the basis of this single experience. However this consultation is expected to reveal a broad spectrum of services suitable for extension of FoI, which may be a suitable basis for a more general principle.