House of Commons

Constitutional Affairs Committee

Freedom of Information —one year on

Seventh Report of Session 2005–06

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House of Commons

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Seventh Report of Session 2005–06

Report, together with formal minutes, oral and written evidence

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Contacts

Correspondence should be addressed to the Clerk of the Constitutional Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8196 and the email address is conaffcom@parliament.uk

Media enquiries can be addressed to Jessica Bridges-Palmer, Committee Media Officer, House of Commons, 7 Millbank, London SW1P 3JA. Telephone number 020 7219 0724 and email address bridgespalmerj@parliament.uk

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The Freedom of Information (FOI) Act came into force fully on 1 January 2005. It gives people the right of access to information held by over 100,000 public authorities across the UK. The new Environmental Information Regulations, which provide a separate access regime for environmental information, also came into force on the same date. We conducted this inquiry in order to examine the first year's experience of FOI and to consider the impact which it had made.

It is clear to us that the implementation of the FOI Act has already brought about the release of significant new information and that this information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits resulting from this legislation. We are impressed by the efforts made by public authorities to meet the demands of the Act. This is a significant success.

The most commonly cited problem for requesters was delays in responding to requests. Published data show that there are many cases where the 20 day statutory response time is not being complied with. In addition, lack of interpretation in the code of practice as to 'reasonable' time limits enables public authorities to make indefinite extensions of many months in order to make public interest decisions and to conduct internal reviews. These delays undermine the effectiveness of the Act and reduce the benefits to the public. We have identified a number of areas where the Department for Constitutional Affairs (DCA) could and should improve compliance. A culture change towards greater openness is the aim, but the immediate priority is a more assertive enforcement of the law.

Our overall impression is that the complaints resolution process provided by the Information Commissioner's Office during 2005 was unsatisfactory. We heard evidence from requesters and public authorities who had waited months for the Information Commissioner to start investigating their complaints. Witnesses also gave examples where the quality of investigation and the information provided in the resultant decision notices were inadequate. We are nevertheless pleased to note the efforts being made by the Commissioner's Office to learn from its first year's experience of a challenging workload in order to investigate complaints more efficiently. The Commissioner has told us he will publish a progress report in September 2006 and we will use this report to assess whether any more follow-up by us is needed.

We see considerable merit in the Information Commissioner becoming directly responsible to, and funded by, Parliament, and recommend that such a change be considered when an opportunity arises to amend the legislation.

We have another area of concern. The long-term preservation of electronic records is widely recognised as a serious problem. The National Archives has told us about the impressive range of guidance documents which it has issued but the evidence suggests that records management practices in some public authorities need substantial improvement. More proactive leadership and progress management of departments' records management systems is required.

When the DCA Minister, Baroness Ashton, came to give evidence to us about Government plans to ensure the long-term preservation of documents held in digital form, we were disappointed by her failure to recognise that this was a serious threat. Plans are needed to handle the rapid and significant changes in technology and the inevitable degradation of storage media. National Archives and the DCA must take the lead in developing such plans. Freedom of Information has no force without a proper commitment to ensure that the information held is in a retrievable form.

1 Introduction

1. The Freedom of Information (FOI) Act came into force fully on 1 January 2005. It gives people the right of access to information held by over 100,000 public authorities across the UK. The new Environmental Information Regulations (EIR), which provide a separate access regime for environmental information, also came into force on the same date. The EIR apply to a wider range of organisations and there are fewer exceptions to disclosure, but, as with FOI, the Information Commissioner has the powers to promote and enforce them.

2. A number of foreign jurisdictions including Australia, New Zealand, Canada, and USA have had FOI legislation in place for many years. However, statutes differ in the way that they have implemented the basic right of access to information and so it was difficult to predict the UK's likely experience during the first year of implementation. Some of the particular aspects of the UK implementation are that:

- it was implemented across all public bodies simultaneously (the 'big bang' approach) after a four year preparation period;
- it is fully retrospective;
- there is no requirement to cite the Act in an information request;
- there is no fee for making a request, for making a complaint to the Information Commissioner, or for an appeal to the Information Tribunal.

All of these factors were considered likely to contribute to a relatively higher volume of requests and complaints in the first year.

3. In our previous report on FOI published in December 2004,[1] we concluded that the state of readiness of the public sector for FOI was patchy. We conducted the current inquiry in order to examine the first year's experience of FOI and to consider the impact which it had made. The terms of reference were to assess:

- The role of the Information Commissioner in providing guidance, issuing decisions and participating in Information Tribunals;
- Requesters' experiences of the first year of FOI implementation;
- Public authorities' experiences of the first year of FOI implementation; and
- The role of the Department for Constitutional Affairs (DCA) in providing central guidance, including the operation of the central government clearing house.

1 Constitutional Affairs Committee, First Report of Session 2004-05, *Freedom of Information Act 2000 – Progress Towards Implementation*, HC 79-I & II

4. We took oral evidence from the Lord Chancellor, Lord Falconer of Thoroton, the Information Commissioner, Richard Thomas, the DCA Parliamentary Under Secretary of State, Baroness Ashton of Upholland, the Chief Executive of the National Archives, Natalie Ceeney, and representatives of requesters and public authorities. The Committee also visited the offices of the Information Commissioner in Wilmslow and the Scottish Information Commissioner in St. Andrews.

2 First year of FOI implementation

5. The Information Commissioner estimated that between 100,000 and 130,000 requests had been made under the Act during 2005. There is no single count of the total number of requests made throughout the public sector, but for example DCA statistics show that around 38,000 requests were received by central government departments.[2] Local authorities indicated that they had received around 70,000 requests and the police service around 21,000.[3]

6. Research commissioned by the Information Commissioner's Office (ICO) showed that the types of information requested most frequently under FOI included statistics about the organisation, information about the decisions it made and spending and contract details.[4] Snapshots of media coverage generated by FOI and given to us by the ICO contained references to hundreds of media articles illustrating the breadth and volume of information released in 2005. Examples included:

- Percentages required for school and university exam pass grades;
- Hygiene reports for restaurants, hotels and school kitchens;
- Detail on progress towards Government efficiency targets, including the number of redundancies made since the cost-cutting drive was launched;
- Information about events leading to faulty TB vaccines being given to nearly one million children;
- Comparative regional figures for knife and alcohol related crime; and,
- Public authority spending on consultants' fees.

7. The Information Commissioner told us that in his view FOI was working and that the FOI Act had made a significant impact across the whole of the public sector:

> large numbers of requests are being made and I find it very reassuring that the majority are coming from members of the public. It is not just, as some had predicted, the media or pressure groups; members of the public are heavy users of the Act. A very wide range of information is now coming into the public domain which would not have been disclosed without freedom of information.[5]

8. The DCA stated that there had been some very significant releases across central government, and that 'Local authorities and local service providers are releasing information of real value to people's daily lives, public services and the environment.'[6]

2 www.dca.gov.uk/foi

3 www.dca.gov.uk/foi; Qq126 and 127

4 www.ico.gov.uk

5 Q2

6 Ev 44, para 3.5

9. Users of the Act who provided evidence were also positive. Maurice Frankel , Director of the Campaign for Freedom of Information, told us that:

> I am very pleasantly surprised by the amount of information that has come out and the importance of a lot of it…I think that we have a worthwhile, important piece of legislation and it is functioning at the moment.[7]

10. The Act has clearly been of use to journalists. David Hencke, from the Guardian, stated 'I have been very surprised and pleased with parts of this Act.'[8] A written submission from the BBC stated that:

> Since January 2005 numerous journalists and programme-makers from across different parts of the BBC have sought to make use of the FOI Act and the Environmental Information Regulations to research material for broadcast. The information obtained has led to a wide range of investigative reports. FOI has proved a useful tool enabling our journalists to put into the public domain material which should indeed be there.[9]

11. Several witnesses provided examples of the constructive use being made of information received. The National Council for Voluntary Organisations (NCVO) reported that voluntary and community organisations were using the Act to find out how public bodies arrived at decisions.[10] The BBC listed a number of investigative reports to which information obtained via FOI had made a significant contribution.[11] The reports covered an impressive range of subjects including performance of schools, internal police guidelines, food hygiene inspections and safety issues at a nuclear power station. The DCA's examples of significant new releases included details of individual Common Agricultural Policy subsidies paid to farmers and historical information from the 1980s and 1990s relating to nuclear waste storage, the UK withdrawal from the Exchange Rate Mechanism and the Falklands conflict.[12]

12. The National Archives stated that:

> 50,000 records were proactively released by government departments and made publicly available at the National Archives on the first working day of FOI in January 2005. There records included…information ranging from research at Porton Down to arranged marriages…Home Office files on reviewing gambling laws and the classification of cannabis.[13]

The evidence from the National Archives highlighted the value of FOI to academic researchers:

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7 Q104

8 Q104

9 Ev 81, para 2

10 Ev 80, para 4.3

11 Ev 82–83, para 10

12 Ev 44, para 3.4

13 Ev 58, para 1

> Scholars have new resources to understand and explain decisions taken within government. No longer is it necessary to wait for 30 years for major parts of this country's history to be written. Academic researchers are beginning to exploit the new opportunities for research that have been opened up by a combination of the FOI Act and the increasing availability of information online, although it may be a few years before the impact on research trends and patterns can be fully discerned.[14]

13. **It is clear to us that the implementation of the FOI Act has already brought about significant and new releases of information and that this information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits resulting from this legislation and are impressed with the efforts made by public authorities to meet the demands of the Act. This is a significant success.**

14. Notwithstanding this success, we also found that the quality of compliance was variable. The BBC told us that 'Overall, the experience of BBC journalists and programme-makers who have tried to use FOI is that the response of public authorities is patchy and inconsistent, ranging from those who are highly efficient and cooperative to those who are neither.'[15] Other concerns raised by witnesses related to delays and inadequate complaints resolution. We go on to consider these problems in the following chapters.

14 Ev 58, para 1

15 Ev 83, para 19

3 Requesters' experiences

Requesters' rights under FOI

15. The FOI Act requires public authorities to provide the information requested by an applicant within 20 working days. If the authority complies with the Act, and the applicant is satisfied with the response, then the matter can often be resolved within the 20 day limit. If the applicant is dissatisfied, the initial request is only the first step in what can become a long drawn-out process. For example, in cases where the authority refuses to provide the information requested and the applicant believes that it has wrongly applied an exemption, the steps in the process would be as follows:

i. The applicant makes a **written request for information**. The authority should acknowledge the request and then normally either supply the information or refuse and state which exemption applies within 20 working days;

ii. Some exemptions are subject to a **public interest test**. When an authority has applied one or more of these exemptions, it must communicate that decision to the applicant within 20 days, but may then take as much extra time 'as is reasonable' to consider whether, even though the information is covered by that exemption, it is in the public interest that it should be released;

iii. If the applicant is dissatisfied with the authority's response he can ask the authority to conduct an **internal review**. There are no statutory time limits for internal reviews; however the applicant may have difficulty proceeding to the next stage until he can show that he has exhausted the authority's internal review process;

iv. Once the applicant has received a letter from the authority with the decision from its internal review, he may then (if still dissatisfied) make a **complaint to the Information Commissioner**. There are no statutory time limits for the Commissioner's investigation; and,

v. The applicant may appeal to the **Information Tribunal** against the Commissioner's decision and ultimately on a point of law to the appropriate court.

There is evidence that delays are occurring at all stages of the process and there have to date been no penalties for such delays.

Delays

16. The most commonly cited problem for requesters was delays in responding to requests. Lord Lester of Herne Hill described the response from the FCO to his request for information as 'wholly unsatisfactory'.[16] He explained that 'the FCO stated that they would

16 Ev 101, para 20

reply to my request of 15th February 2005 within 20 days. It has taken them over a year to do so.'[17] Friends of the Earth had experienced similar problems:

> Of the 108 requests made by Friends of the Earth in 2005, 81 failed to respond within 20 working days. Of those 81, 27 failed to provide any explanation at all for the delay…Some authorities took several months to respond to the request…This level of delay in receiving information significantly reduces the usefulness of the new laws. Often the relevance of the information to the requester diminishes with time, so that six months after the request the point of having the information no longer exists.[18]

17. Published data show that there are many cases where the 20 day statutory response time is not being complied with. For example, three decision notices issued by the Commissioner on 20 October 2005 related to separate instances where the Home Office had exceeded the 20 day deadline by several months and the DCA statistics show that late responses were provided to around 10% of all requests made to central government.

Public interest test extensions

18. Although the FOI Act requires public authorities to provide the information requested by the applicant within 20 working days, some exemptions are subject to a public interest test and authorities may legitimately take such extra time 'as is reasonable' to consider and decide whether the public interest in maintaining the exemption outweighs the public interest in disclosing it.

19. In their evidence to us, requesters described cases where decisions had been delayed several times, sometimes for a period of months, in order to consider the public interest. Lord Lester's submission described the handling of a request for information made to the FCO where an extension of nearly 3 months was made to consider the public interest.[19] The BBC said that it had experienced 'cases where public authorities have taken months to assess the public interest test (repeatedly extending their own self-imposed deadlines).'[20]

20. The DCA's monitoring statistics show that the 'permitted extensions' were used by central government departments for around 10% of requests made in 2005 but there is no information about the length of additional time taken.[21] Provided that the authority has advised the applicant that it requires extra time, this data is included in the statistics for requests dealt with 'in time'. The delay could just be a matter of days but the evidence from requesters shows that it is sometimes many months.

21. The Information Commissioner told us that:

> I am increasingly sceptical they need as much time as they are taking…I hope I am sending out a very clear signal that where public authorities are taking an excessive

17 *Ibid*

18 Ev 87, paras 14–16

19 Ev 100, paras 7–11

20 Ev 83, para 13

21 www.dca.gov.uk/foi

> time to consider the public interest considerations that will not be acceptable. We are working towards giving more explicit guidance. I cannot create law on this front, but…two months ought to be quite long enough for anybody to go through a weighing of the public interest considerations.[22]

We return to this issue in Chapter 6 of this Report.

Lengthy internal reviews

22. Requesters such as the BBC also encountered delays when some authorities took months to conduct internal reviews.[23] One of the effects of lengthy internal reviews is that applicants may be prevented from starting the complaints process with the ICO. Professor Alasdair Roberts, Associate Professor of Public Administration at Syracuse University, gave us examples of cases where the Information Commissioner had refused to start investigations into the refusal of his information requests until government departments had completed their internal reviews, even though the reviews had already been very delayed:

> A particularly troubling issue is the ICO's treatment of delays on internal reviews. In two cases I have been told by the ICO that they are unable to take action on a complaint regarding a request to DCA until it has completed its internal review, even though the DCA has substantially exceeded its own deadline for completion of review. In the first case, DCA set its own deadline of July 18 2005 for completion of an internal review. It then extended this deadline to the week of August 22 2005. On August 31 the Information Commissioner refused to take action on a complaint of mute refusal, stating that ICO 'is unable to investigate a complaint whilst the review is ongoing'. DCA eventually completed its internal review on September 7 2005. The review took 58 business days.[24]

23. Section 50 of the Act states that on receiving a complaint 'the Commissioner shall make a decision unless it appears to him that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45'. The Information Commissioner told us that in future he intended to exercise greater control over unacceptably lengthy reviews:

> Where we feel that we are being spun a line by a public authority, we think that they are not actually pursuing the internal review as fast as they should be, then we will do our best to put more pressure upon the public authority to speed up their act…to the extent possible, we will be using our formal powers to improve performance at a more general level.[25]

24. **Indefinitely delayed internal reviews conflict with the concept of the statutory response time in the Act. We note that the Commissioner has the discretion to begin**

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22 Qq31 and 32

23 Ev 83, para 13

24 Ev 98, paras 2.5 and 2.6

25 Q34

his investigations when he judges that the complaints process has effectively been exhausted. We welcome the commitment he has now made to put pressure on public authorities to complete internal reviews more quickly.

Complaints resolution

25. Some requesters who gave evidence felt that the complaints procedure had been inadequate. They described cases where they had waited months before the ICO began investigating their complaint. The BBC stated:

> As for the Information Commissioner's Office, BBC journalists have taken several complaints to the Commissioner. Our experience has been, in common with other complainants, that we have had to wait a considerable period of time and often several months before work has started on investigating our complaints. To give one typical example (not the worst), a complaint made to the ICO by one BBC journalist in September 2005 was not acted upon (beyond sending a standard acknowledgement) until over four months later in January 2006, when the investigation into it was started. In another case a BBC journalist complained to the ICO about the Department of Health holding back some information as intended for future publication, although they could give no indication of when publication was planned. It took the ICO five months to reject the complaint – which was just about the same time that the Department took to get ready to publish the information anyway.[26]

Professor Alasdair Roberts told us that:

> In the most serious delay which I have encountered, a complaint regarding my request to the Department of Trade and Industry made in April 2005 has been held by the ICO for 187 business days…without action. Another complaint, relating to a request to the Department of Constitutional Affairs (DCA) has been with ICO for over 110 business days.[27]

26. Maurice Frankel pointed out some of the potential consequences of these delays:

> There is a significant backlog of unresolved complaints in the Commissioner's office, which amounted to some 1300 cases at the end of 2005…the existence of a large backlog at such an early stage in the life of the FOI Act creates a particular problem, since so far there are relatively few decision notices dealing with substantive issues of interpretation under the Act.[28]

We return to the issue of the backlog of cases in the ICO in Chapter 5 of this Report.

26 Ev 83, paras 16 and 17

27 Ev 97, para 2.2

28 Ev 75

Application of exemptions

27. Requesters gave us examples of cases where they considered that public authorities had interpreted the exemptions too widely. Friends of the Earth made the general point that 'Public authorities interpreted the exemptions both in the EIR and in (the FOI Act) in an excessively broad manner.'[29] Making decisions about the proper application of exemptions is the responsibility of the Information Commissioner and it is for him to decide whether the use of exemptions was excessively broad in those particular cases. However the cases did illustrate to us the importance to both requesters and public authorities of clearly reasoned decision notices in order to inform future best practice.

28. Maurice Frankel told us that:

> One of the key issues under the Act is whether disclosure is likely to affect the formulation of government policy or the frank discussion of policy issues. This issue was first addressed in a decision of the Scottish Information Commissioner in July 2005. The first equivalent decision involving a UK government department was only issued in January 2006…Once such decisions are in place requesters will also be better placed to recognise and successfully challenge unreasonable refusals or to accept that information has been legitimately withheld. This may tend to reduce the number of unnecessary appeals that are made.[30]

29. Requesters and public authorities would both welcome more direction from the Information Commissioner about the scope of the exemptions, both in the form of clearly reasoned decision notices and in guidance material which is relevant and up-to-date. Steve Wood, Senior Lecturer in Information Management, Liverpool John Moores University, said that 'it is currently unclear what procedures are in place (at the ICO) to periodically review guidance' and gave examples of instances where guidance material had not been yet been amended so as to reflect Tribunal decisions.[31]

Failure to recognise requests for environmental information

30. Some requesters had experienced difficulties because authorities did not properly identify requests for environmental information and applied the FOI Act rather than the EIR. *Which?* gave the example that 'there appears to be confusion among councils as to whether they should treat requests for council hygiene inspections under the EIR or the FOIA.'[32] Whilst in many respects the two regimes are similar, there are key differences which public authorities must consider when refusing disclosure. The EIRs have stronger rights of access, including narrower exemptions, stricter time limits and are informed by European case law.[33] At present there are separate codes of practice for EIRs and FOI and so for an authority which has started to deal with a request under FOI, it is not necessarily

29 Ev 87, para 18

30 Ev 76

31 Ev 2.2.2

32 Ev 93, para 13

33 Ev 88, para 22

clear at what point they must instead consult EIR guidance and apply that regime. A single code of practice could provide better integrated guidance and more effectively alert FOI practitioners to the EIR issues which they must consider. In addition, ICO decision notices could distinguish more clearly between the two regimes. Maurice Frankel listed a number of decision notices which showed that the Information Commissioner was content to deal with requests for environmental information under either regime and pointed out:

> We see no reason to object to the policy, so long as it is explained in the decision notices concerned—but this has not been done. The result may be to encourage authorities to disregard the boundaries between the two regimes. In certain cases this may lead to the withholding of information which should be released.[34]

31. **Some public authorities are not recognising the circumstances in which they should apply the EIR rather than the FOI Act. We recommend that DEFRA and DCA work together to prepare a shared code of practice for the EIRs and FOI.**

34 Ev 77

4 Public authorities' experiences

32. We formed the impression that although FOI has created more work for authorities, they are positive about its benefits, and many are coping efficiently with its requirements. A research study commissioned by the ICO found that four in five respondents from public authorities felt that the FOI Act was a good thing from the point of view of their organisation.[35] The most commonly mentioned benefits were increased openness and better records management.

Timeliness

33. Some authorities have achieved a good level of compliance with the 20-day statutory deadline for responses. For example the BBC stated that 96% of the requests it received in 2005 were handled in time.[36] Similarly high compliance was achieved by ACPO (94%) and the National Archives (98%).[37] Compliance for central government departments was much more variable, ranging between 64% and 92% for compliance with the 20 day deadline during the last three months of 2005.[38]

34. These figures suggest that with good planning and organisation, and adequate resources, authorities are able to meet the demands of the legislation. The BBC commented that 'based on our experience so far, we believe that the 20 working day deadline is demanding but necessary'.[39]

35. However, the evidence from requesters shows that not all authorities are meeting the same high standards of compliance. More analysis is needed to identify what the problems are and where they exist. The Commissioner pointed out the difficulties for smaller authorities which did not have a specialist FOI Officer. Smaller authorities may well still lack specialist knowledge and support, but larger ones too need to improve performance. During the first three months of 2005, the Home Office met the 20 day statutory deadline for only 30% of its cases. Its compliance improved consistently throughout the year, but was still only 64% by the end of 2005.

Support and co-ordination

36. The Information Commissioner suggested to us that authorities might be suffering from 'guidance fatigue' and that his resources would more usefully be applied to investigating complaints rather than publishing guidance. We agree that there is a comprehensive range of guidance documents available on the DCA, ICO and other websites but the evidence suggests that it is not always specific enough or up-to-date. Public authorities which gave evidence asked for guidance which reflected the decisions

35 www.ico.gov.uk

36 Ev 84, para 22

37 Ev 61, para 1.3.1 and Ev 57, para1

38 DCA statistics

39 Ev 85, para 39

and practical experience of FOI implementation, rather than the more general information which was published before the Act was implemented. Decisions notices are valued by authorities because of the guidance they provide on future similar cases. For example, the General Medical Council (GMC) stated that:

> We are keen to receive the Information Commissioner's decision so that we can consider whether any of our policies or staff guidance should be amended. This is exacerbated as we have received many requests for information of a comparable nature and, if the complaint against us is upheld, we may have made the same error of interpretation in response to other information requests. We could, therefore, find ourselves held accountable for other refusal notices despite not having had a formal decision notice from the Information Commissioner to assist and guide our decision making process.[40]

37. Public authorities also value opportunities to share best practice with similar authorities. The DCA clearing house provides this for central government and ACPO have established similar arrangements for the police service. Local authority networks are more informal and our witnesses expressed a desire to improve the sharing of information via these networks. The DCA told us that it 'worked closely with the wider public sector to facilitate the successful operation of FOI'.[41] The approach described is arranging meetings with panels representing the Departments which sponsor different parts of the public sector in order to share best practice. There is a limit to how much best practice can be shared during the course of two or three meetings a year. ACPO told us that they had daily contact with the DCA clearing house, and received valuable case-specific advice directly from it. Other public authorities would also value this type of advice and we consider that there is scope for the wider dissemination of clearing house guidance.

38. **Whilst central co-ordination can cause problems if it is slow or too directive, we believe that when it is provided openly, it can be a valuable way of improving compliance. We recommend that the DCA takes a more active role in improving co-ordination and in disseminating advice from the clearing house more widely throughout the public sector.**

Records management

39. Good records management is essential for FOI to work well; public authorities can only provide information efficiently if it has been properly organised and is readily accessible. Public authorities are required under the FOI Act to comply with a code of practice under section 46 on records management. The code of practice states that:

> Any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements

40 Ev 91

41 Ev 49, para 5.10

> for their eventual archiving or destruction are inadequate. Consequently, all public authorities are strongly encouraged to pay heed to the guidance in the Code.[42]

40. However, there is evidence that records management is poor in some public authorities and that this reduces the quality of response which they can offer to applicants. Baroness Ashton described the quality of records management in public authorities as 'patchy'.[43] Lydia Pollard, consultant to the Local Government Association, described the problems faced by local authorities:

> One of the big issues is just finding the information. Local authorities are still working on records management, the vast majority still do not have a corporate records management system, they have a mix, and finding information in a manual system takes a considerable amount of time.[44]

41. **The National Archives has told us about the impressive range of guidance documents which it has issued but the evidence suggests that records management practices in some public authorities need substantial improvement. More proactive leadership and progress management of departments' records management systems and compliance with the section 46 code is required. We note that the National Archives will, during 2006, make plans to assess authorities' compliance with the section 46 code of practice and we look forward to the publication of their findings at an early date.**

42. Steve Wood suggested that the potential benefits of electronic systems were not always being exploited:

> It is my impression that too often the benefits of improved records management are not felt by users: public authorities have benefited from streamlined procedures for the retention of records but the user has not benefited from electronic document and records management systems (EDRMS). I have had requests refused for being above the cost limits to locate and retrieve information. It is my belief that the requests have been immediately rejected because the authority concerned has viewed the request with a 'paper-based' mindset. In many cases I believe that an advanced electronic search of the EDRMS that could take a matter of minutes has not even been attempted.[45]

43. **The National Archives has been monitoring implementation of EDRMS in government departments in terms of progress against the Cabinet Office targets for 2004. We recommend that it publishes a report setting out the extent to which those targets were met and the actions which should now be taken to achieve the benefits from EDRMS.**

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42 FOI Act, s46, Code of Practice

43 Q218

44 Q147

45 Ev 72, para 3.5.1

44. The National Archives expressed concern to us about the long term preservation of digital records in government and pointed out that departments may be unable to comply with FOI requests relating to relatively recent electronic information because the data is no longer retrievable:

> Of particular importance in the FOI context is the development of digital preservation requirements in EDRM systems…Because of the ephemeral nature of digital records, they are likely to perish within a few years of their creation, unless active steps are taken to ensure their survival. In particular, there is a serious risk that FOI requests for information that is only a few years old and held in electronic form will simply not be retrievable. Unless processed, the information – originally held on disk or on tape – may have perished completely or may not be readable because it is kept on software that is seriously out of date.[46]

45. In some cases physical storage media may become damaged over time and, in others, the data becomes unreadable by newer technology unless it is converted. However, Baroness Ashton told us that she was confident that there was no significant problem:

> There is nothing that suggests to me that we have lost anything because as computer technology has moved along, we have found ways in which we have incorporated it…As I understand it all the software is migrated on to new software immediately…There is nowhere that I am picking up that this is a significant problem of any kind.[47]

46. **The Minister's attitude that adequate processes for the long-term preservation of digital records are in place contrasts with the views of the National Archives. Her response to our questions does not accord with the widely recognised view among industry specialists that digital preservation of records is a complex and urgent problem to which no satisfactory long-term strategy has been found. Difficulties in accessing older electronic records could soon become a serious problem for government departments. There is a serious possibility that material over 10 years old will essentially be irretrievable in the near future and complacency about this is not acceptable. Plans are needed to handle the rapid and significant changes in technology and the inevitable degradation of storage media. National Archives and the DCA must take the lead in developing such plans. We will monitor progress on this issue.**

46 Ev 58–59, para 3

47 Qq222 and 225

5 The Information Commissioner

The Role of the Information Commissioner

47. The Information Commissioner's Office is the UK's independent public body set up to promote access to official information and protect personal information. It provides guidance to individuals and organisations and is responsible for enforcing FOI, environmental information and data protection legislation.

48. One of its key duties in relation to FOI is to enforce compliance by public authorities. An individual who has made a request for information to an authority and believes that the authority has not handled their request in accordance with the Act may apply to the Commissioner for a decision. In addition to the duty to issue decision notices in such circumstances, the Commissioner's roles are to:

- Promote good practice by public authorities;
- Provide information and advice to the public about the operation of the FOI Act;
- Assess whether authorities are following good practice (as set out by the Act and the codes of practice); and
- Approve publication schemes.

49. Under the Act, the Commissioner has a number of enforcement powers to improve compliance with the Act: he has the power to issue decision notices, good practice recommendations (if an authority's practices do not conform to the codes of practice), information notices (requesting information to assist complaint investigations) and enforcement notices (directing an authority to amend its practices). The Commissioner's notices can be enforced through the courts if an authority fails to comply with them.

50. Although the Information Commissioner reports directly to Parliament and is responsible for setting the priorities for his office, the resources for his office are provided by the DCA, in contrast to the Scottish Information Commissioner, whose resources come directly from the Scottish Parliament. The Commissioner commented to us that this arrangement posed some challenges:

> We are grant aided from the DCA. There are some interesting questions there about the Scottish parallel, for example, or the Parliamentary Ombudsman here. There the money is voted directly from Parliament and that is perhaps an issue this Committee may want to give some thought to…I am a little uncomfortable that the same part of the same government department is responsible for policy on FOI, for leadership of the clearing house and for sponsorship of my department, and I think that there are some slightly uncomfortable questions there about competing considerations.[48]

We return to this issue in Chapter 6.

48 Qq68 and 69

Caseload

51. Research commissioned by the Information Commissioner during 2004 suggested that his office was likely to receive between 1250 and 3000 cases during the first year and that this could rise to between 4000 and 9000 cases in 2009 before stabilising.[49] The prediction for 2005 proved to be accurate; he actually received 2385 cases during 2005. Of these:

- 1325 were outstanding as of 31 December 2005; and,
- 1060 were closed by 31 December 2005. Of those closed cases:
    - 135 resulted in formal Decision Notices;
    - 360 were resolved informally;
    - 565 were deemed not valid complaints.

Many of the 1325 cases carried over to 2006 had been awaiting attention for several months.

52. We heard evidence from requesters and public authorities who had waited months for the Information Commissioner to start investigating their complaints. Witnesses also gave examples where the quality of investigation and the information provided in the decision notice were inadequate.

53. The Commissioner accepted that the backlog of cases in his office was unsatisfactory, stating that he was 'deeply concerned about the time it is taking my office to deal with complaints, particularly as the complaints themselves often already reflect frustration arising from a public authority's delay in responding to an FOI request or the perceived inadequacy of response when received.'[50]

54. To some extent, the difficulties faced by the Commissioner were predictable, given the decision to implement the Act across the whole public sector at the same time. The ICO did not have time to build up its expertise and authorities had to rely on general guidance and international experience for their training and to inform their early best practice. As he stated in his submission:

> We had the problem, which this Committee identified, the so-called 'Big Bang' problem of 115,000 public authorities all starting at the beginning. I think my predecessor and myself had expressed reservations about this. It was a done deal and I had to accept the Government's line on that, but my personal feeling is that, rationally, one might have started a little more incrementally rather than having the 'Big Bang' of every public authority starting at the same time.[51]

49 www.ico.gv.uk

50 Ev 53, para 18

51 Q15

Despite his reservations about the DCA's approach to implementation, the Commissioner had expressed confidence to us in October 2004 that his office was well prepared, adequately resourced and ready to assume its new FOI responsibilities in 2005.[52]

55. The Commissioner told us in March 2006 that he planned to improve his caseload handling by implementing organisational changes so that his office could process new cases more quickly and by requesting one-off additional resources from the DCA to clear the backlog:

> We recognise the need for improvements, we have started to improve and have made some worthwhile improvements….We are right in the middle now of considering some structural and procedural changes going a step-change further. those changes will enable us, as long as the volumes stay within our predictions, to get to what we call a 'steady state' - in other words, as many cases going out as are coming in…Where we do need more resource is dealing with the backlog. We have got about 700 cases now which are what we call in our backlog, and that is where we need the additional resource.[53]

56. The backlog of cases was not the only problem raised by our witnesses; of equal concern to us were criticisms from witnesses which called into question the quality of investigations carried out by the ICO. Friends of the Earth stated that:

> The standard of some of the work produced by the ICO has fallen short of that expected of a public body. Friends of the Earth has received letters from the ICO that were undated, which had no signature or sender's name, and which did not identify the complaint they referred to…Of greater concern, perhaps, is the poor understanding of the legislation evidenced by many of the decisions, which leads us to question the standard of training and legal knowledge of those charged with making the decisions.[54]

Maurice Frankel stated that:

> What I am worried about is the quality of the decisions, which I think the (Information) Tribunal is highlighting in a series of cases. That is worrying…There have only been about eight or nine (Tribunal decisions)…There has been a substantial criticism of the Commissioner's approach in two, and implicit in at least two of the others.[55]

57. Maurice Frankel also questioned the judgement of the Commissioner in choosing to make his early focus the procedural cases and to postpone decisions relating to exemptions:

> The relatively slow progress that has been made in addressing the Act's exemptions does not merely affect the complainants and authorities awaiting decisions. It has

52 Q299

53 Q43

54 Ev 89, paras 33 and 34

55 Qq108 and 109

> implications for the speed with which authorities move towards greater openness generally. If the Commissioner's decisions are delayed, poor practice may continue unchecked or become even more entrenched. Conversely, even a single decision by the Commissioner to require disclosure may, depending on the case, unlock a substantial volume of information across a whole sector.[56]

58. However, witnesses also commented that the quality of decision notices had improved and that the ICO was now providing fuller explanation of its approach to the investigation and the reasons for its decision.[57] A greater proportion of decisions now relate to exemptions. We welcome the evidence that the Commissioner recognises the importance of quality and of guidance about the exemptions and that he has responded constructively to feedback about the early decision notices.

59. When we visited the ICO in May 2006, the Commissioner told us that he had implemented some structural and procedural changes. During February, March and April 2006 the number of new cases had remained about level, but the number of cases closed per month had increased, and had exceeded the number of new cases. A number of measures have been introduced to improve the quality control of investigations and the ICO plans to implement further controls over the next few months. This is an encouraging start to the recovery plan.

60. The Commissioner first requested additional resources from the DCA in late 2005 and refined that request in January 2006, when he asked for an additional £1.13million for 2006/07.[58] The DCA did not advise the Commissioner until mid-April (and after the start of the financial year) that it had decided to provide one-off additional funding of £550,000 which delayed the appointment of new staff.[59] The Commissioner's Corporate Plan states that he will use his 'best endeavours' to clear the backlog (which by that stage was estimated as 1275 cases) by March 2007.

61. The Commissioner told us in March that he required an additional £1.13million to clear a backlog of around 700 cases in one year, but in May that he was aiming to clear twice as many cases with half the money, in under a year. He also told us that he was planning on the basis of the number of new cases remaining level, despite the predictions of his research that they would continue to increase for the first few years.

62. **The impression given by our witnesses was that the complaints resolution process was unsatisfactory during 2005, but we were pleased to note the efforts being made by the ICO to learn from its first year's experience of a challenging workload in order to investigate complaints more efficiently. We are surprised that the need for additional resources was not identified earlier in 2005, before the backlog became such a problem, and we are not convinced that adequate resources have been allocated to resolve the problem, or that they were allocated early enough. The Commissioner has told us he**

56 Ev 76

57 Ev 69, para 2.3.2 and Ev 76

58 Q44

59 Q191

will publish a progress report in September 2006. We expect this to provide measures of quality as well as quantity. We will use this report to monitor the success of the recovery plan and to assess whether further action by the Committee is needed.

Approach to enforcement

63. Some of our witnesses suggested that the Commissioner's approach to enforcement had contributed to delays. Steve Wood said that:

> It is my view that the first year of the FOI Act was characterised by tentative enforcement and dissemination of best practice by the ICO...The ICO's position of 'negotiation and discussion' in gathering information may need to be altered to enable swifter resolution in cases where public authorities are slow to respond and provide information requested.[60]

64. The Commissioner told us that his early approach to enforcement had been to be 'reasonably tolerant, reasonably non-confrontational trying to help public authorities get it right'.[61] During 2005 he issued no practice recommendations and very few information notices. He now felt it was to adopt a firmer approach: 'I think we have resolved that we must be considerably tougher in some respects as we go into the second and third year…we will be using our powers to serve practice recommendations and enforcement notice increasingly after that first…learning year.'[62]

65. The Commissioner told us that during most investigations it was essential for him to have access to the requested information so that he could form a judgement about the applicability of exemptions or public interest factors, but that in some cases, public authorities had been reluctant to allow this access. He had therefore recently issued seven information notices in cases where 'public authorities had been rather slow at sharing information' with the ICO:

> Although most public authorities have responded appropriately to my office's investigation of complaints made against them, there have been some pockets of resistance…we are now seeing some evidence of more entrenched attitudes regarding openness and even resistance to constructive dialogue with the ICO.[63]

66. Central government has a written agreement to co-operate with the Commissioner on such matters. In February 2005, the Secretary of State for Constitutional Affairs, on behalf of government departments, signed a Memorandum of Understanding (MoU) with the Information Commissioner to promote good standards of co-operation. The DCA has responsibility for promoting government compliance with the MoU.

67. We asked Baroness Ashton for reassurance that government departments were co-operating fully with the Commissioner. She gave us a commitment that she 'knew of no

60 Ev 67, para 1.2 and Ev 71, para 2.5.2

61 Q2

62 Qq2 and 23

63 Qq2 and 3; Ev 28 and 29

cases where government departments had refused to provide information to the Commissioner' and that 'the approach the Government would take is to provide the Information Commissioner with information as appropriate to the Act. There is no resistance on behalf of Government to doing that.'[64] She did not acknowledge that there were 'pockets of resistance' as reported by the Information Commissioner in his evidence.

68. **We support the Commissioner's decision to adopt a firmer approach to enforcement. We expect to see him use his full range of powers to improve compliance and reduce the delays being experienced by requesters.**

69. **We recommend that the DCA takes a more proactive role in ensuring that government departments co-operate fully with the Commissioner and provide him with the information required for his investigations, within the periods agreed in the Memorandum of Understanding.**

Information Tribunals

70. If either the public authority or the applicant disagrees with the Commissioner's decision notice, they can appeal to the Information Tribunal. The Commissioner told us that by the end of 2005, 25 appeals had been made to the Tribunal, of which nine had been decided, and that he had already identified two procedural issues which impacted on his office.[65] Firstly, if oral hearings (as opposed to cases being determined on the papers) became the norm, it would have significant resource implications for the ICO. Secondly, because the appeal was always against the Commissioner's decision, he was the respondent in every case. The Commissioner told us that he was looking at ways in which the ICO could take a lesser role so that his input was more effective and proportionate: 'Although the Act requires that we are the respondent, I would much rather see the real battle at the tribunal between the original requester and the original public authority'.[66]

71. **We believe that to it is too soon to assess the role of the Tribunal process in detail, but the Commissioner has made some important points which should be considered at a later date.**

FOI in Scotland

72. The FOI (Scotland) Act, like the UK Act, was implemented on January 2005. During our inquiry we visited the offices of the Scottish Information Commissioner in order to learn more about the Scottish experience of the first year of FOI implementation.

73. The Scottish FOI legislation is similar, but not identical to the UK. The Scottish time limits are stricter; there is no permitted extension to consider the public interest test and there are statutory time limits for internal reviews and the Commissioner's investigations. Some of the Scottish exemptions require a higher level of harm to be demonstrated, the

64 Q203

65 Ev 55, para 35

66 Q97

fees arrangements are different and there is no Information Tribunal in Scotland (but the authority and applicant have the right to appeal to the Court of Session on a point of law). The UK Information Commissioner retains responsibility for FOI in relation to UK-wide public authorities and for Data Protection throughout the UK.

74. Based on the same research used by the UK Commissioner, the Scottish Information Commissioner predicted that he would receive between 125 and 300 cases in 2005; actual volumes were much higher and he received 571 cases. 240 cases were closed during 2005 (191 of them within four months) and 331 were carried over to 2006. Two additional investigators were recruited during 2005 to deal with the higher than expected volume of work. Procedural cases dealing with technical breaches (such as non-compliance with the 20 day deadline) are fast-tracked and often closed within two weeks.

75. The Scottish ICO receives its funding directly from the Scottish Parliament. It is a much smaller organisation than the UK ICO; the Scottish 2005 caseload was around one fifth that of the UK. It has a flatter organisational structure and the investigators all deal with a wide range of work including complaints and public authority liaison. The Scottish Commissioner estimates that investigators are able to close around 30 cases a year.

76. The Scottish Information Commissioner's view was that Scottish authorities were generally coping well with the legislation, although, as in the rest of the UK, some authorities were apparently encountering problems because of inadequate records management systems.

6 The role of the DCA

77. The DCA was responsible for the implementation of FOI across the public sector and has retained responsibility for providing leadership and guidance to central government. It publishes FOI guidance for central government which it states 'may be of use for other public authorities and of interest to the public' and collates statistics and publishes quarterly reports relating to central government compliance with FOI. Under the Act, the Secretary of State is required to issue codes of practice providing good practice guidance to public authorities on handling requests and on records management. The codes themselves do not have statutory force but enforcement action can be taken by the Information Commissioner.

Guidance and Compliance

Delays

78. It is clear from the evidence we have received from requesters and authorities and from the Commissioner's decision notices that there are many cases where public authorities are not meeting the 20 day response deadline. We accept that many of those cases may have occurred in the early stages of implementation but it is essential that the reasons for these delays are identified and that appropriate support is provided to enable authorities to improve. The high number of procedural non-compliance cases is increasing the pressure on the Commissioner's already limited resources and he cannot deal effectively with the problem only by addressing individual cases of non-compliance.

79. **The 20 day response deadline is a statutory requirement and not merely a target. The DCA, together with the Information Commissioner, must work to improve compliance with the deadline and raise standards so that authorities consistently provide a more timely response to requesters.**

Public interest test extensions

80. We found that authorities are frequently taking extra time to consider the public interest test. Whilst this is permitted within the existing code of practice, it is not consistent with the original commitments made by the Government. The first edition of the code, published in November 2002, included a statement that public authorities should aim to make all decisions within 20 days, including requests where the public interest applied:

> Public authorities should aim to make all decisions within 20 working days, including in cases where a public authority needs to consider where the public interest test lies in respect of an application for exempt information. However, it is recognised that there will be some instances where it will not be possible to deal with such an application within 20 working days.

This statement was withdrawn (without consultation) from the final version of the code which was submitted to Parliament in November 2004, just prior to the implementation of the Act. Maurice Frankel pointed out at that time, in a letter to the Lord Chancellor, that this issue had been debated in Parliament during the passage of the FOI Act.[67] Concern about unnecessary delays had prompted the Home Office minister Lord Bassam of Brighton to give the following commitment:

> The Government remain of the view that wherever possible all information should be disclosed within a 20-day time period. That too – I give a commitment – will be reflected in the Secretary of State's code.[68]

81. The current version of the code offers no suggestion that authorities should attempt to deal with public interest considerations within 20 days nor does it offer guidance as to how much extra time might be reasonable. In practice, this means that there is no statutory response time limit whenever an authority is considering one of the 17 exemptions which requires consideration of the public interest. This contrasts with other regimes such as the EIR and the FOI (Scotland) Act, under which there is no option to make such indefinite extensions.

82. **Routine time extensions of up to several months undermine the spirit of the 20 day response deadline in the Act and reduce the benefits for requesters. We recommend that the DCA guidance be updated to reflect the Information Commissioner's guideline that two months should normally be sufficient to reach a decision about the public interest and the Minister's undertaking that wherever possible all information should be disclosed within 20 days. We recommend that the DCA publish data to show how often and by how much this guideline is exceeded by government departments.**

Lengthy internal reviews

83. Best practice guidance for internal reviews (also called internal complaints procedures) is provided in the section 45 code of practice, which states that 'Authorities should set their own target times for dealing with complaints; these should be reasonable, and subject to regular review. Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets.'[69]

84. We note, however that the DCA does not include any of this information in its quarterly FOI statistics reports. The DCA report for October to December 2005 states that:

> it can quite properly take several months from the initial receipt of an information request to the completion of any resulting review or appeal work in some cases. It would therefore not be practical to collect data on internal reviews and appeals for discrete quarterly time periods.[70]

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67 www.cfoi.org.uk/pdf/falconerltr.pdf

68 HL Deb, 14 November 2000, col 190

69 www.dca.gov.uk/foi

70 www.dca.gov.uk/foi

Although the DCA states that internal reviews can sometimes take several months, it is not clear why this should be necessary, given that other regimes such as the EIR and the FOI (Scotland) Act set a fixed limit for the duration of such reviews. The DCA report provided a count of the total number of internal reviews carried out by Departments of State and other monitored bodies, and subtotals showing the outcomes of those reviews, but no information about the length of time taken to complete them.

85. **We recommend that the target times and actual time taken for internal reviews by government departments be included in the DCA quarterly published statistics.**

Clearing house

86. In 2004, the DCA established a central clearing house as an 'expert advice centre to which cases can be referred by central government departments for further assistance when assessing the duty to release or withhold information'. The DCA told us that the clearing house had provided advice on over 3,100 cases in 2005, which represents about 10% of the requests made to central government.[71]

87. The experience in Canada has been that whilst co-ordination can improve the quality and consistency of responses, it can also contribute to delays. Professor Alasdair Roberts commented:

> In the case of FOI, co-ordination runs a risk of aggravating two serious problems. The first is delay…there is a real danger that co-ordination procedures will consume large amounts of time, resulting in a failure to respond to requests within statutory time limits…This has proved to be the case in Canada, which adopted its FOI law .. in 1982. The second problem may be the abuse of co-ordination procedures for political purposes. Routines that are set up for perfectly legitimate reasons – to advise on FOI policy in difficult cases – could soon be bent to serve illegitimate purposes… an excessive preoccupation with damage control and 'spin' can…lead once again to unjustified delay in processing FOI requests.[72]

88. Given that there are already problems with delays, we are concerned that this should not be exacerbated by further delays caused by central co-ordination. There are indications that sometimes it is. The BBC stated that:

> On occasions FOI officers in government departments have complained informally to BBC journalists that referring requests to the DCA's central clearing house has caused substantial delays (for which the department itself is then blamed), and in some cases the clearing house has stopped them from releasing information which they themselves would be happy to disclose.[73]

Maurice Frankel agreed:

71 Ev 49, para 5.15

72 'What's wrong with the co-ordination' *Open Government: A Journal on Freedom of Information* Vol 1, Issue 1

73 Ev 83, para 13

> I made a request last year for the internal reviews carried out by government departments, for a sample of them, and the correspondence that they had had with the applicants. Nothing private; simply the material that was in the applicants' hands, and I said that I would have that anonymously, without the names. I spoke to the clearing house informally and told them what I was doing, and asked them if it caused them any problem. They said no. Three or four weeks later I started getting my requests refused and discovered that the clearing house had advised departments to refuse to release their internal reviews to me, on the grounds that the information was not held in the form requested. So they were not even using a particular exemption.[74]

89. There is no evidence either to support the allegations that the clearing house causes delays and blocks information requests, or to refute those allegations. This is primarily because the clearing house has not provided information about its activities, even in response to specific FOI requests. Professor Alasdair Roberts told us that he had made an FOI request to the clearing house for information about cases referred to it, but that his request had been refused on the grounds that disclosure of any such information could prejudice the effective conduct of public affairs. He pointed out that Canadian and American practice is to fulfil statutory obligations by releasing data in response to requests under the legislation and queried how the clearing house could properly consider that such statistical data was exempt from disclosure:

> The claim that the release of such data would prejudice public affairs is also ridiculous on its face. How for example would the release of data showing the length of time required for handling of requests by the DCA clearing house prejudice pubic affairs? It would be more accurate to say that withholding of such information allows DCA and the Cabinet Office to escape accountability regarding the operation of their central clearance procedures…DCA's practice is also inconsistent with the practice of other countries.[75]

90. The DCA anticipated these points, and countered them in its written evidence:

> There have been reports in the media that the Clearing House blocks information requests. The Clearing House does not do so: its function is to ensure that there is proper and consistent application of the Act across central government…The Clearing House is unable to release lists of requests that have been referred as this may in itself disclose exempt information. For example, it might be obvious that a particular case could only have been referred because it has security implications on the basis that it clearly does not meet any of the other triggers.[76]

Baroness Ashton told us that FOI requests for information had been refused by the clearing house in order to provide it with 'space to talk to departments' and because the statistics alone would be meaningless without contextual information. She said that some

74 Q118

75 Ev 98, paras 3.3–3.6

76 Ev 50, paras 5.18–5.20

information about the clearing house would appear in due course on the DCA's website and in the annual report, but information about the clearing house published in the 2006 FOI annual report merely showed the number of requests referred by each government department.[77] We do not consider that these explanations are consistent with the exemptions defined in the Act. This is an unacceptable position for the government department in charge of promoting FOI compliance.

91. **The clearing house must comply fully with the letter and the spirit of the FOI Act, be openly accountable for its work and respond to any individual requests for information which it receives in full accordance with the Act.**

92. **We recommend that the clearing house publish quarterly statistics about its case handling so as to provide clear information about its role.**

Fees regulations

93. Section 12 of the FOI Act allows public authorities to refuse to answer requests for information if the cost of complying would exceed the 'appropriate limit' prescribed in the fees regulations. The regulations set out which costs may be taken into account when public authorities are estimating whether the appropriate limit has been exceeded. Under the current regulations, the costs are limited to those reasonably incurred in determining whether it holds the information requested and in locating, retrieving and extracting the information.

94. An authority may not take into account any costs other than those set out in the regulations. Specifically, it may not include the time taken to consider whether the information requested should be withheld under an exemption and any time taken to provide advice and assistance.

95. The Lord Chancellor told the Committee that the DCA was conducting an internal review of the FOI fees regime in order to establish whether there was a fair balance between providing information as freely as possible and the time taken by public authorities to find the information.[78] He said that one option being considered was to include within the chargeable limits the time taken to read files to assess which exemptions might apply.

96. When we asked Baroness Ashton to elaborate on why this review was considered necessary, she told us that staff were 'spending huge amounts of time simply finding files before we even get to the point of reading them' and that staff spent 'weeks and months trying to find all of the information that is relevant'.[79]

97. **We would be concerned if there were cases where public authorities were spending weeks finding information. Since authorities may already include this time within their calculations of chargeable limits, we do not consider that it would justify a review of the**

77 Q182

78 Qq191–194

79 Qq209 and 213

fees regulations, but it would demonstrate a serious shortcoming in some public authorities' records management systems.

98. We note that the current fees regulations encourage public authorities to discuss wide-ranging requests with applicants in order to narrow them down to more manageable amounts of information. The regulations also state that if, after providing advice and assistance, the request is still over the appropriate limit the authority can decide not to provide the information, to answer and charge any permitted fee or to answer without charging. There are already therefore, measures available to help authorities narrow down the information actually required.

99. Baroness Ashton suggested that public authorities had encountered difficulties dealing with 'vexatious' or 'frivolous' requests and that public money was being wasted on providing trivial information.[80] However, the Commissioner told us that he was 'very surprised' that government departments were not making more extensive use of the existing provisions in the Act for vexatious or repeated requests.[81]

100. **We recommend that problems with 'frivolous' requests should be dealt with through the existing provisions in the Act. We do not consider that this is an appropriate reason for reviewing the fees regulations.**

101. The Information Commissioner told us that he believed that the existing fees regime was working well and that it had 'all the advantages of being simple, clear and straightforward and not being a deterrent'.[82] Both requesters and public authorities agreed that changes were not desirable at this stage. Maurice Frankel said that 'coming at this early stage in the life of the legislation, it would be a very regrettable step to take…I think you will probably find that half of all the requests that are now being answered will be refused on cost grounds.'[83] The BBC stated that 'we believe that it it is too early to amend the legislation in such a fundamental way without first encouraging the use of the other tools that are available to public authorities'.[84]

102. Steve Wood suggested that it would be helpful to see more detailed evidence and analysis of the types of requests which the DCA considers are causing problems and that there should be an open consultation process before making any amendments to the regulations.[85] We note that the DCA states that the information from its internal review will 'provide a firm evidence base' to inform any changes to the charging regime.[86] We are pleased that Baroness Ashton agreed that an open consultation was necessary: 'If we decide

80 Q217

81 Q99

82 Qq99–102

83 Q119

84 Ev 86, para 45

85 Q119

86 Ev 50, para 6.3

that we want to do something quite different around the fees regime, I think we have to do a public consultation in any event.'[87]

103. It would be highly regrettable if the effect of any new fees regulations was to reduce the benefits of FOI, particularly since we have the opportunity to learn from overseas experience. The Irish FOI Act came into effect in 1998. Amendments made in 2003 included the introduction of a range of fees. In her Annual Report 2004, the Irish Information Commissioner reported that following the introduction of fees, requests for non-personal information declined by 75%. She said that the decline in use of the Act had gone far beyond what the Government had intended when it decided to introduce fees, and called for a review of the scale and structure of the charges.[88] The Information Commissioner told us that he was 'concerned about the Irish experience, where the fees were increased, and that had (had) a very obvious chilling effect on the uses to which the Act was being put'.[89]

104. **We see no need to change the fees regulations. There appears to be a lack of clarity and some under-use of the existing provisions. We recommend that the DCA publish the results of its internal fees review when it is concluded and that it conducts a public consultation before deciding on any change.**

Relationship with the ICO

105. The DCA determines the level of funding available to the Information Commissioner's Office. We were told by both the Commissioner and the DCA that the 2006/07 ICO funding was not agreed until after the beginning of the financial year, in the middle of April 2006. This has restricted the ability of the Commissioner to plan effectively for the year ahead, and reduces the time during which he can make use of those resources. The amount of funding was less than that requested, and the Commissioner had earlier expressed doubts about his capacity to maintain quality and keep guidance up-to-date as well as clearing the backlog of cases within these resources.

106. The Commissioner told us that he was concerned about the salary levels he was able to pay to ICO staff.[90] He said that he had recently commissioned a full review of all staff salaries, and indicated that the salary levels of equivalent staff of the Scottish Commissioner were higher than he was able to pay since his ability to adjust salaries was restricted by Treasury policy. The UK model, where funding of the ICO is provided by the government department responsible for FOI promotion and compliance, is unusual. Since the level of funding for the ICO can have a direct impact on its capability to enforce compliance, there is a potential for conflicts of interest. We note that in other comparable jurisdictions such as Canada, New Zealand and Scotland, the ICO is funded directly by Parliament.

87 Q210

88 www.oic.gov.ie/en/Publications/AnnualReports/2004/

89 Q99

90 Q17

107. **We are not convinced that the relationship between the DCA and the ICO is working as effectively as it might. We are concerned that resource restrictions and staff salary constraints could limit the Commissioner's performance as an independent regulator and recommend that other reporting arrangements be considered if the recovery plan does not achieve its stated objectives.**

108. **We see considerable merit in the Information Commissioner becoming directly responsible to, and funded by, Parliament, and recommend that such a change be considered when an opportunity arises to amend the legislation.**

7 Conclusion

109. A wide range of new information is being released by public authorities as a result of FOI and this information is being used constructively. Members of the public, as well as journalists, campaigners and academics, are making use of the legislation, and, in general, public authorities are coping with its demands. For these reasons, the majority of our witnesses judged the first year of FOI implementation to be a success.

110. Some requesters have, however, experienced long delays in receiving responses from authorities. Some of these delays can be attributed to authorities' inexperience and we expect to see an improved compliance with the 20 day statutory response deadline over the next year or two as authorities become more familiar with the Act. We believe that many other long delays are attributable to the lack of clarity about response targets in the central guidance and that the DCA could and should bring about a much more timely response from the public sector by setting specific targets for public interest consideration and internal reviews in the section 45 code of practice.

111. We heard a number of concerns from both requesters and authorities about the effectiveness of the complaints resolution process. The Information Commissioner himself acknowledged that the first year had been more challenging that he had expected. A recovery plan is now in place to improve the quality and quantity of decision notices issued by the ICO and we will review the Commissioner's autumn progress report to assess whether this is achieving results.

112. One of the often-stated intentions of FOI legislation is to bring about a culture change towards greater openness in the public sector, but other jurisdictions have found that culture change remains an elusive aspiration. The Canadian experience after 16 years of FOI was that 'it has been successful in forcing public servants to disclose more information - but it has not changed the closed culture. And the clear evidence of the durability of the old ways is the system-wide crisis of delay in answering access requests. These delays illustrate the capacity of the public service (through design, incompetence or both) to thwart the clearly expressed will of Parliament'.[91] Professor Alasdair Roberts argues that there has been little evidence of profound shifts in bureaucratic culture in any of the Commonwealth jurisdictions which implemented FOI legislation during the 1970s and 1980s:

> Governments have become more open; but this does not mean that they have acquired a 'culture of openness'. It means only that the rules that govern the conflict over information have shifted in favour of openness, and that government officials (as a rule) recognise their ultimate obligation to submit to the rule of law.[92]

113. A culture change towards greater openness is the long term aim, but the immediate priority should be a more effective and assertive enforcement of the law. The first year of FOI in the UK has demonstrated a shift towards greater openness in parts of the public

91 Office of the Information Commissioner of Canada Annual Report 1998–1999; www.infocom.gc.ca

92 'Two challenges in administration of the Access to Information Act'; www.aroberts.us

sector. We look to the DCA and the ICO to ensure that this shift continues and that public authorities recognise their obligations under the FOI Act - this includes taking all necessary steps to protect the integrity of the information which they hold electronically.

8 Conclusions and recommendations

First year of FOI implementation

1. It is clear to us that the implementation of the FOI Act has already brought about significant and new releases of information and that this information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits resulting from this legislation and are impressed with the efforts made by public authorities to meet the demands of the Act. This is a significant success. (Paragraph 13)

Requesters' experiences

2. Indefinitely delayed internal reviews conflict with the concept of the statutory response time in the Act. We note that the Commissioner has the discretion to begin his investigations when he judges that the complaints process has effectively been exhausted. We welcome the commitment he has now made to put pressure on public authorities to complete internal reviews more quickly. (Paragraph 24)

3. Some public authorities are not recognising the circumstances in which they should apply the Environmental Information Regulations rather than the FOI Act. We recommend that DEFRA and DCA work together to prepare a shared code of practice for the EIRs and FOI. (Paragraph 31)

Public authorities' experiences

4. Whilst central co-ordination of support and guidance to public authorities can cause problems if it is slow or too directive, we believe that when it is provided openly, it can be a valuable way of improving compliance. We recommend that the DCA takes a more active role in improving co-ordination and in disseminating advice from the clearing house more widely throughout the public sector. (Paragraph 38)

5. The National Archives has told us about the impressive range of guidance documents which it has issued but the evidence suggests that records management practices in some public authorities need substantial improvement. More proactive leadership and progress management of departments' records management systems and compliance with the section 46 code is required. We note that the National Archives will, during 2006, make plans to assess authorities' compliance with the section 46 code of practice and we look forward to the publication of their findings at an early date. (Paragraph 41)

6. The National Archives has been monitoring implementation of Electronic Document and Records Management System in government departments in terms of progress against the Cabinet Office targets for 2004. We recommend that it publishes a report setting out the extent to which those targets were met and the actions which should now be taken to achieve the benefits from EDRMS. (Paragraph 43)

7. Baroness Ashton's attitude that adequate processes for the long-term preservation of digital records are in place contrasts with the views of the National Archives. Her response to our questions does not accord with the widely recognised view among industry specialists that digital preservation of records is a complex and urgent problem to which no satisfactory long-term strategy has been found. Difficulties in accessing older electronic records could soon become a serious problem for government departments. There is a serious possibility that material over 10 years old will essentially be irretrievable in the near future and complacency about this is not acceptable. Plans are needed to handle the rapid and significant changes in technology and the inevitable degradation of storage media. National Archives and the DCA must take the lead in developing such plans. We will monitor progress on this issue. (Paragraph 46)

The Information Commissioner

8. We heard evidence from requesters and public authorities who had waited months for the Information Commissioner to start investigating their complaints. Witnesses also gave examples where the quality of investigation and the information provided in the decision notice were inadequate. (Paragraph 52)

9. The impression given by our witnesses was that the complaints resolution process was unsatisfactory during 2005, but we were pleased to note the efforts being made by the ICO to learn from its first year's experience of a challenging workload in order to investigate complaints more efficiently. We are surprised that the need for additional resources was not identified earlier in 2005, before the backlog became such a problem, and we are not convinced that adequate resources have been allocated to resolve the problem, or that they were allocated early enough. The Commissioner has told us he will publish a progress report in September 2006. We expect this to provide measures of quality as well as quantity. We will use this report to monitor the success of the recovery plan and to assess whether further action by the Committee is needed. (Paragraph 62)

10. We support the Commissioner's decision to adopt a firmer approach to enforcement. We expect to see him use his full range of powers to improve compliance and reduce the delays being experienced by requesters. (Paragraph 68)

11. We recommend that the DCA takes a more proactive role in ensuring that government departments co-operate fully with the Commissioner and provide him with the information required for his investigations, within the periods agreed in the Memorandum of Understanding. (Paragraph 69)

12. We believe that to it is too soon to assess the role of the Information Tribunal process in detail, but the Commissioner has made some important points which should be considered at a later date. (Paragraph 71)

The role of the DCA

13. The 20 day response deadline is a statutory requirement and not merely a target. The DCA, together with the Information Commissioner, must work to improve

compliance with the deadline and raise standards so that authorities consistently provide a more timely response to requesters. (Paragraph 79)

14. Routine time extensions of up to several months undermine the spirit of the 20 day response deadline in the Act and reduce the benefits for requesters. We recommend that the DCA guidance be updated to reflect the Information Commissioner's guideline that two months should normally be sufficient to reach a decision about the public interest and the Minister's undertaking that wherever possible all information should be disclosed within 20 days. We recommend that the DCA publish data to show how often and by how much this guideline is exceeded by government departments. (Paragraph 82)

15. We recommend that the target times and actual time taken for internal reviews by government departments be included in the DCA quarterly published statistics. (Paragraph 85)

16. The clearing house must comply fully with the letter and the spirit of the FOI Act, be openly accountable for its work and respond to any individual requests for information which it receives in full accordance with the Act. (Paragraph 91)

17. We recommend that the clearing house publish quarterly statistics about its case handling so as to provide clear information about its role. (Paragraph 92)

18. We would be concerned if there were cases where public authorities were spending weeks finding information. Since authorities may already include this time within their calculations of chargeable limits, we do not consider that it would justify a review of the fees regulations, but it would demonstrate a serious shortcoming in some public authorities' records management systems. (Paragraph 97)

19. We recommend that problems with 'frivolous' requests should be dealt with through the existing provisions in the Act. We do not consider that this is an appropriate reason for reviewing the fees regulations. (Paragraph 100)

20. We see no need to change the fees regulations. There appears to be a lack of clarity and some under-use of the existing provisions. We recommend that the DCA publish the results of its internal fees review when it is concluded and that it conducts a public consultation before deciding on any change. (Paragraph 104)

Relationship with the ICO

21. We are not convinced that the relationship between the DCA and the ICO is working as effectively as it might. We are concerned that resource restrictions and staff salary constraints could limit the Commissioner's performance as an independent regulator and recommend that other reporting arrangements be considered if the recovery plan does not achieve its stated objectives. (Paragraph 107)

22. We see considerable merit in the Information Commissioner becoming directly responsible to, and funded by, Parliament, and recommend that such a change be considered when an opportunity arises to amend the legislation. (Paragraph 108)

Formal minutes

Tuesday 13 June 2005

Members present:

Mr Alan Beith, in the Chair

James Brokenshire	Keith Vaz
David Howarth	Dr Alan Whitehead
Barbara Keeley	

Draft Report [Freedom of Information—one year on], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 113 read and agreed to.

Summary read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Seventh Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 20 June at 4.00pm

Witnesses

Tuesday 14 March 2006

Tuesday 28 March 2006

Tuesday 18 April 2006

List of written evidence

Reports from the Constitutional Affairs Committee

Session 2005-06

First Report	The courts: small claims	HC 519
	Government response	*Cm 6754*
Second Report	The Office of the Judge Advocate General	HC 731
Third Report	Compensation culture	HC 754
	Government response	*Cm 6784*
Fourth Report	Legal Services Commission: removal of Specialist Support Services	HC 919
Fifth Report	Compensation culture: *NHS Redress Scheme*	HC 1009
	Government response	*Cm 6784*
First Special Report	Legal Services Commission's response to the Fourth Report on removal of Specialist Support Services	HC 1029
Sixth Report	Family Justice: the operation of the family courts revisited	HC 1086

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
	Government response	*Cm 6470*
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [*Lords*]: the Government's proposals	HC 275
	Government response	*Cm 6488*
Fourth Report	Family Justice: the operation of the family courts	HC 116
	Government response	*Cm 6507*
Fifth Report	Legal aid: asylum appeals	HC 276
	Government response	*Cm 6597*
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee)	HC 243
	Government response	*Cm 6647*
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates	HC 323
	Government response	*Cm 6596*