

Constitutional Affairs Committee inquiry: “the operation of the Freedom of Information Act: one year on”

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My evidence will address the following three themes from the inquiry’s terms of reference:

- 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
- The role of the DCA in providing central guidance, including the operation of the central government clearing house

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² www.foia.org.uk The blog has been running since 2003 and has received over 100000 visits – it is a resource used by both practitioners and users of the Act. In 2005 the blog won an award at the International Information Industry awards. The blog also has a monthly mailing list with over 350 members. The success of the blog has in part been down to the way it draws together information about FOI from a wide number of disparate sources and blog users have indicated frustration with the quality of some official websites. Blog users are encouraged to leave comments and send in information. A good example of comments can be seen at: <http://foia.blogspot.com/2005/07/e-mails-between-councils-on-foi.html>

³ www.opengovjournal.org Open access, international peer reviewed journal set up in 2005

1 Introduction

1.1 From overseas experience the success of any Freedom of Information regime in facilitating the release of new information of public value into the public domain is generally based around four key factors:

- Tightly drawn legislation that has a strong presumption in favour of disclosure
- A developing culture of openness in public authorities supported by senior managerial and political positions as a stated and implemented policy
- An independent ombudsman or information commissioner that consistently applies a high level of authority to enforce the legislation and promoting best practice
- A balanced level of central coordination and control of requests that improves the consistency and quality of responses that applicants receive whilst not subjecting certain requests to unfair levels of scrutiny and delay

1.2 It is my view that the first year of the Freedom of Information Act was characterised by tentative enforcement and dissemination of best practice by the ICO and in central government there appears to be an excessive level of central control. 2005 exposed many weaknesses in the legislation allowing excessive delays to take place for requests, internal reviews and appeals to the ICO. The process of cultural change is underway, with many public authorities showing a clearly defined approach of openness balanced against many who see FOI as a burden and have responded with delay and highly protective use of exemptions.

- 1.3** The decisions made by the ICO in late 2005 and early 2006 do offer encouraging indications that 2006 will see the backlog reduced and a number of decisions that push new information into the public domain.

2 The role of the Information Commissioner in providing guidance, issuing decisions and participating in Information Tribunals

2.1 Providing guidance, advice and disseminating best practice

- 2.1.1** From contact and discussion with practitioners I have found that the information commissioner's guidance has been an important source of reference in helping them handle freedom of information act requests. A common problem cited by practitioners is that the process for updating and adding new guidance and subsequent alerting is not clear, for example new guidance on refusal notices was produced in January 2006⁴ without clear signposting or alerting on the ICO website. The production of such new guidance labelled as a "best practice note" reflecting on operational experience of the Act is important. It is often not clear when guidance was produced or when it is likely to be revised.

- 2.1.2** An example of a guidance note that requires review is guidance note no 2: "Information provided in confidence"⁵. The note still references an element of the S45 Code of Practice related to the approach public authorities should take in refusing to accept confidentiality clauses. This element was removed when the S45 Code was redrafted in November 2005 (the redrafting of the

⁴ ICO (2006) Good Practice Note 1: refusal notices.

http://www.ico.gov.uk/cms/DocumentUploads/Refusal_Notice_Guidance_Jan_06.pdf

⁵ ICO (2004) Guidance Note 2: Information provided in confidence

<http://www.ico.gov.uk/documentUploads/AG%202%20Info%20in%20conf.pdf>

clause was of high significance, as detailed in the letter from the Campaign for FOI to the DCA from the same date).⁶

- 2.1.3** Guidance on fees: the ICO has still not produced any guidance on fees despite information stating that it will be published being on the ICO website for over a year.
- 2.1.4** Records Management: compliance with the S46 Code of Practice. In guidance note 8: Records Management FAQs⁷ the IC stated a paper would be produced on “setting out his approach to audits/inspection” on this issue. This paper has not yet been produced. I believe that the role of records management audits is an important issue in improving the standard of the records management and that the ICO should make an effort to promote and encourage. The training courses I have run on this issue have been oversubscribed and would indicate a “knowledge gap” currently in the public sector.
- 2.1.5** The relationship with the DCA guidance is not always clearly flagged on the website, whilst it is accepted that ICO is an independent body of the DCA. There is little acknowledgement of other guidance being available on the DCA website.
- 2.1.6** Under Section 48 the Information Commissioner has the powers to issue practice recommendations, I made an FOI request to the ICO during November 2005 and found that none had been issued. A publicly available

⁶ CFOI (2004) Letter to Lord Falconer on the new edition of the FOI code of practice. <http://www.cfoi.org.uk/pdf/falconerltr.pdf>

⁷ ICO(2004) Guidance note 8 : Records Management : FAQs. <http://www.ico.gov.uk/documentUploads/AG%208%20Rec%20Man%20FAQI.pdf>

list of practice recommendations could be an important tool in disseminating best practice.

2.1.7 There is often best practice guidance contained in the correspondence from the ICO to public authorities related to complaints. This correspondence could be more effectively captured and disseminated as best practice to the wider practitioner community. This was evidenced by an FOI request made by myself to the ICO for all “best practice correspondence relating to Decision Notice cases”⁸. An example of one letter received from of this request is included as appendix A.

2.1.8 Some examples of inconsistent advice from ICO and DCA have emerged. One example: I have been sent an example of an ongoing case where the complainant to the ICO was told their case was closed as the public body concerned (a body funded by the Learning and skills Council) was not subject to the FOIA only for only for the DCA to confirm that the body was.

2.2 ICO and the Information Tribunal: implications for guidance

2.2.1 I would like to highlight that of the Information Tribunal Decisions issued so far there have been implications for the guidance issued by the ICO in the following cases:

2.2.2 The John Connor Press Associates Limited v The Information

Commissioner. This case has implications for guidance issued on the S43

⁸ Request sent to the ICO 7th December 2005. Another practitioner has made a similar request and has written an article reflecting on the best practice issues raised from the correspondence. The article will be published (subject to peer review) in the Open Government Journal March/April 2006)

Commercial interests exemption in terms of whether information released about one procurement can effect another ongoing set of negotiations. The ICO guidance has yet to be updated to reflect or acknowledge this decision.

2.2.3 Mr R Bustin v The Information Commissioner: Although the tribunal upheld the Commissioner's decision, the tribunal made an important note on the issued of deleted information: "The Tribunal interprets this as meaning that where the deleted or unamended information is still readily accessible and this is the information that the applicant wants, then the deleted or original version of the information should be recovered and that is what should be communicated to the applicant, with perhaps an explanation of what has happened to the information since the request was received." The Tribunal also noted: "The Information Commissioner should give serious consideration to issuing guidance to Public Authorities on this matter, and to enquiring himself, where appropriate, in relation to complaints made to him, whether an authority has considered the recovery of deleted material."

The ICO guidance note 8: Records Management FAQs⁹ states (nearly four months after the ruling): "If the information is contained within a record that is due for destruction within 20 days of the request being received, there is no requirement to release the information." And "Information on a back-up server is not regarded as being held by a public authority for the purposes of the FOI."

This relates to the point earlier that it is currently unclear what procedures are in place to periodically review guidance issued and what will trigger a review.

⁹ previous note : page 6

2.2.4 Mr A Mitchell v The Information Commissioner. This decision concerned the S32 absolute exemption for Court Records and although because the information had been destroyed the decision was not changed the discussion in the tribunal decision has important implications for guidance note 9¹⁰ that has not yet been updated.

2.2.5 Mr E A Barber v The Information Commissioner. This tribunal decision was important in terms of a request that was interpreted by the ICO as being “framed in general and subjective terms focusing on the complainant s opinions of the alleged actions of the Inland Revenue” The Tribunal stated “.....As a result we find the Commissioner was wrong in law to find that the Inland Revenue have no information to provide in response to his request. The decision is crucial in terms of guiding public authorities as to what an FOIA request is. The ICO does not currently provide a guidance note on “what is an FOIA request”.

2.2.6 At present there is little or no acknowledgement of the decisions made by the information tribunal in the ICO website. At present the position of the ICO’s guidance and relationship with the tribunal decision is unclear.

2.3 Case Management

2.3.1 The backlog of cases is still of major concern to both users of the Act and practitioners. The written answer given to Norman Baker MP on the 27th

¹⁰ ICO (2004) Guidance note no.9: information contained in court records.
<http://www.ico.gov.uk/documentUploads/AG%209%20Court%20Recs.pdf>

February¹¹ offers clear evidence of the problem. The data illustrates that the number of complaints received is remaining at a similar high level month on month and that problem should not be dealt with by the ICO in terms of presuming the number of complaints will reduce therefore allowing it to focus on the backlog. Overseas evidence (in the UCL report commissioned by the ICO¹²) indicates that case volumes may grow in year 2.

2.3.2 However it is noted there appear to have to be recent improvement in the last two months in the number of cases determined.

2.3.3 From FOI requests made to the ICO for spreadsheets containing the complaints received by the ICO logged in their case management system data quality issues are apparent that could hamper consistent management of cases. E.g. the names of public authorities in the case management system do not appear to be selected from a defined list –for example the Ministry of Defence is recorded four different ways.

2.3.4 Whilst the ICO does provide a Complaints form¹³ the form provided can only be printed off and no automated system is provided. The ICO needs to consider offering a much greater level of Internet based automation. An online form via its website linked to the back office case management system would offer a better standard of service to complainants for the following reasons: the ICO could quickly remove unsuitable cases from the system, move to clarify missing or unclear information in a swifter manner,

¹¹ WPQ Norman Baker to Harriet Harman. Answer 27th February 2006.

¹² ICO/UCL (2004) Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the Freedom of Information Act 2000 and the Environmental Information Regulations.

<http://www.ico.gov.uk/documentUploads/Final%20Document.pdf>

¹³ ICO Complaints form <http://www.ico.gov.uk/eventual.aspx?id=9185>

complainants could immediately (via email) receive an acknowledgement that their application has been received and they could receive a ID for their complaint to track in the system. Whilst it is to be acknowledged that the above suggestion may have a high resource overhead, given the current focus on e-government it would be a relevant option to consider.

2.3.5 Whilst the DCA does produce an online guide¹⁴ to authorities covered by the Act neither the ICO or the DCA offer a definitive list.

2.3.6 In contrast the Scottish Information Commissioner (SICO) offers a spreadsheet download of all public authorities covered by the Scottish Act. Whilst it is to be acknowledged that that the Scottish context is much smaller, I see no reason that sector by sector lists could not be produced and published by the ICO over time as resources permit.

2.3.7 The (SICO) also offers a contrasting approach to case management in terms of the proactive release of information: the SICO offer a list of ongoing investigations on the website¹⁵ and the SICO also publishes all the following documentation on its website¹⁶:

- Enforcement and investigation procedures (59 page manual)
- Investigations procedure note 1: allocation of investigations
- Investigations procedure note 2: Construction of the Commissioner's decision
- Investigations procedure note 3: Investigations involving the Scottish Executive
- Investigations procedure note 4: extending the 4 month time limit

¹⁴ <http://www.foi.gov.uk/coverage-guide.htm>

¹⁵ <http://www.itspublicknowledge.info/appealsdecisions/investigations/index.htm>

¹⁶ <http://www.itspublicknowledge.info/aboutus/scheme.htm>

- Investigations procedure note 6: technical investigations

2.4 Decision notices

2.4.1 I wish to highlight the comments in the Information Tribunal Decision notice in the Barber V ICO case: “It is not for the Tribunal to determine how the Commissioner should conduct his investigations when considering a complaint under s.50 FOIA. However the Tribunal notes that the Commissioner in coming to his decision in relation to Mr Barber’s request did not appear to communicate in any substantive way with Mr Barber or the Inland Revenue until sending out the Decision Notice, except perhaps to acknowledge the complaint and respond to enquiries on the progress of the investigation. We would have thought that there would be very few complaints where the Commissioner could only rely on the complaint notice and any accompanying documentation, particularly where the complainant is not represented.”

2.4.2 The issuing of decisions during 2005 raised a number of issues related to backlog that have been widely raised and discussed. In terms of planning it should be noted that the ICO Commissioned research from the UCL Constitution Unit: “Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the Freedom of Information Act 2000 and the Environmental Information Regulations”¹⁷

¹⁷ ICO/UCL (2003) “Estimating the likely volumes, sensitivity and complexity of casework for the Information Commissioner under the Freedom of Information Act 2000 and the Environmental Information Regulations.
<http://www.ico.gov.uk/documentUploads/Final%20Document.pdf>

2.4.3 The number of complaints received during 2005 (2000 approx.) is well within the projection in the research, as indicated in table 14 from the report.

Table 14 Forecast of UK Commissioner's FOI caseload 2005-2009

Year	2005	2006	2007	2008	2009
Lower forecast (excluding requests for personal information)	1,250	2,000	3,000	3,500	4,000
Higher forecast (including requests for personal information)	3,000	6,000	7,000	8,000	9,000

2.4.4 The process of the issuing of decision notices was initially less than transparent – the first notices were placed on the ICO website only in summary form, then leading to FOI requests being made for the full notices.

2.4.5 The decision notices have been broken down by section of the FOIA by the UCL constitution unit¹⁸ a feature the ICO website should offer (as do the Scottish and Irish ICOs for example).

2.4.6 Evidence suggests the ICO prioritised the focus of decision notices during 2005 on procedural based complaints as opposed to exemption based. The following data illustrates the majority of the decisions issued in 2005 were procedural (sections 1, 9, 10, 16, 17). The breakdown by time is as follows:

- Jan-June 2005: 18/19 procedural notices issued
- July 2005: 12/16 procedural notices issued
- August 2005: 7/11procedural notices issued
- September: 8/9 2005 procedural notices issued
- October 2005: 13/15procedural notices issued

¹⁸ <http://www.ucl.ac.uk/constitution-unit/foidp/resources/ICO-Cases/foi-index.html>

- November 2005: 31/41
- December 2005: 19/21
- January 2006: 3/6
- February 2006 10/17
- Total: 121/155
- **78% Procedural**

2.4.7 Whilst the above data above needs to take into account the number of complaints that were procedural (data I do not have access to), there is a clear need to ask questions as to how cases are prioritised and how many exemption based cases lie the backlog.

2.4.8 Many of the decision notices issued in 2005 failed to document all the considerations, processes and deliberations that would enable a practitioner or member of the public to fully understand how the decision had been reached. As an illustration out of the decisions issued in 2005, the author wishes to highlight the following three selected examples of decision notices that lack clarity:

2.4.8.1 Case: South Holland District Council. Case Ref: FAC0065281 Summary: Complainant objected to £25 charge imposed by the Council for providing 296 pages of photocopied information relating to the erection of wind turbines. The ICO accepts the Council's view that this charge is reasonable. Section of Act/EIR & Finding: EIR r.8 - Complaint Not Upheld. The decision notice issued does not offer any discussion or consideration as to why the IC regards the charge as meeting the criteria of "a reasonable amount". Although in fact the charge when calculated works

out at less than 10p sheet – there is no acknowledgement of this and the decision makes no reference to the Code of Practice and guidance issued by DEFRA on the environmental information regulations that states:

“Public authorities should ensure that any charges they make are reasonable, and in accordance with the EIR and the guidance.” The DEFRA Code of Practice also states: “When making a charge, whether for information that is proactively disseminated or provided on request, the charge must not exceed the cost of producing the information unless that public authority is one entitled to levy a market-based charge for the information, such as a trading fund.”¹⁹ It is not clear whether this aspect has been considered by the ICO.

2.4.8.2 Case: Public Authority: London Borough of Hounslow. Case Ref: FER0074855. Summary: Having inspected information contained within particular planning application files, the complainant requested copies of various documents from these files. He was charged £188 for provision of the information under the Environmental Information Regulations 2004 and complained that this charge was excessive. The Commissioner's decision is that the Council has satisfied itself that its charges do not exceed a reasonable amount in accordance with Part 2, paragraph 8(3) of the Regulations. Section of the Act/EIR & Finding: EIR r.8 - Complaint Not Upheld.²⁰ Again as in the previous case the considerations of a “reasonable amount” are not documented.

2.4.8.3 Case: Cornwall County Council. Case Ref: FS50075186. Summary: The complainant requested a copy of an approved drawing of a street plan

¹⁹ <http://www.defra.gov.uk/corporate/opengov/eir/pdf/cop-eir.pdf>
²⁰ <http://www.ico.gov.uk/documentUploads/74855%20DN.pdf>

and alleged that the Council wrongly stated that the information specified in their request was not held. The drawing did come into the Council's possession and was subsequently provided to the complainant. The ICO is however satisfied with the Council's assurances that it did not hold the information at the time of its response to the initial request. The complainant lodged an appeal with the Tribunal, which was subsequently dismissed. Section of Act/EIR & Finding: FOI s.1 - Complaint Not Upheld.²¹ The decision issued stated: "The Information Commissioner has approached Cornwall County Council for verification and is satisfied that the information was not held by the Council at the time of the request and, therefore, could not be provided to the complainant", this statement does not give any indication of what effort the ICO made to verify that this information was not held.

2.4.9 During late 2005 and early 2006 the IC made a number of important decisions that set precedents that mark important advancements in enforcing the Act and bringing new information into the public domain. The author wishes to commend the decisions issued in the three following cases:

- Derry City Council February 2006: IC requires the disclosure of the City Airport Agreement with Ryanair
- DFES January 2006: IC requires the disclosure of minutes of senior management meetings and the identities of Civil servants noted at the meeting.
- Bridgend County Borough Council. IC requires the disclosure of a restaurant inspection report.

²¹ <http://www.ico.gov.uk/documentUploads/75186%20DN.pdf>

- The level and depth of the notices issued are also markedly improved compared to earlier in 2005.

2.5 Information notices

2.5.1 A freedom of information request was made by myself to the ICO for details of information notices issued under 51 of the FOIA. By November 2005, 11 months into the operation of FOIA five had been issued to the following public authorities:

- University of Cambridge
- Corby Borough Council
- Hounslow PCT
- NHS Purchasing and Supplies Agency
- East Riding of Yorkshire Council

2.5.2 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 required. The ICO also need to indicate publicly that information notices are being used and in which circumstances.

2.5.3 Section 8 of the Memorandum of understanding between the ICO and Government Departments states that: "The Commissioner will not normally serve an Information Notice under section 51 of the FOI Act on any government Department unless he believes that relevant information is being withheld from him or that there has been undue delay in providing the

information requested. Where the Information Commissioner intends to serve an Information Notice, wherever possible he will inform the Department in advance.” The need for this statement has not been clearly explained by the ICO or DCA.

2.6 Memorandum of understanding and pre-decision notices

2.6.1 The justification for the “Memorandum of Understanding (MoU) between the Secretary of State for Constitutional Affairs (on behalf of government Departments) and the Information Commissioner, on co-operation between government Departments and the Information Commissioner in relation to sections 50 and 51 of the Freedom of Information Act 2000”²² has not been clearly explained in detail by either the ICO or the DCA and practitioners in the other sectors can rightly feel that the playing field is not level.

2.6.2 Evidence indicates that in practice preliminary decision notices have not been widely used. I made an FOI request asking for details of preliminary notices issued and by November 2005 only 2 had been issued (Child Support Agency and the Office of Government Commerce)

3 Requesters’ experiences of the first year of FOI implementation

3.1 I have made many requests to central and local government and have observed many aspects of good and bad practice, plus areas where the weaknesses in the legislation often compound the problem.

²² <http://www.foi.gov.uk/memorandum.pdf>

3.2 Customer Service aspects

3.2.1 The author has experienced a marked contrast between the Central and Local Government in terms of advice and assistance in terms of S16 of the FOIA. Although these comments are generalised the author experienced a much greater willingness in local government to acknowledge requests and quickly make contact, often by telephone to assist in clarifying any aspects of the request.

3.3 Delay

3.3.1 Delay is one of the most common problems cited by myself and other requestors I have come into contact with. The highest delay the author has experienced was a delay of 74 days in a request sent to Department for Constitutional Affairs.

3.3.2 The loophole of allowing public authorities when considering the public interest to extend beyond the statutory 20 working days time limit under S10(3) of the FOIA: "until such time as is reasonable in the circumstances" is vague and very open ended and subject to wide misapplication. For example: the author received the following vague statement from DEFRA: "The Act allows us 20-working-days to respond to your request from the date of its receipt. However, it is occasionally necessary to extend the 20 working day time limit for issuing a response. In this case, I regret that we must extend the time limit for responding by up to 20 working-days", with no further explanation.

3.3.3 The removal of the following statement: “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 lies in respect of an application for exempt information. However, it is recognised there will be some instances where it will not be possible to deal with such an application within 20 working days.” from the S46 Code of Practice in December 2005 has left S10(3) to very open ended interpretation.

3.3.4 The lack of acknowledgement is a commonly cited frustration for requestors – it is often unclear if the authority has received and processed the request. I would highlight the provision in the Irish Freedom of Information Act²³ that states that all requests must be acknowledged within 10 working days.

3.4 Form and format – reasonably practicable

3.4.1 The author has experienced government departments refusing requests in the grounds of form and format without considering the “reasonably practicable” S11(1)c of the Act. Example from received from the Northern Ireland Office: “You also asked for a list of all Freedom of Information requests and releases since January 2005. The NIO does not hold this information in the format you have requested, and to enable the NIO to answer this we would have to create a document to list requests received which is outside the scope of the requirements for us to comply with the Freedom of Information Act.”

²³ The Freedom of Information Act 1997 and FOI (Amendment) Act 2003 (Ireland)

3.5 Cost calculations – users not realising the benefits of records management

3.5.1 Before 2005 the benefits of records management were widely discussed and new records management programmes and systems were implemented. 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. It is only when the complaint reaches the ICO that these issues can then hope to be resolved.

3.6 Application of exemptions – time

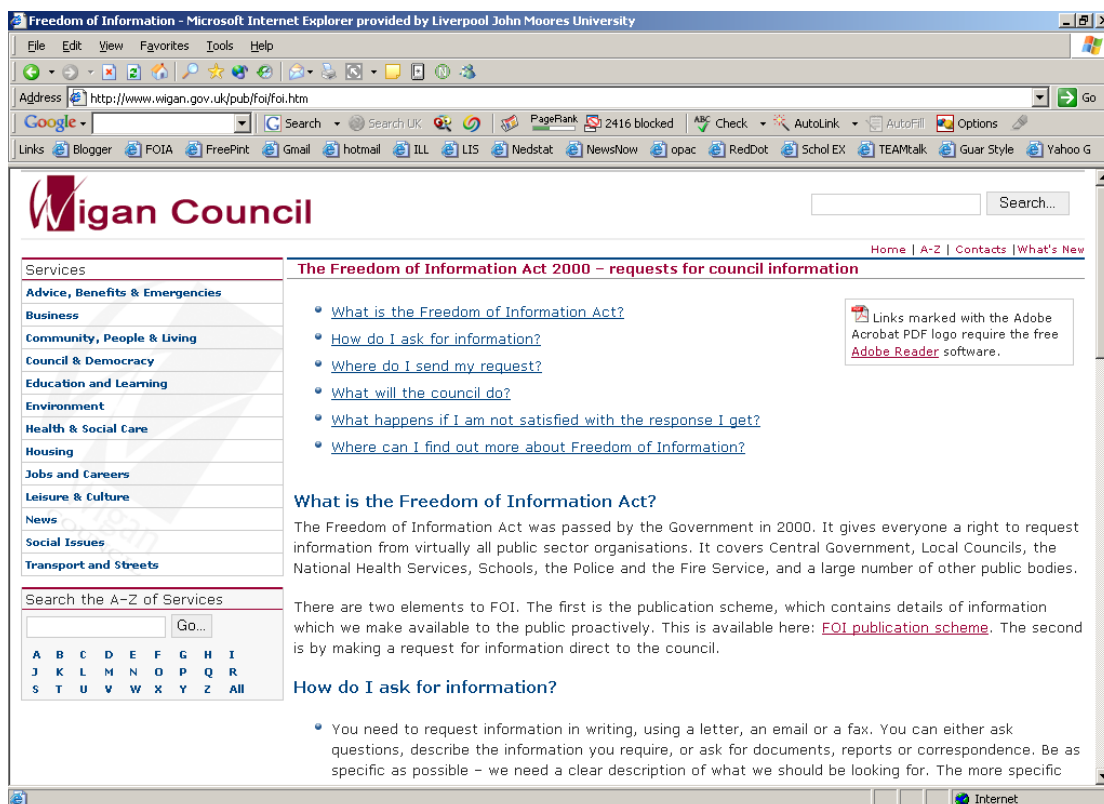
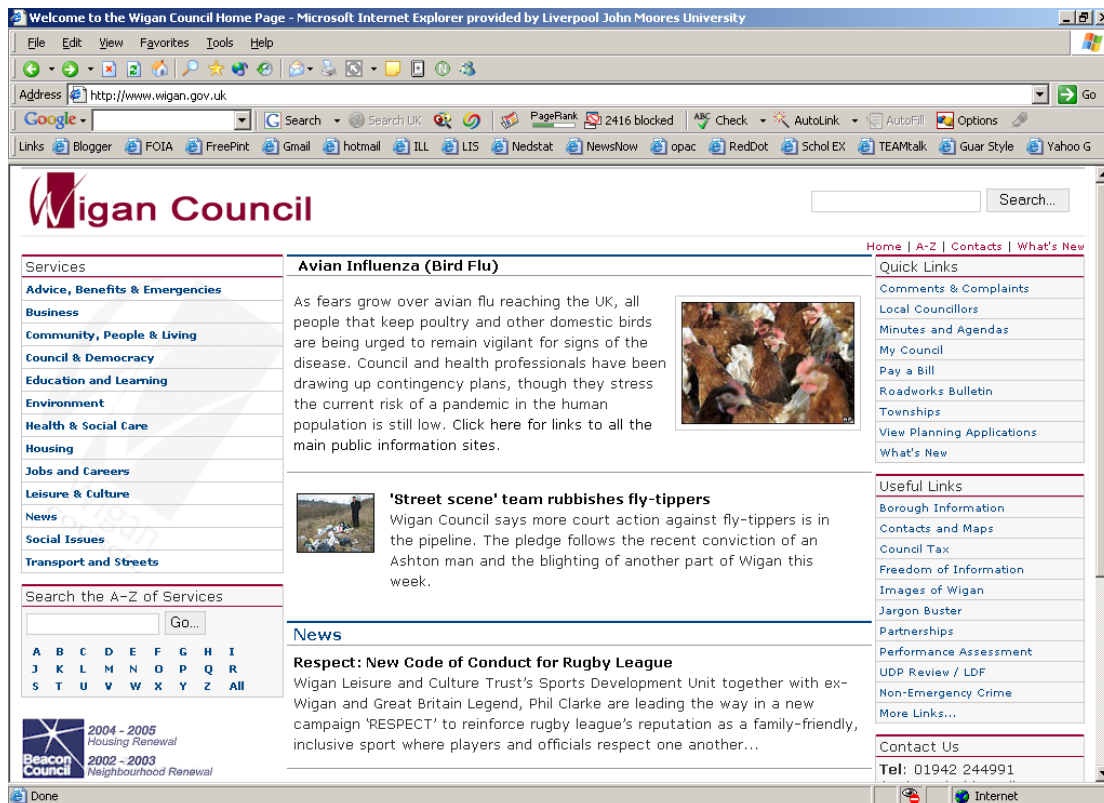
3.6.1 I have had experience and have seen many examples where public authorities apply exemptions uniformly and do not consider the reduction of prejudice over time in such exemptions. An example the author has seen involved the application of the S38 exemption by a police force to cases files from a 1928 murder on grounds of “of the health and safety of surviving family members and/or relatives of the victim” even though both sides have publicly stated they have no objections.

3.7 Internal Reviews

- 3.7.1** The process of internal review can be varied across the public sector with no time limit seemingly set for an internal review as yet in terms of an intervention by the ICO. The FOIA compares badly with the Scottish Act in this respect which states that public authorities must reply promptly and within 20 working days.

3.8 Use of the Internet by public authorities

- 3.8.1** The primary vehicle for the public to find out information about how to make freedom of information requests is the Internet. From the outset some public authorities make the process of guiding the requestor an easy one: explicit links to “freedom of information” from the home page of the website guide the requestor to a simple set of webpages listing the various methods to make a request and guidance that encourages requests and helps the framing of requests. The screen shots below illustrate the approach taken by Wigan Council



3.8.2 The primary method of delivery for publication schemes is the website of the authority: I have conducted research using FOIA requests for log files

detailing the number of page views²⁴. The figures illustrate that publication schemes are used by the public to varying degrees, better in central government, though use in local government is disappointing. To take two examples: the main page of the Cabinet Office publication scheme received approximately 2000 visits a month, this compared to 50 for a Local Council.

3.8.3 Many public authorities have not reviewed their publication schemes since inception, also publication schemes require much greater sign posting for users and greater integration with the contents of websites rather than standing alone.

3.8.4 Despite the advances in e-government that have been achieved in the last few years few public authorities have taken the opportunity to offer e-government style services to users such as online forms and tracking systems. This approach is being considered in other jurisdictions: In 2005 US an Open Government Bill was published proposing tracking numbers and tracking systems via phone or Internet for each FOIA requests.²⁵

3.8.5 There is a lack of a user-friendly citizen portal/gateway on the Internet to assist people to make requests, at present the Directgov website only offers a very basic guide to the Act. An innovative gateway has been provided by Friends of the Earth – who provide an information request generator.²⁶

3.8.6 It is very hard for users to access more than one publication scheme and currently there is no central website to act as a gateway with links to all

²⁴ research paper in progress: due for publication later in 2006

²⁵ Open Government Bill http://www.cornyn.senate.gov/FOIA/files/OPEN_Gov_Act.pdf

²⁶ http://community.foe.co.uk/tools/right_to_know/request_generator.html

publication schemes I consider this a large gap in promoting their use.

3.8.7 I would like to commend the public authorities that have created, via their websites disclosure log or request logs²⁷. Disclosure logs illustrate to the public the information that has been released – illustrating the openness of the authority and will help to answer repeated requests on “hot topics”. They also have a high value in “adding value” to the information released by exposing to a wider audience.

3.8.8 The main issue with disclosure logs is the lack of standardisation and inconsistency. Some authorities will use the log too list all requests received for example Norwich and Norfolk University NHS trust²⁸ lists all requests and even names organisations who have made requests, whereas the Department of Education and Skills²⁹ takes a most recent and most viewed approach that only highlights selected releases. Historians are rightly worried about this selective approach and the issue of what happens to releases once they are removed from the website. It is important that records of all releases are maintained for historical purposes. The possible scenario could arise that information is released, placed on a disclosure log for a year then removed and is not subsequently retained as record to be transferred to the National Archives.

3.8.9 I commend the recently announced funding for the HE sector by JISC for disclosure log templates to be developed for all public authorities in the HE

²⁷ The author maintains a list at: www.foia.org.uk/log.htm

²⁸ <http://www.nnuh.nhs.uk/qa.asp?c=foi>

²⁹ http://www.dfes.gov.uk/foischeme/subPage.cfm?action=collections&i_collectionTypeID=2&filter=latest

sector that will enable consistent indexing and extraction of disclosure log data.

3.9 Public authorities outside the scope of the FOIA

3.9.1 The following bodies are not covered by the Freedom of Information Act 2000 that I would highlight for inclusion under the FOIA:

- Academy Schools
- Energy Utilities
- Transport bodies e.g. Cross Rail

4 The role of the DCA in providing central guidance, including the operation of the central government clearing house.

4.1 Excessive data collection

4.1.1 The data structure for the Clearing House case management system was obtained by Professor Alasdair Roberts from University of Syracuse and is in Appendix B and it illustrates the level of complexity the Clearing House adds to the management of cases. The rationale the following fields in particular needs to be questioned:

- DCA To Process / Case Meeting Required / GICS Press Advisers
- DCA To Process / Case Meeting Required / DCA Press Advisers
- Case Details / Requester's Organisation (Text field)

4.1.2 The Freedom of Information Act is meant to be “requestor blind” so it is unclear why the organisation of the requestor is relevant to central

coordination. It is also unclear why press advisors need to be involved in FOI request cases.

4.1.3 From an answer to a Parliamentary question we know that “The Access to Information Central Clearing House received 3,006 referrals between 1 January and 31 October 2005³⁰. If the assumption is made that the majority of the referrals were made by central government departments this could mean the % of requests referred to central government could be as high as 20%.

4.1.4 At present no reporting data on the clearing house is formally published.

4.1.5 Evidence from academic research conducted on Canada’s Access to Information Act and delay (the most comparable overseas regime with a similar central system of coordination) offers a warning: “Coordination requirements proved to be one of the most critical factors in influencing processing time.”³¹

5 User group and consultation

5.1 The user group set up by the DCA has been less than transparent: at present details are unclear and have not been publicised. Membership is by invitation only: there is no formal application process. I suggest greater transparency is required in order to improve confidence in the Act generally.

³⁰ PQ Asked by Norman Baker MP to Harriet Harman. Holding answer given 7th November 2005. The author has been able to get a copy subsequent paper deposited paper that broke the volumes down by Department

³¹ Roberts, A (2005) What’s wrong with coordination? Open Government: a journal on freedom of information. Vol1 Issue 1. www.opengovjournal.org

6 Frivolous and vexatious requests

6.1 Recent comments made by the Lord Chancellor: “....culture is being undermined by requests under the Act which arguably do not impact so positively - like what a central government department spends on toilet paper or make-up”.³² suggest a highly subjective approach to assessing FOI requests. I would state the need for documented evidence of the scale of the problem cited and would not agree these requests are necessarily frivolous or vexatious. The Act is purpose blind and this type of information could be of value: it is disturbing that requests may be subject of such subjective scrutiny.

³² Lord Falconer speech: TNA - British Academy Seminar: Freedom of information and scholarship - year one London 11 February 2006
<http://www.dca.gov.uk/speeches/2006/sp060211.htm>