

Submission to the Department for Constitutional Affairs

Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

Recommendations

“Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizenry in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental human rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.”

- Regulation No 1049/2001 of the European Parliament and of the Council



Submitted by the
Commonwealth Human Rights Initiative
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Commonwealth Human Rights Initiative

March 2007

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-government organisation mandated to ensure the practical realisation of human rights in the lives of the people in the Commonwealth. CHRI's Access to Information Programme has been working for 10 years to support Commonwealth member states to develop and implement strong right to information laws. CHRI works with governments, intergovernmental organisations, and civil society to promote this right.

This submission responds to the Department for Constitutional Affairs' consultation paper on the Draft *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 07*.

The Consultation Questionnaire

1. CHRI notes that the Consultation Paper provides a questionnaire for respondents to complete and that the questions therein are primarily concerned with how best to implement the proposed amendments to the *Freedom of Information Act 2000*. However, CHRI strongly urges the Government of the United Kingdom to reconsider the proposed amendments entirely. The proposed amendments are not consistent with international best practice across the Commonwealth and CHRI is concerned that they may send a troubling signal to other Commonwealth governments about the UK's commitment to transparency and accountability in public bodies and the importance of public participation in governance. At Annex 1 we have provided a table to show where our comments correspond with specific questions in the questionnaire.

Summary of Major Concerns

2. CHRI is deeply concerned with the Department for Constitutional Affairs' proposed amendments to the *Freedom of Information Act 2000* (FOI Act). If brought into effect, the changes will severely limit the use of the Act and seriously undermine its potential as a tool to ensure governmental transparency and accountability. CHRI also believes that the research on which the proposed amendments are based is problematically biased in favour of lowering costs to the Government as it takes into account only the economic impact of implementing the Act without due consideration to the social impacts of giving effect to the changes.
3. The proposed amendments are based exclusively on the recommendations provided in Frontier Economics' *Independent Review of the Freedom of Information Act* published in October 2006 which occurred as a result of the Government's February 2005 commitment to reviewing the impact of the FOI Act. However, in choosing to conduct an exclusively *economic* impact assessment, any amendments made as a result of the report will necessarily be biased in favour of lowering the costs to the government. Controlling costs should only be a subsidiary consideration in implementing freedom of information and in any case should be prioritised secondary to maximising the Act's effectiveness as a tool for the public good.
4. Essentially, the FOI Act is a *social* tool and at the very least, the government must consider carrying out a comprehensive social impact assessment before any

changes are even hypothesised. A limited focus on just one element of implementation should not be used as the basis for any proposed changes.

5. If brought into effect, the proposals to include the cost of officials' time and to aggregate non-similar requests for the purposes of calculating fees would enable bureaucrats to reject applications on purely procedural rather than substantive grounds, in direct contradiction of United Nations international best practice principles. In accordance with the principle of 'maximum disclosure' it is of fundamental importance that each claim for information be assessed in its own right to decide whether allowing, or denying access to that information would be in the public interest. At all times, the public interest should be the only deciding factor, and never should economic considerations be the central factor when deciding whether information can be released.
6. CHRI would like to strongly remind the UK Government that the right to seek and receive information is a fundamental human right recognised as such in the Universal Declaration on Human Rights (UDHR), in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and has been heralded by the United Nations as 'a touchstone of all the freedoms to which the United Nations is consecrated'. CHRI is concerned that the DCA's Consultation Paper does not fully recognise these principles.
7. The UK is a signatory to both the ICCPR and the United Nations Convention Against Corruption (Article 13). Both of which place unequivocal obligations on the UK to implement effective mechanisms that fully realise the people's human right to information. The proposed amendments would unnecessarily weaken the effectiveness of the UK's FOI Act and would cast doubt on their full commitment to their international human rights obligations.
8. The European Convention on Human Rights (Article 10) and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters place further obligations on the UK to protect the people's fundamental right to seek and receive information.
9. If brought into effect, the proposed amendments to the Freedom of Information Act will severely limit the amount and quality of the information that the public will be able to gain access to, and will consequently disempower them by restricting their ability to scrutinise the UK government and hold them accountable for their decision making.
10. CHRI notes that throughout the Consultation Paper, access to information is considered a 'public service' the delivery of which must be balanced with the provision of other public services. Paragraph 3 of the executive summary reads 'the existing provisions need to be amended to allow public authorities to provide the right balance between access to information for all and the delivery of other public services.' The paper also emphasises the many inconveniences experienced by government officials in performing their duties under the FOI Act. Both of these aspects of the paper strongly imply that the DCA views freedom of information as a discretionary gift granted to the public by a benevolent government rather than a fundamental human right which the Government which has a corresponding duty to protect.
11. CHRI is also concerned that the amendments would disproportionately disadvantage the media and civil society organisations which often request large quantities of

information in order to inform the public about issues that may sometimes be deemed sensitive by government. The amendments would mean that in future, the more politically contentious an item of information was, the less likely that a request for it would be considered under the FOI Act. 'Sensitive' information would require officials to spend more time deliberating the application of exemptions and would be more likely to have to be referred to a senior official.

12. CHRI would also like to express regret over the extremely limited time period initially given between the date the consultation process ends (8th March) and the date the proposed changes will be introduced to Parliament (19th March) and subsequently brought into force (17th April). Such a short time period provides the DCA with very little time to give full consideration to the responses it receives to the consultation paper and suggests that the government has prematurely decided that the amendments will come into effect even before the consultation process is complete. As it is understood that these timeframes are now under consideration, CHRI urges the UK to allow a longer time period for responses to the consultation to be thoroughly considered.

Comments on the proposal to include the costs of officials' time spent examining, considering and consulting in the calculation of the appropriate limit

13. CHRI recommends that the DCA *not* go ahead with the proposed amendment to allow public authorities to include the cost of officials' time spent examining information, consulting with others and considering the applicability of exemptions when calculating the appropriate limit of £600 for central Governmental and £450 for the wider public sector when processing applications under the FOI Act.
14. In accordance with international best practice, governments should provide the public with inexpensive, preferably free of charge, access to information. If fees are charged at all, they should be minimal, covering only the actual costs of reproducing the information requested. This is based on the premise that in a democratic society, all information belongs to the people who have already paid the costs of collecting it and maintaining it in the form of taxes. The government are merely custodians of this information and therefore must only ever refuse access if it is truly in the public interest to do so.
15. The Trinidad and Tobago *Freedom of Information Act 1999* is an example of good practice charging only the amount necessary for reproducing information and no application fee. The *Indian Right to Information Act 2005* charges only minimal fees and waives the costs for members of the public who are living below the poverty line.
16. It has been CHRI's experience across the Commonwealth that burdensome fee provisions can reduce the effectiveness of an FOI law and can be counterproductive to their fundamental goal of promoting open governance. Fees can serve to deter people from applying for information – a fact the DCA have explicitly recognised – and often result in prejudicing the poorer sectors of society who cannot afford to pay the costs the government has set. Ireland provides a good example of the debilitating effect of the imposition of fees. There, the introduction of application fees led to a 75% reduction in the use of the act by the Irish general public.
17. The Consultation Paper openly acknowledges that the amendments have been proposed in order to discourage certain groups and individuals from using the Freedom of Information Act. Paragraph 12 describes the 'small percentage of requests [that] place disproportionate resource burdens on public authorities' and

paragraph 13 describes 'a small number of regular users [who] account for a substantial proportion of the overall costs of delivering Freedom of Information'.

18. The Frontier Economics report on which the recommendations are based, divide these applicants into three main categories: 'vexatious requestors', those who make requests that are 'not in the spirit of the Act' and specifically the media and civil society organisations. The report claims that 'Journalists make up a significant proportion of the serial requestors identified. Requests from journalists tend to be more complex and consequently more expensive.'
19. The open acknowledgement that journalists and the media would be amongst those who will be hardest hit by the proposed amendments and indeed, that this is the intention behind them, is deeply worrying. An independent and informed media is an bulwark of a truly functional democracy as the media often perform the function of being a 'watchdog' for the public at large. As such, it is essential that they are not prevented from gaining access to information simply because it is politically sensitive or would require much deliberation from public officials before the information is released. Throughout the Commonwealth, supporting an open, professional and active media has been recognised as a key contributor to an environment of good governance and accountability. To deliberately attempt to undermine the media's ability to report on government activities sets a troubling precedent for other Commonwealth member states.
20. The more time it takes for an official to deliberate or consult on whether a particular piece of information is exempt under the law, the more likely it will be that the information is politically contentious or likely to cause embarrassment to the Government. If after much deliberation or consultation it is decided that an exemption does not apply, or that the public interest in releasing the information outweighs the benefits of keeping the information secret, it is imperative that this information is indeed released. The proposal to include the cost of officials' time in deciding whether or not an application should be accepted or rejected would ironically undermine this principle by ensuring that any claims for 'sensitive' information never even got to the deliberation stage at all.
21. The Frontier report's examples of requests that were deemed to place a disproportionate burden on the delivery of FOI are particularly enlightening. The two examples that occurred during the week in which the study was conducted¹ are both requests for significant information that it would certainly be in the public interest to release. The first concerned the approval dates and training received by doctors and was expensive because it involved consultation with an external contractor. The second concerned the impact of the reduction in carbon emissions on the economy.
22. In contrast, the examples given of 'frivolous' or 'vexatious' requests are one-off applications for small amounts of data. Although providing such information as 'the total amount spent on Ferrero Rocher chocolates in UK embassies' may seem burdensome and unnecessary to public authorities, the proposed amendments are extremely unlikely to result in a significant reduction in this type of request. As the information is unlikely to relate to any exemptions and, being politically neutral, is unlikely to be referred to a high ranking official, applications such as these will remain untouched by the proposed amendments.

¹CHRI believes that the time period Frontier Economics were given to carry out this piece of research was extremely limited and the data gathered is therefore insufficient to be used as the basis for amendments to the Act.

23. Further, the FOI Act already has a provision that prevents the Government from having to respond to 'vexatious' requests. Section 14 states that 'Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious' even though it provides no definition of what 'vexatious' would mean for the purposes of implementing the Act.

Comments on the proposal to aggregate non-similar requests received within a 60 day period

24. CHRI is also deeply concerned by the proposal to aggregate non-similar requests received within a 60 day period, and is particularly concerned that this applies not only to individuals but also to 'those acting in concert or in pursuit of a campaign'. Not only would these changes disproportionately target the media and civil society organisations who have a legitimate role in keeping a check on government activities, but they presuppose the 'reason' or 'intent' behind a request and are therefore in direct contravention to international best practise.

25. International best practice requires that applicants should not have to provide a reason for requesting information when submitting an application. The UK Act recognises this principle when it states in section 8 that an applicant need only provide his/her name, contact address and a description of the information required. In aggregating requests from those who appear to be 'acting in concert or in pursuit of a campaign', the public authority would be hypothesising the intention behind requesting the information. Basing a refusal upon such a hypothesis would be an illegal and illegitimate reason for denying the public access to information.

26. CHRI believes that the current UK practice of aggregating similar requests that are received within a 60 day period is already out of accord with international best practice and can see no legitimate justification for the aggregation of non-similar requests as well. Individuals and organisations should be able to exercise their right to information freely and without unnecessary obstruction from their government.

27. The 60 day time period is particularly long and will seriously affect the ability of the media to work to the tight deadlines necessary for their work. The media and the public should never have to rely solely on the information the government chooses to give them; this is the very rationale behind the freedom of information legislation.

28. The DCA highlights a number of factors that it claims will serve to mitigate the risks involved in rejecting of a high number of 'complex' requests. Paragraph 42, for example, suggests that a reasonableness test will be applied when deciding if it would be appropriate to aggregate requests to calculate the appropriate limit. However, CHRI strongly believes that these factors alone will be insufficient to ensure that the public interest is protected.

29. For example, the 'level of disruption to the public authority[...] that would be caused by answering a series of non-similar requests' (paragraph 30) is a subjective and non-measurable test of proportionality which cannot be applied fairly and consistently across all public authorities.

30. Consideration of whether the individual is making the request for personal or business related interests is also an irrelevant factor. As described in paragraph 5 it is against international best practise for a public authority to take into account the reason behind a request when carrying out their duties under the Freedom of Information Act.

31. For this reason it is also not acceptable for the public authority to consider an individual's or group's patterns of using of the FOI Act in the past. This would constitute penalisation of those who have exercised their right to information, a move which would entirely undermine the premises on which the law was enacted.
32. Paragraph 26 claims that the risk of a high number of complex requests being rejected will be mitigated by the fact that consideration time will only be included for the purposes of determining the public interest or application of exemptions. This provision is irrelevant as it presupposes that requests that may involve the application of exemptions will be somehow less 'legitimate' than other requests that would involve only time spent on such activities as 'press briefings' (paragraph 27).

CHRI's Recommendations

33. **Conduct a thorough social impact assessment.** CHRI recommends that a thorough social impact assessment is conducted that takes into account the social benefits gained from the implementation of the Freedom of Information Act 2000. The section entitled 'Costs and benefits – sectors and groups effected' is insubstantial and does not cover the issues it claims to in any degree of depth. Before any amendments to the Act are considered their potential social impact must be assessed in detail in consultation with a wide variety of FOI users – including the media and civil society organisations.
34. **Consider training staff to adopt a more cooperative approach towards applicants assisting them to narrow their requests** CHRI commends the Government's commitment to continue providing advice to applicants to educate them on the FOI Act and assist them in submitting their requests. Rather than taking action that could be misconstrued as a drive to protect the bureaucracy or could threaten to alienate the public from the government, the DCA should invest more resources in training programmes that build the capacity of public authorities to provide assistance to the public. At all times, the emphasis should be on empowering the public to exercise their right to information more effectively.
35. **Encourage a greater emphasis on proactive disclosure.** CHRI commends the suggestion in paragraph 48 that public authorities should place a greater emphasis on proactive disclosure and recommends that the Government consider disclosing more information in the absence of requests. This would significantly lower the costs of implementing the FOI Act, without placing unnecessary restrictions on the amount of information and frequency of requests applicants are allowed to make.
36. **Do not charge for time taken by staff to consider requests.** Charging for staff time will substantially add to the cost of making a request and in reality, will severely curtail the amount of information released to the public. In particular, in a bureaucracy that has already exhibited its resistance to disclosing information, such provisions could easily result in prohibitive costs if bureaucrats take their time when collating information in order to increase fees above the limit. The reality of course, is that the most sensitive information requested will request the most senior officials to make a decision, which will incur the highest "staff fees" – with the result that such applications will be rejected for process reasons before they can even be considered on their merits. This is deeply troubling considering the importance of the new FOI law to ensuring public accountability at the highest levels of government.

37. Official work that involves implementation of the freedom of information should be viewed as part of the overall day-to-day responsibilities of government officials and should not attract extra charges. Public taxes should cover the costs of information management and disclosure. *Not* going ahead with the proposed amendments would be a clear message that the Government is committed to transforming the cultures of secrecy that continue to exist within the bureaucracy and being open and accountable.
38. **Do not aggregate changes for multiple requests from single institutions or applicants.** This move is completely contrary to best practice throughout the world and deeply troubling in its apparent intent to discourage regular requesters – such as media organisations, journalists, academics and MPs – from making applications. There appears little justification for permitting the rejection of multiple requests simply because they come from the same applicant. In any case, CHRI suspects that this will only lead to unnecessary machinations by requesters to ensure that different people are named on applications to practically circumvent such an onerous and unnecessary procedural requirement.
39. **Limit the amendments.** Although CHRI strongly urges the Government to make no amendments before a thorough social impact assessment is commissioned, if the Government is still minded to make the amendments, the following suggestions may assist in minimalising their negative impact:
40. **Reduce the time period within which requests can be aggregated from 60 to 20 days** corresponding to the time allowed for a request to be processed under the Act. This would serve to regulate the volume of information an applicant could request at one time and would be more inline with the Act's current provisions.

Annex 1 – Response to the Questionnaire

| QUESTION NUMBER | CORRESPONDING PARAGRAPH IN CHRI'S SUBMISSION |
|---|---|
| <p>Q1. Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (i.e. a 'ready reckoner') for how long a page should take to read be included in the Regulations or guidances?</p> | <p>CHRI rejects the idea of amending the FOI Act in order to impose greater costs on the requestor.</p> |
| <p>Q2. Does the inclusion of thresholds in the Regulations provide sufficient flexibility, taking into account the differing complexity of requests received?</p> | <p>CHRI rejects the idea of amending the FOI Act in order to impose greater costs on the requestor.</p> |
| <p>Q3. Are the thresholds the right ones to make sure that balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?</p> | <p>CHRI rejects the idea of amending the FOI Act in order to impose greater costs on the requestor.</p> |
| <p>Q4. Are the Regulations as drafted the best way of extending the aggregation provision?</p> | <p align="center">See paragraphs 24-32</p> |
| <p>Q5. Does the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the Regulations or can this be dealt with in the guidance?</p> | <p>CHRI rejects the idea of amending the FOI Act in order to impose greater costs on the requestor.</p> |
| <p>Q6. Are these the right factors?</p> | <p>CHRI rejects the idea of amending the FOI Act in order to impose greater costs on the requestor.</p> |

Q7. What guidance would best help public authorities and the general public apply both the EIRs and the Act under the new proposals?

CHRI rejects the idea of amending the FOI Act in order to impose greater costs on the requestor.