

NCVO Response to the Independent Commission on Freedom of Information Call for Evidence

Established in 1919, the National Council of Voluntary Organisations (NCVO) represents over 11,000 organisations, from large ‘household name’ charities to small voluntary and community groups involved at the local level. NCVO champions voluntary action: our vision is a society where we can all make a difference to the causes that we believe in. A vibrant voluntary and community sector deserves a strong voice and the best support. NCVO works to provide that support and voice.

Since the Freedom of Information Act’s (FOIA) implementation in 2005, charities have found Freedom of Information (FOI) requests to be a versatile and powerful tool in allowing them to better understand and support their beneficiaries. The voluntary sector has proven success in using FOI requests to collect and bring together fragmented data from across public authorities, which allows them to highlight and advocate on issues where their beneficiaries are not being best served. Further restrictions on exemptions to the FOIA, and the possibility of charges for FOI requests, would dramatically reduce the voluntary sector’s ability to understand how their beneficiaries are being served by public authorities and how they can better hold them to account.

In its post legislative scrutiny of the FOIA, the Justice Select Committee concluded that the increased openness, transparency and accountability of public authorities brought about from the Act has led to a significant enhancement of our democracy¹. NCVO believes that the FOIA is crucial for enabling the UK to be one of the most open and transparent governments in the world and would view any introduction of charges, or further exemptions, as a substantial step backwards for the government’s transparency agenda.

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

NCVO accepts that public officials need to have a ‘safe space’ for policy development, but believe that the current protections offered by the Freedom of Information Act are sufficient.

When considering information withheld under sections 35 and 36, the Information Commissioner will apply a public interest test. The call for evidence suggests that this test creates uncertainty about which information may be suitable for release, which could in turn lead to less frank

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

recording of views. In its post-legislative scrutiny report the Justice Select Committee stated that, if a 'chilling effect' did exist, then the mere risk that information could be disclosed might be enough to create behavioural changes in policy makers, but, crucially, that no evidence of a chilling effect was identified².

Furthermore, the annual freedom of information statistics for central government in 2014 show that the percentage of cases where section 35 and 36 exemptions were made and requester complaints were then upheld by the Commissioner was 2.75%³. This low percentage suggests that central government departments seem to understand well where the exemptions should be applied. It could be the case that a small number of high profile cases are disproportionately affecting the perceptions of the FOIA within government.

In 2009, research from the Constitutional Unit at University College London found no evidence that the FOIA was actually impacting on the decisions of government, and that no actual policy decisions had changed because of FOI concerns⁴. NCVO believes that without a stronger case that a 'chilling effect' is affecting government policy practice and outcomes, the public interest test for sections 35 and 36 should be maintained, with the Ministerial veto available in exceptional circumstances as a back stop.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

Cabinet responsibility is a specific example of deliberative space. As above, NCVO considers the current system to be adequate for information relating to the process of collective Cabinet discussions and agreement.

A study into FOI in 2010 found that there were actually few requests for Cabinet information, and that leaks are a far more common cause of Cabinet discussions coming into the public eye⁵. The UK Government has only used the Ministerial Veto 7 times, with 4 cases relating to Cabinet discussions. It seems that its relatively infrequent use to protect information of this kind demonstrates that there is little threat to Cabinet discussions.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423487/foi-statistics-oct-dec-2014-annual.pdf

⁴ <https://ico.org.uk/media/about-the-ico/documents/1042359/ucl-report-government-policy-in-the-context-of-foi.pdf>

⁵ Hazell, Robert, Worthy, Ben and Glover, Mark (2010) Does FOI Work? The Impact of the Freedom of Information Act 2000 on British Central Government. London: Palgrave Macmillan

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

The voluntary sector plays a key role in providing a voice for disadvantaged and marginalised communities. Being able to understand the risks that policy choices present for these groups is a crucial advocacy tool.

Risk assessments can contain material that covers a wide range of exemptions, not just sections 35 and 36, but also information that may be protected due to security concerns or commercial interests. Because risks assessments can cover such a wide range of government material, any further protections for risk assessments would be incredibly difficult to legislate for and could create a very broad area for exemptions that would cause additional confusion.

As with information relating to internal discussions and Cabinet material, it seems that a small number of high profile cases are altering the view of how the FOIA is working in relation to disclosing risk assessments. There are few instances where the release of risks assessments has been problematic and NCVO therefore believe that the protections assured by the Act are sufficient.

Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

NCVO believes that the ministerial veto is an adequate safeguard for the protection of sensitive information in exceptional circumstances. As the ministerial veto has only been used in 7 cases since the Act came into effect in 2005, it doesn't seem to be problematic.

The Justice Select Committee understood the confusions involved with the veto and the application of the word 'exceptional'. However, after considering appropriate solutions to the issue, they concluded that the FOIA had provided one of the most open regimes in the world for access to information, and therefore considered the veto an appropriate mechanism to protect policy development at the highest levels⁶.

NCVO agrees with the Justice Select Committee and also believes that the veto is a more appropriate and proportionate backstop for sensitive information than turning sections 35 and 36 into absolute exemptions would be.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

NCVO has heard from a number of our members about the process involved in appealing. Most frequently, charities have had to ask for internal reviews when requests took longer than the 20 allocated days. On occasions requests from our membership have taken up to 100 days, and often

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

with no explanation of why. Without a named contact in an FOI team, it is difficult to hold anyone to account and find out why requests have taken so long to process.

The Government recently published proposals to introduce fees into Tribunals, including appeals for the First-Tier Tribunals against the Information Commissioners' FOI decisions. NCVO believes that this is not appropriate for FOI appeals, as unlike other tribunal proceedings, FOI appeals seek to promote public interests rather than private interests. The introduction of fees to appeals for Employment Tribunals has dramatically cut the number of unfair dismissal claims. It is likely that the introduction of fees for FOI Tribunals will similarly affect the number of appeals, and therefore affect the provision of information the public and the voluntary sector has access to.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

NCVO acknowledges that the public sector as a whole faces significant pressures on how they spend public money. When assessing the cost of FOI requests it is important to put them in context. It is estimated that central government departments spend less than 2% of their external communication activities on complying with the FOIA⁷. This is a small price to pay, particularly when the public benefits of this spend are also taken into account. These can be difficult to quantify but should not be ignored for this reason.

Charities use FOI requests in a number of different ways, from building up research to understanding how decisions have been made on issues relating to their beneficiaries. In particular, our membership have told us that a substantial part of their FOI activity comes from asking for already held information because data is not routinely published or easily accessible. This is especially true for health and social care sectors. NCVO believes that better routine publication of data already held by authorities would significantly reduce the number of FOI requests made and in turn the burden placed on public authorities.

Mind, the national mental health charity, told us they frequently send FOI requests to local authorities, NHS trusts and national bodies to access information about mental health spending, services and welfare, in order to gain a nationwide picture of mental health. In 2014 and 2015 they sent FOI requests to all local authorities with public health responsibilities, asking what proportion of public mental health budgets were spent on mental health. Mind had to submit FOI requests in order to access this information because currently 'public mental health' is classified as miscellaneous in reporting to the Department of Health, and grouped with 14 other health areas. Through the data they received, Mind were able to identify a huge underinvestment in public mental health, which accounts for only 1% of public health budgets, and have since been able to raise the profile of the importance of public mental health.

⁷ <http://www.foiman.com/archives/2072>

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Other national health and social care organisations have told us they have faced similar obstacles when trying to understand spending in their health areas. Often, where data is openly published by an authority, it's not broken down into different spending areas, which makes it impossible to determine the national picture. As this activity makes up a large proportion of the use of the FOIA, a better routine publication of detailed and useful data would significantly reduce the number of FOI requests made and in turn the burdens placed on public authorities.

At the same time, proactive and reactive transparency should not be seen as mutually exclusive. Open accessible data does not render FOI redundant, as the decision of what information the public wants to see is not for public authorities to decide. Both tools should be used together to ensure the transparency and accountability of government, but better and more accessible open data would reduce the burdens placed on public authorities by FOI requests. It's also important to note that with or without the FOIA, interest in public authorities' activities and requests for information will always exist - the FOIA simply grants a right to request this information.

NCVO believes that any attempt to create charges for submitting FOI requests would be a step backwards for the openness and transparency of the UK. A small flat fee would not cover the cost of responding, but rather act as a deterrent for reasonable FOI requests. Because of the fragmented state and poor practice in routinely published data, charities must routinely submit FOI requests to public bodies nationwide to determine the national picture. Any charges, whether flat fees for submitting or charges based on staff time would quickly run into thousands of pounds. This would reduce charities ability to access information that helps them better understand and support their beneficiaries and divert charitable funds to paying for information that should be freely available.

When a €15 application fee was introduced to Ireland for their freedom of information act in 2003, the usage of the Act dropped quickly and dramatically. In the first year of the fee's introduction, the total number of requests fell by over 50%, with the Information Commissioner admitting that the introduction of fees 'had an impact on the operation of the Act far beyond what I believe could have been envisaged...'⁸. Ireland's fees for requesting information were later dropped.

⁸ <http://www.oic.gov.ie/en/Publications/Special-Reports/Investigations-Compliance/Review-of-the-Operation-of-FOI2003/Up-front-Fees.html>