



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

Freedom of Information Act 2000: Designation of additional public authorities

Response of the Information Commissioner

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

Comments: The Commissioner supports extending the coverage of the Act as set out above. The Freedom of Information Act has been a success since its implementation in 2005, it is estimated that over 300,000 requests have been made. The public have made great use of their new rights and in the majority of cases responsibly. The Act has already seen great benefits in terms of new information reaching the public domain via FOI requests and new proactive approaches taken by public authorities. The Commissioner has observed that there is public interest in extending the Act beyond its current coverage and therefore supports extending in principle, but cautions that the benefits of certain coverage and the timing of introduction requires careful consideration. He would like to highlight potential resource implications if the Act's extension increases the number of complaints received with the effect of increasing the complaints backlog.

The Commissioner also observes the fast pace of change in the delivery of public functions and services in terms of public and private sector remits, for example in the Health Service. It is vital that the FOI Act keeps pace with these changes in order that public confidence in the regime is maintained and compliance with right to know legislation cannot be reduced by funding external organisations to carry out functions or contracting out. Where public authority functions are transferred to other organisations in principle FOI obligations should follow.

It is still comparatively early days in the life of the legislation. An incremental approach is far more attractive to the Commissioner than a "big bang", starting with clear certainty on particular groups of organisations, considering further additions if appropriate at later stages.

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

Comments: The Commissioner's preferred option is number 5. A staged approach is preferable because it will enable the Commissioner to offer advice and guidance to the organisations that will become subject to the Act in advance. Lessons can be learned at the end of each wave that should enable the Commissioner to assess the impact and develop further guidance to proactively deal with potential problems. New organisations added under section 5 may require advice and guidance from the Commissioner to develop publication schemes and request handling procedures.

The Commissioner can also draw upon experience of assisting public authorities in their preparation for the 2005 implementation. There should be an aim for high standards of compliance from the start and this should result in low numbers of complaints. Early involvement of the Commissioner with the new organisations will be a key factor in achieving this.

Whilst adding new organisations may cause an additional burden the Commissioner considers this will be manageable from his perspective as the regulator if option 5 is followed and there is a satisfactory response to the bid he has made for additional resources. The Commissioner has stabilised and started to reduce the backlog of FOI complaints and aims to continue this reduction over the next two years. It is important for public confidence in the FOI system that any improvements in delivery from the ICO are not completely negated by the impact of new bodies being added. Should the addition of new organisations lead to a significant increase in the number of complaints beyond the very short term the Commissioner may need seek further resources to support this additional work.

The Commissioner would want to make further comments about the potential impact of section 5 orders once the likely scope is known including the nature and estimated numbers of additional organisations covered.

Whilst supporting extending coverage of the Act the Commissioner would want to highlight the lack of clarity in the current definition of public authorities caught by the Environmental Information Regulations. The Commissioner would therefore want to emphasize that any section 5 orders made must be clearly written, with tight descriptions. The ambiguous descriptions in the EIR have, in the Commissioner's experience led to complaints that are difficult to adjudicate on. If it is difficult to interpret section 5 orders, more complaints may be received by the ICO and may be resource intensive to adjudicate, this will not be of benefit to the public or the organisations involved.

A further potential impact is highlighted by the case recently heard by the Court of Appeal (Sugar), on the BBC's position as a public authority under FOI. If an organisation is not found to be a public authority in respect of the information requested the only route of appeal from the Commissioner's finding is via judicial review. If this process was to be repeated on a regular basis due to unclear wording in section 5 orders there would be a considerable financial burden on the ICO to defend these cases.

The Commissioner's views on the other options are as follows:

Option 1 – given the public interest the Commissioner set out in his answer to question 1, he believes it is important that some action is taken.

Option 2 and 3 – these options are likely to lead to less clarity on the position of such organisations, may not increase public confidence and may lead to complaints being made to the Commissioner that he cannot adjudicate on and have to be dismissed (self regulation/access obligations in contracts).

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

Comments: The Commissioner believes in most cases this will be an essential factor. However, he has evidence of public interest in FOI coverage of a number of organisations that do not receive a form of public funding. He has listed them below to illustrate that public funding may not be an essential criterion in all cases.

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

Comments: The Commissioner does not offer a firm view that these organisations should be covered by the Act but would like to highlight that he has received complaints and enquiries about the following organisations:

- Press Complaints Commission
- Financial Ombudsman Service
- Royal Institute of Chartered Surveyors
- ICTIS (now PhonepayPlus)
- Financial Reporting Council

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

Comments: In the Commissioner's view this is an appropriate consideration. Careful consideration should be made as to how any information held by organisations added will enhance transparency and accountability versus any potential burden. He believes that when factors such as large amounts of public funding or contracts, complexity of relationship, delivery of crucial functions or services are present the public interest would be served by adding under section 5 as the further information available should increase public understanding and improve accountability.

The Commissioner has handled many complaints that concern information held by public authorities about organisations arguably carrying out public functions or providing services under contract. In many scenarios the Commissioner observes that correct interpretation of section 3(2)(b) of FOI Act (information is held by another person on behalf of the authority) should lead to information about bodies carrying out public functions or delivering contracted out services being caught by the Act. The Commissioner offers decision FS50090632 (Transport for London) as an example. When deciding complaints on these matters the Commissioner makes careful consideration of contextual information about the relationships with third parties holding information (e.g. contracts). In many cases the Commissioner has found that comprehensive information about the relationship with and performance of the other organisation is held by the public authority. Adding organisations under section 5 in some circumstances may add little value to what can already be accessed via the Act.

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

Comments: The factors listed are all valid in the Commissioner's view and it would be relevant to consider them when determining if organisations should be added.

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

Comments: The Commissioner does agree that FOI Act could be extended to contractors as set out above. The Commissioner qualifies this with reference to the comments above in answer to question 5 based on his experience of handling complaints during the first three years of operation of the Act. The Commissioner has handled many complaints relating to public sector contracts, many have resulted in information reaching the public domain after being withheld under exemptions under sections 41 and 43 of the FOI Act.

The Commissioner has also received complaints that have argued that the following types of public sector contractor should have provided information under the FOI Act:

- Health Services
- Pensions services
- Procurement services
- Qualification assessment services
- Parking services

The Commissioner has also received similar complaints under the Environmental Information Regulations related to:

- Environmental consultancy services

As noted in response to question 5 the Commissioner would suggest that careful consideration needs to be made about the value that can be gained from adding organisations against what information is already accessible via the Act. The Commissioner considers that a bar set in the region of £1million for public sector contracts might provide a suitable starting point for considering whether public sector contractors are brought within the Act.

As highlighted in answer to question 2 the Commissioner would stress the importance of precision in describing any class of authorities intended to be brought into the Act by any section 5 order and, where relevant, the proposed information in respect of which an organisation is considered to be a public authority.

The Commissioner would also like to highlight the potential difficulties in covering organisations that have both public sector and private sector clients e.g. generic consultants, where it may be difficult to apply the wording of any section 5 order.

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

Comments: The Commissioner agrees with the scenario in paragraph 34 that information related to that aspect of administration would be included in the function. In scenarios where the sole or dominant source of funding is public money the Commissioner would accept that information relating to all the examples of

administrative areas given should be subject to FOI. The Commissioner believes it is important that any orders designating organisations should be clear and supporting guidance clearly sets out likely interpretation. If the boundaries are unclear this may confuse those making requests and not achieve the benefits sought by adding the organisations under section 5.

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

Comments: In responding to this question the Commissioner has drawn upon evidence from the first three years of operation of the FOI Act and where relevant has given examples of types of organisations. The Commissioner has drawn upon evidence from complaints and enquiries received. The Commissioner also makes a number of observations where clear discrepancies are apparent when comparing across or within sectors. The Commissioner has set out his response under a number of headings.

Bodies funded by more one public authority , wholly owned by more than one public authority or jointly owned with a private company

The Commissioner has received a number of complaints about bodies in these types of scenario. The definition in section 6 of the Act does not include companies that are wholly owned by more than one public authority. The Commissioner observes that organisations owned by more than one public authority e.g. a consortium of local authorities, or a local authority and an NHS Trust are not currently caught by the Act. It is not clear what policy reasons exist for their omission.

The Commissioner has received complaints about the following organisations:

- Speed camera partnerships
- Culture Companies
- Science promotion companies
- Local Safeguarding Children Boards
- Airports

Independent officials/individuals/organisations

The Commissioner has received complaints about the following organisations:

- Parking adjudicators
- Casino Advisory Panel – panel of individual appointees who are independent of the Dept for Culture, Media & Sports

- Local Medical Committees
- Association of Local Councils – constituent members are public authorities

Private companies arguably providing services under contract

The Commissioner has received complaints that have argued that the following types of public sector contractor should have provided information under the FOI Act.

- Health Services
- Pensions services
- Procurement services
- Qualification assessment services
- Parking services

Private companies arguably exercising functions of a public nature

The Commissioner has received complaints about the following organisations:

- Housing Associations, registered social landlords
- Water companies
- Learning Trusts
- Train companies
- Bus companies
- Network rail (Under Environmental Information Regulations)
- Port of London Authority (Under Environmental Information Regulations)

Charities

The Commissioner has received a number of complaints that argue certain charities are public authorities under the FOI Act. The Commissioner would distinguish between charities that receiving funding for their work as a means of support and those who are actually contracted to deliver services for the public authority.

Other observations of the Commissioner

There is also evidence of public interest in a number of different types of organisation being added under the Act. The Commissioner has received enquiries about these organisations or has formed the view (based on casework) that these organisations should be considered for addition:

- Care homes

- Energy companies
- Olympic Lottery distributor
- Toll Road Companies
- Waste Disposal companies
- Academy Schools
- Private Prisons
- New Deal training providers

Additional comment

The Commissioner also wishes to make the following observations on implications of organisations being brought within ambit of the Act via a section 5 order:

- Interaction with the Data Protection Act – public authorities subject to the FOI Act have additional responsibilities to handle requests for category (e) personal data as defined in section 1(1) of the Data Protection Act (amended via section 69 of the FOI Act). Any impact assessments on adding organisations under section 5 may need to consider the impact of increased numbers of category (e) subject access requests.
- Regulation 2(2)(ii) of the Environmental Regulations excludes “any person designated by Order under section 5 of Act”. The Commissioner observes that this could lead to a situation where for example a body such as Network Rail who has important role relating to the environment could be covered by the FOI Act but not by the Regulations. This would lead to requests for environmental information being handled under FOI rather than EIR. In many cases the difference between the legislation can be important, for example in respect of information relating to emissions, when a number of the EIR exceptions are disapplied. The Commissioner would therefore suggest that this provision in the EIR is also reviewed when a suitable opportunity arises.

RICHARD THOMAS
INFORMATION COMMISSIONER
1 FEBRUARY 2008