



INFORMATION COMMISSIONER'S RESPONSE TO CONSULTATION ON DRAFT FOI AND DP (APPROPRIATE LIMIT AND FEES) REGULATIONS 2007

Introduction

1. This paper is the ICO's response to the DCA Consultation Paper 28/06 issued on 14 December 2006. It makes a number of key points:
 - **a more robust application of section 14 (exclusion of vexatious requests) would, to a very significant extent, address the mischief at which the new cost proposals purport to be directed;**
 - **there are grave doubts about the extent to which the aggregation of non-similar requests would be workable in practice, particularly if determined applicants took steps to circumvent the new provisions;**
 - **the proposed concepts of reading, consultation and consideration time, will present very real difficulties for challenge and adjudication;**
 - **the proposals will introduce new layers of procedural and bureaucratic complexity. There is likely - as feared by Frontier Economics - to be "a substantial increase in requests for internal review and appeals to the ICO, with a substantial increase in costs".**
 - **there will certainly be a surge of difficult procedural complaints to ICO which can be predicted to start no less than two months after the new Regulations have been implemented. Unless further resources are made available, regrettably, the net effect – at least for the forthcoming year - has to be the prospect of more time taken to resolve difficult cases, an increase rather than a reduction in the backlog of complaints and the diversion of resources onto complaints about costs rather than substantive issues of disclosure of official information in the public interest.**
2. The ICO accepts that the policy content of this proposed legislation is a matter for government, subject to the necessary Parliamentary approval. In its role as adjudicator on complaints made under the FOI Act and promoter of good practice by public authorities, the ICO is primarily concerned with the practicality of implementing the proposed measures and their likely practical effect.

3. The ICO notes that the stated intention is to target the small percentage of requests and requesters that impose the highest burdens on public authorities. Such an approach encourages public authorities to look primarily at the cost of compliance and the identity of requester rather than the public interest in the disclosure of the information sought.
4. By way of general comment, the ICO remains very surprised that public authorities are not using the provisions of section 14 of the FOI Act more frequently or more effectively. This section removes the obligation on a public authority to comply with a request if it is vexatious. The ICO and the DCA have both issued guidance for public authorities on the application of section 14. The ICO has issued decision notices in relation to complaints on this point upholding the decisions of a number of public authorities that requests were vexatious (Birmingham City Council - ICO ref: FS50078594; Warwickshire County Council - FS50069395; Sussex Police - FS50099691; Cabinet Office - FS50099755; London Metropolitan University - FS50085398; Crown Prosecution Service - FS50130467; National Archives - FS50102437; Treasury Solicitors - FS50105213).
5. The ICO believes that a more robust application of section 14, in line with the published guidance and decision notices, would, to a very significant extent, address the mischief at which the new cost proposals purport to be directed.

THE PROPOSALS

AGGREGATION

6. The ICO has grave doubts about the extent to which the aggregation of non-similar requests would be workable in practice, particularly if determined applicants took steps to circumvent the new provisions. Public authorities and the ICO already have experience of requests being made by the same people using different addresses. Many requests are handled electronically and the actual identity of a requester using an email address can often not be linked to the same person making a request from a postal address. It would also be very easy for requesters to find proxies to make requests on their behalf.
7. Given that those targeted are identified in the consultation paper and in the Frontier Economics report as “experienced” users of the Act, many of whom have a professional interest in obtaining information from public authorities, it seems likely that they would be quick to identify legitimate means of circumventing the aggregation rules. Public authorities would find it difficult to identify and challenge such actions. Indeed doing so would in itself be a time consuming business. In addition, aggregation can – and doubtless will - be challenged by way of an internal review and a complaint to the ICO.
8. The aggregation proposals are not tempered by any duty to consider the public interest in disclosing the information requested.

ESTIMATING WHETHER THE COST LIMIT HAS BEEN REACHED

READING TIME

9. There is an inherent difficulty in standardising the approach to calculating the time it takes to read and examine information held. Recorded information is held in a variety of formats and varies in complexity. Font size, paper size, the use of diagrams, tables and illustrations will all have a bearing on reading or examination time. An average might be used for the purposes of a “ready reckoner”. However, it would be very easy for a public authority creating, say, a report which it wanted to keep out of the public domain to increase the font size and the margins to increase the number of pages comprising the report, thus boosting the assessed cost of complying with a request for it.

CONSULTATION TIME

10. Decisions on the extent to which third parties should be consulted will be a matter for the public authority receiving the request, although they are guided by the Code of Practice under section 45 of the Act. Once again, however, it would be possible for a public authority to embark on unnecessary but not unreasonable consultation with a view to avoiding compliance obligations under the FOI Act.
11. The Frontier Economics report highlights the issue of consulting Ministers, stating that this is “the most expensive stage of work for the average central government request”. The consultation paper and the regulations are not clear as to whether time spent consulting Ministers would count as consultation time for these purposes. The ICO’s view is that a Minister within a department cannot be a consultee for these purposes, as their involvement in handling the request is not as a third party. The ICO recognises that a Minister may be involved in the consideration of a request, in particular where he or she is the “qualified person” for the purposes of section 36 of the Act and the applicability of that exemption is being considered. However, this is not consultation for the purposes of calculating the cost of compliance with the request.
12. The ICO notes that, in any event, Ministers’ time is to be costed for these purposes (i.e. consideration time) at the standard £25 per hour (draft reg 4(2)) as indicated by Vera Baird MP, Parliamentary Under Secretary of State, when responding to a question in the House of Commons on 17 October 2006.

CONSIDERATION TIME

13. Consideration time is likely to be the most difficult to estimate accurately for these purposes. By the same token, it will present very real difficulties for challenge and adjudication. There will be a number of key issues, including:
 - How much time has in fact so far spent on consideration?
 - How much further time would be involved?
 - Was this “reasonable”?

Experience over many years with recording, challenging and approving historical (not prospective) litigation costs - where time-recording, scale costs

and various types of experts are usually involved - demonstrates the difficulties which lie ahead for all concerned. Even if time-sheets or similar means to record the use of officials' time were to be introduced, the tasks will be daunting. The estimate of time required for the activities in draft regulation 6(2)(e) and (f) (considering the applicability of exemptions and the public interest test) in particular could easily be inflated artificially. This will particularly be the case where multiple exemptions could apply, even though the compliance issue could quickly have been determined by reference to one exemption only. The lack of any bench-marks as to "reasonableness" will compound the challenges, especially until the Tribunal, and possibly the courts, begin to give definitive guidance by ruling on individual appeals.

COMPLAINTS TO THE ICO

14. The process of estimating the time which might be spent on the various activities which can be included when calculating whether the cost limit has been reached is thus uncertain, subjective and open to exaggeration, if not abuse. This makes it all the more likely that there will be further challenge when the Regulations are invoked to resist a request. Public authorities themselves would be the first to experience this. In real terms, the cost of this to the public authority will be high because the principles of internal review, embodied in the Code of Practice under section 45, include a requirement that the reviewer should be more senior than the original decision-maker.
15. Once the internal review has been completed (or if none has been completed within a reasonable time scale) the ICO will need to investigate any complaint it receives. This is likely to lead to a significant increase in the volume of complaints received by the ICO.
16. The proposals will introduce new layers of procedural and bureaucratic complexity. This point is recognised in the Frontier Economics report and reflected in the following extract from the executive summary (page 8):

"If practitioners do not take a systematic approach, there is likely to be a substantial increase in requests for internal review and appeals to the ICO, with a substantial increase in costs".
17. The ICO is concerned that this may precisely be the consequence of the introduction of the new proposals and cannot be optimistic that any defensible systematic approach could be adopted and used by practitioners, at least in the short term.
18. Throughout 2005, during the first year of FOI complaints-handling, one of the features was the high volume of procedural complaints received by the ICO, particularly regarding non-compliance with time limits. However, in the first 2 years together the ICO received only 32 section 12 complaints (i.e. complaints about the application of the cost limit) out of a total of almost 5000.
19. Issues regarding the ICO's complaints-handling performance during that period are well documented and the most up-to-date account appears in our Progress

Report, published in October 2006. There remains a significant backlog of complex complaints which are proving difficult to resolve. Slow but steady progress is being made in reducing this backlog. However an influx of significant numbers of new complaints about the application of new cost and aggregation rules will present a very serious set-back. The temporary additional resources for FOI complaints-handling made available to the ICO for 2006/07 will run out at the end of March 2007, apparently with no prospect of further funding above a baseline of £4.7m for 2007/08. There will be a new surge of novel and potentially difficult procedural complaints which can be predicted to start within two months of the new Regulations. The net effect for the forthcoming year, regrettably, has to be the prospect of more time taken to resolve difficult cases, an increasing rather than decreasing backlog of complaints and the diversion of resources onto complaints about costs rather than substantive issues of disclosure of official information in the public interest.

20. Although it is impossible to predict the numbers with any accuracy, it seems reasonable to expect that there will be a significant proportion of challenges to refusals on cost limit grounds in the months immediately following the implementation of regulations as currently proposed. This can be expected all the more because the requests targeted are those made by experienced requesters. This will generate a new species of complaint which will differ from those which the ICO (and internal reviewers) have so far had to consider.
21. Using the estimates in the Frontier Economics report, approximately 20,000 FOI requests per year would be eligible for exclusion from consideration as a result of the measures now proposed in the draft regulations. If only 10% of these resulted in complaints to the ICO, this would see an annual increase in complaints to us of 2,000. In numerical terms this would almost double the current number of FOI complaints received annually by the ICO.
22. It is accepted that such a high proportion of complaints is unlikely to be sustained beyond, say, the first year of implementation. It is also accepted that where requests have been excluded from consideration on cost grounds, that request will not itself generate a substantive complaint about non-disclosure as the matter will not get off the ground. However, these long term effects will not be felt by the ICO for some years. In the meantime, with the current level of resources, the backlog would inevitably continue to build.
23. In order to handle the projected influx of cost limit and aggregation complaints, a discreet team of complaints officers will be needed to ensure that these complaints are addressed as quickly as possible. Until the eligibility of a request refused on cost grounds has been considered, it will not progress any further. It therefore seems right that some priority should be given to these cases so that, where appropriate, the request can be remitted back to the public authority for substantive consideration. Given the ICO's experience to date of public authorities failure to fulfil adequately its obligations under section 16 (advice and assistance to requesters) in cases where the current cost limit has been invoked, priority for these cases seems particularly appropriate.

24. Without additional (temporary) resources to cover this new work there will, however, be inevitable knock-on effects for the FOI complaints caseload as a whole. The overall backlog, already a matter of serious concern, will increase further.

COMMUNICATING THE ESTIMATE

25. One final, but important point on the draft regulations is the notable absence of any requirement on the public authority to communicate its estimate of cost to the applicant. Section 17(5) of the Act simply requires the public authority to give the applicant a notice stating that section 12 applies. If the proposals are implemented it is fundamental that such a notice should include the estimate of costs, broken down for each activity, so the applicant can see how the estimate has been reached, particularly by reference to the additional costs threshold and the additional costs ceiling. This should be a requirement of the regulations.

QUESTIONNAIRE

26. The consultation paper invites response to 7 specific questions. The ICO notes that these questions all assume that the key proposals in the consultation paper are accepted. The responses to these questions must be considered in the context of the ICO's response generally.

- Q.1 The ICO does not believe the regulations will ensure consistent calculation of the appropriate limit, nor does the ICO believe that this could be achieved by adopting a more prescriptive approach.
- Q.2&3 The inclusion of thresholds and ceilings for each activity is a welcome element of the proposals, if they are to be adopted it will ensure a more balanced approach to the issue of reaching the cost limit.
- Q.4 The ICO questions the practical efficacy of extending the aggregation provision.
- Q.5 Factors to be taken into account should be included in guidance rather than enshrined in legislation.
- Q.6 They may all be relevant factors but they are not an exhaustive list (so should not be included in the regulations.) There may be others which are relevant in individual cases.
- Q.7 The ICO supports the production of guidance which covers both EIRs and the FOI Act so that their provisions can be compared and contrasted. However, given that the appropriate limit and aggregation are not concepts which feature in the EIR charging regime the case for joint guidance on this subject is less compelling. Joint guidance would, however, be likely to demonstrate that the EIR offers a less restrictive access to information regime than the FOI Act.

Richard Thomas
Information Commissioner
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