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# Submission to the Independent Commission on the Freedom of Information Act

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## **Introduction**

As City University academics we educate future generations of journalists who go on to work in major national and local media organisations across the United Kingdom and the world. City's Journalism Department is a world-renowned journalism training institution known for its focus on teaching the professional and practical skills necessary to work as a journalist in a variety of media and formats. The focus is on public interest reporting that uses verifiable sourcing and documentation to produce stories that enlighten and inform society.

Freedom of Information is an essential component in every module in the Graduate Journalism Department and for most students it is their first encounter with public services or the State. They are both fascinated and excited to receive official correspondence from various state bodies. FOI is one of the few ways these young people gain a deeper understanding of how politics, public services and public policy work.

For example, a current student in one of our journalism programmes is keen to investigate the issue of the personal safety of public health nurses who perform home visits. The Royal College of Nursing has done a survey that resulted in anecdotal observation, but there is no empirical data or evidence collected on the actual numbers of cases where nurses have filed a complaint or been abused when making a home visit. The student will use FOI to collect and analyse that data which has never before been collected nationally or made public. Subsequent reporting may then lead to an article that will identify and educate society on an important issue. Last year, a student made an FOI to British Transport Police for a dataset of criminal incidents on trains. This is important civic data yet it is not made public. The only way to obtain it is to put in an FOI. Once she received the data, she was able to analyse it and show which train lines had the most incidents of crime. Her story was published in a double-page spread in the Mail on Sunday. Another student sent FOIs to various police forces to find out how often Clare's Law was used. He discovered that very few women used the law indicating it has not been effective as a tool to help women identify violent partners. Another student found that 18,000 children a year lose their mothers to prison. By making an FOI to the Ministry of Justice she discovered that when a parent is sentenced to prison, there is no requirement at court to alert the relevant services of these newly vulnerable children. They simply go missing and thus likely are not given the help and support they need. In this way, FOI helps to identify at an early stage important improvements that need to be made in public services.

These are just a few examples and there are many more where the Freedom of Information Act has had enormous public benefit whether through money savings, better outcomes, better decision-making or more efficient and representative public services.

In addressing this Commission, we first make a general point about the tone of the questions raised in the call for evidence. The formation of these questions demonstrates a systemic bias in favour of an elite government view of FOI rather than the wider public experience of FOI or the democratic view. There are many considerable difficulties faced by requesters in the operation of the existing legislation,

yet the Commission has neither addressed nor sought to investigate these. Instead it has chosen to focus on what concerns a small elite.

This submission outlines our concerns as experts on information rights internationally, and as academics involved in the training of journalism students at one of the most respected journalism schools in the world. We address the discussion thematically but do consider the problematic questions later in the text.

## Democracy versus official secrecy

The first Freedom of Information law was Sweden's Freedom of the Press Act of 1766. However, the United States has been the beacon of open democracy, introducing freedom of Information in 1966 and strengthening it in 1974 after Watergate. The importance of this law can't be overestimated. The US had produced "a small miracle for the world" according to scholar Michael Schudson and this law became the model for FOI laws around the world. It marked the beginning of what is called the 'Openness Revolution' and while FOI may have begun as a means to reign in the growing state's administrative power, it soon expanded as a necessary means of ensuring other rights, most notably in the FOI campaigns of India and South Africa where secrecy bred such corruption that the most vulnerable were being deprived of life's essentials such as food, water and work. Hence India's FOI campaign slogan: "The Right to Know is the Right to Live." In the 1990s only about a dozen countries had FOI laws but by 2006 there were 70 countries and in 2012 there were 93.

International organisations such as the United Nations and the European Union recognise the need for open and transparent decision making, as well as recognising freedom of information as a 'right' in several international conventions. In a European context, states that have introduced modern FOI legislation in the 20th Century include: Finland (1951); Denmark (1964); Norway (1970); France (1978); Netherlands (1978); Austria (1987); Spain (1992); Portugal (1993); Belgium (1994); Ireland (1997); Latvia (1998); Czech Republic (1999); Estonia (2000); Lithuania (2000); Slovakia (2000); United Kingdom (2000); Poland (2001); Slovenia (2003); Germany (2005); and Hungary (2005). Other states that have adopted freedom of information include: Australia (1992); New Zealand (1992); Canada (1993); Israel (1998); Japan (1999); India (2000); South Africa (2000); and Turkey (2004).

The United Kingdom's Freedom of Information Act was introduced in 2000 and became operational in 2005. While we believe the legislation has been extremely important in opening up government and public bodies (and this 'opening up' effect has had an impact on transparency and accountability of public bodies; on the quality of decision making; and on public understanding of how bureaucracy works) it is clear that the cultural change required for freedom of information to be truly effective has not occurred in public bodies. Much of the language used by local government managers, by senior civil servants, and indeed by the Commission itself, represents an extremely narrow view of FOI steeped in the Westminster model of government thinking, in essence the primacy of 'official secrecy'. The commission is aware that the UK has a long-standing tradition of state secrecy embedded in both its civil administration and its security / military traditions. This culture of elitism and 'official secrecy' is evidenced in the commission's focus on 'safe spaces' and the 'burden' of providing the public with meaningful information. This thinking has its roots in a Westminster model that favours elitist rule rather than the more enlightened understanding of democracy which vests power in the people.

This plays out in how FOI is approached. Either it is viewed narrowly as an administrative reform or in a broader context as an essential element in a democracy. This contrast between "FOI as administrative reform" and "FOI as integral to open government and democracy" is extremely relevant to this Commission because a narrowly defined FOI regime might be seen to be operating well; however if FOI is

considered to be integral to how we as a society and as a democracy rule ourselves, then it is clear that language around 'burden' and 'safe space' is entirely misplaced in a review of the legislation. Under the first (narrow) interpretation, there is an element of suggesting that citizens 'have no business' seeking information; whereas under the second there is an assumed 'right to know'. This broader democratic understanding of FOI suggests that public access to information about policy-making is a fundamental right and citizens do not have to give reasons, much less pass a public interest test when asking to be given reasons for decisions. It is worth noting that China's FOI was adopted for its instrumental, administrative function rather than for its intrinsic value.

One of the strengths of FOI in achieving open government compared to previous mechanisms is that it allows relatively quick access to the detail of policy-making. Traditionally, in terms of mechanisms to provide scrutiny of public bodies, there is a major trade-off between detail and speed of access. Some bodies provide detailed information (such as public auditors) but they do so slowly, where the information provided is typically several years behind what is current. On the other hand, some information is provided very quickly, such as press releases that are carried in one day's news cycle and then vanish. But all too often little or no detail is provided and little in-depth investigation or analysis occurs. Freedom of Information bridges this gap, by allowing citizens to quickly access the detail of documents relevant to current policy-making. This was (and remains) an important advance.

## **Necessary state secrecy?**

In the elitist Westminster model, information must be kept secret from the people. Power, under this model, comes from secrets. In an open democracy, power is vested in the people. In any political system, there is a hierarchical cordon around senior civil servants, with each layer (closer to the top) having access to more information. It is no coincidence that the words 'secret' and 'secretary' have the same root; secretaries are those who are privy to secrets. And there are good reasons for some things to be kept secret. For example, criminal investigations may need to operate away from public view, but even here there is public oversight in various forms. Likewise, some secrecy may be motivated to prevent individuals getting unfair advantage in the economy (e.g. through inside information about future changes in government policy). Very few people dispute the need for secrecy in certain circumstances, but it is vital to ensure that rules and laws governing secrecy should be specific and proportionate to the seriousness of the information in question. The United Kingdom continues to be governed by laws and an administrative culture that grants blanket secrecy to government business. Blanket secrecy not only prevents the public (and parliament) from having relevant information on why decisions were taken, but sometimes prevents the public from knowing what decisions were taken at all. This in turn undermines democracy.

## **Exemptions and exclusions**

A false notion exists that Freedom of Information grants unlimited access to everything. On the contrary, FOI laws explicitly provides for legitimate confidentiality as well as openness. But unlike legislation such as the Official Secrets Act, which makes

everything automatically secret, FOI lists those topics where it might be argued it is reasonable for some areas of public decision making be kept from public view. The current legislation includes both blanket exemptions; and exemptions that are qualified – in these cases information may be released where a decision maker is satisfied harm may occur or the public interest test is passed. All other information is rightly available on the basis of a presumption in favour of public access. The principle of a public right to access must be universal across all public bodies, as well as other organisations in receipt of public money. This is a founding principle of Freedom of Information. It would be quite extraordinary, then, for any administration to seek to restrict this.

## The cost of FOI

It has been argued, by former British Prime Minister Tony Blair among others, that Freedom of Information is too costly. This, we argue, is false, but it could be an infectious belief, so it is worth refuting in detail. The argument that FOI costs too much is disingenuous, because it seeks to reduce public administration to a simple bookkeeping exercise, of balancing direct annual costs against revenue. Any serious account must include the estimated savings that are generated through preventing corruption, errors and wrongdoing as well as the moral benefit of ensuring a just and representative political system. There is a reason the world's leading anti-corruption NGO called itself Transparency International and that is because secrecy so often breeds corruption, injustice and abuse of power. Transparency remains the leading remedy to eliminate these societal ills.

Various public inquiries and legal cases have shown that prevention is not just better than cure; it is much cheaper than subsequent inquiries, investigations and compensation. Since the Act was introduced, journalists have exposed ministries overspending, maladministration and, indeed, occasional corruption in public bodies. Such news reports may be uncomfortable to read but ultimately they save the state millions of pounds in taxpayers' money. This accountability culture brought about by FOI has also led to cultural change within public service institutions. A 2014 UK parliamentary report on the operational effectiveness of the UK's FOI Act noted that FOI creates savings when the inappropriate use of public funds is uncovered – or where fear of disclosure prevents the waste of public money (Houses of Parliament, 2012).

The cost of FOI is not easily quantified. An analysis by *The Daily Telegraph* of the cost of the UK's FOI Act on individual government departments, compared to other departmental spending estimated the cost at about £300,000 per department per year. It found that FOI costs about the same to administer as the cost of running ministerial cars, and actually cost less than the design of the London Olympics logo (*Daily Telegraph*, 22 March 2012). A Parliamentary report estimated that on average, it takes 7.95 hours and costs £293 to answer a request, with the caveat that a small minority of requests accounted for a significant amount of time, thereby pushing up the average cost substantially (Houses of Parliament, 2012). A 2010 survey of local government by University College London's Constitution Unit estimated the cost of FOI for local government at £31.6m that year, and that civil servants spent 1.2 million hours responding to nearly 200,000 requests – an average of six hours per request, and at a median cost of £158 (Bourke et al, 2011).

We do not submit any definitive figure here because we believe it is impossible to be definitive, as some requests can (and are) dealt with very quickly and others take an amount of time (albeit up to the cost limit) to process. While it is likely that, on occasions, some requests do require significant search and retrieval time (and consequent labour costs for public bodies) it is also the case that some requests are relatively easily answered, and cost far less to administer. It is also worth emphasising again that in a democracy public services and the information collected in them is done so at taxpayer expense and on behalf of the public so surely the public have a right to the fruits of their labour.

Much of the 'cost burden' of complying with FOI that some public bodies complain of could be avoided simply by publishing much more information as a matter of routine. That would appear consistent also with the government's policy of encouraging open data and greater transparency, particularly in the provision of information collected by and/or supplied to public bodies.

However, the practice of providing open data has yet to match the rhetoric. As the Public Accounts Committee concluded last year: "There is no sign of the promised emergence of an army of armchair auditors. There is little or no evidence that the Cabinet Office is succeeding in encouraging greater public engagement in using data to hold the public sector to account." (Tenth report: Statistics and Open Data, 2014). FOI can act as a valuable lever to prompt the regular publication of important and more consistent data – as has happened in the cases of MOT test data, and convictions for offences under the Housing Act 2004, for example. In the absence of an "army of armchair auditors", journalism remains the primary means by which "greater public engagement" in holding the public sector to account can take place.

The emergence of data journalism in recent years has provided an additional route for this, in addition to more 'traditional' reporting – offering the public a simple route to find relevant information, such as about schools or the NHS, often by postcode or geographical area, that journalists have obtained from public bodies through FOI.

A number of factors are also likely to have decreased – rather than increased - the average cost of processing FOI requests, including improvements in record-keeping (in itself a benefit of FOI); administrative changes toward a culture of openness to accommodate FOI; and electronic rather than manual searching with the advent of greater computerisation of public bodies' files and e-government in the 10 years since FOI was introduced in 2005.

The greater offset against the cost of FOI is of course the prevention of major and minor mistakes by public bodies. It is logically impossible to calculate the cost of a mistake that was prevented. However, the many news media reports of overspending, waste and questionable procurement illustrate some (and only some) of the financial savings to the taxpayer through Freedom of Information. Open government is not just about corruption or illegal activity, but is also concerned with exposing decisions that are driven by vested interests or simply uncovering decisions that are not very sensible when viewed from a different perspective. These so-called 'white elephant' projects occur in every state, wherever over-ambitious or egotistic ministers seek to create a lasting legacy to their time in office by ordering something built or some other major project, which ultimately costs far more than planned and drains a disproportionate amount of taxpayers' money away from core public services. London's Millennium



Dome, to cite just one example, was designed to cost of £43m, but ending up costing more than £600m, and eventually sold for £1 (Independent, 20 September, 2012).

Equally FOI's contribution to public confidence in decision-making, which though hard to quantify in terms of financial cost, is nevertheless vital in terms of public trust in the institutions of state. Likewise, many thousands of individuals have also benefited on a personal level. For many of them, a Freedom of Information request has helped resolve some important concern in their personal dealings with the State. In many cases, FOI can help clear up an error in administration or provide an individual with the assurance that their case was treated fairly. More extreme examples include those who were in state residential care and who suffered physical and/or sexual abuse. Access to their records is an important part of their gaining ownership and empowerment in their dealings with the State. While this may not generate a monetary benefit for the taxpayer, it seems obvious that it is right to have open government for the sake of accountability for people who suffered due to the State's failures.

It must be acknowledged that FOI does come at an administrative cost to public bodies. An FOI regime that places an undue burden on public bodies will never be successful because it will never create buy-in from the civil and public servants required to administer the Act, if it means a significant extra workload for officials. What is important is the balance to be struck between seeking to recoup costs, and the value to the State in terms of democratic accountability, and openness and transparency. If money is scarce, it may be better to allocate resources to answering those questions the public actually ask (FOI) rather than telling them what someone in charge thinks they ought to know (public relations and propaganda).

Freedom of Information is not solely justified by saving money or generating economic growth. It is justified by the strong ethical and democratic arguments that recognise the value of open government. However we submit that on any kind of reasonable estimate, freedom of information is well worth the money.

## **Journalism and FOI**

Co-author of this submission Professor Heather Brooke is an internationally recognised expert on FOI and a campaigning journalist. Her experience of journalism in the US is that it is based predominantly on public records. She notes that US journalism is practiced in a more professional, empirical manner, which is only possible because journalists can legitimately and instantly access all manner of necessary civic information from police reports and court records to detailed local government budgets. The public can see "the machinery of government" in a way that is simply not possible in the UK. British journalism, influenced largely by the elite Westminster model of government, doesn't have access to these large stores of public records and so by necessity is reliant on innuendo, rumour and leaks, and very often not grounded in verifiable facts. One of the ways that journalism can make the cultural shift toward public records reporting is for journalists to have instant and free access to civic information. The corollary is that if this is not the case, we will have a journalism reliant on informal and unverifiable information gathering. FOI will become the preserve of rich private interests. Ultimately this will lead to less civic engagement and an uninformed electorate.

## Ireland's FOI experience

Co-author of this submission Tom Felle has published widely on FOI and is a former newspaper journalist from Ireland. Ireland's experience of FOI is extremely relevant given the UK's legislation is largely based on the Irish Act, and given the neighbouring jurisdiction's folly in reforming its FOI regime in 2003.

The Republic of Ireland's FOI Act, introduced in 1997, was enormously successful, exposing corrupt practices in local government; helping citizens better understand their rights; and uncovering abuse and poor standards of care in nursing homes, to name but a few of its successes. However six years after its introduction, the then Irish government filleted the Act, exempted important documents, and introduced fees for requests. The result was that FOI requests fell off a cliff, and investigative journalists all but stopped using the Act. In 2008 Ireland experienced the worst economic collapse in the history of world capitalism. A fiscal tsunami hit the country, property prices crashed and unemployment skyrocketed. Only an EU/IMF bailout prevented national bankruptcy. In the many post mortems and investigations that have followed, it became clear that the then Irish government and economic and financial regulators were warned in internal memos about their economic policies, but the warnings never became public because journalists or the public couldn't get access to them. Last year the Irish reversed course and have reintroduced a powerful Freedom of Information regime. A costly, but perhaps valuable lesson was learned by the Irish: frank advice, no matter how bitter, is welcome, and that advice is best heard in the open.

Government needs to hear all the advice before making important decisions and the public needs to be confident that those we vote to represent us in parliament (and in government) are making decisions in the interest of the public at large. The best way to ensure that is through strong accountability.

## Addressing the questions

Having discussed the wider issues, we now address the specific questions raised by the Commission in the following section.

### Question 1: Safe space

Sections 35 and 36 are the most abused exemptions because they are incredibly vague. These exemptions are the ones of last resort, used when there is no legitimate or justifiable reason to keep something secret. Rather than broadening these already over-used exemptions the commission should seek to narrow them.

There is already sufficient deliberative space within government. This issue is about democracy: if a democratic society is to have any legitimacy, then the public have to know that decisions were made based on reasoned deliberation not bargaining or horse-trading. Academic studies have shown that FOI increases the likelihood that decisions will be made using deliberation rather than bargaining (De Licht, 2014: 122). Thus it is in a democratic government's interest to support transparency.

The need for a "safe space" is taken seriously by the Information Commissioner, Information Tribunal and Courts. There is a high degree of confidence in the ability of the judicial system to balance the public's 'right to know' with the need for a 'safe space' for frank and robust discussion. However, the safe space can become a dangerous space when there is too little accountability and oversight. Such spaces create environments where groupthink becomes endemic and divergent opinion stifled.

### Questions 2 and 4: Cabinet decisions and veto power

The courts have a legitimate function in democratic society, just as much as the executive or legislature. There is a valid role for the judiciary in the oversight of law-making, just as the US Supreme Court is able to overrule Congress, so the courts in the UK can overrule the legislature. The Houses of Parliament do not enjoy an exclusive monopoly on power nor should they grant themselves exclusive veto rights over the disclosure of information in the public interest.

The fact that the Supreme Court found the executive had acted against the public interest in the case of Prince Charles's letters shows the danger of granting an executive veto. The veto was also used to block the release of information about the decision to send British troops to Iraq despite an overwhelming public interest in knowing the reasons for this decision. This shows how quickly a 'safe space' can become a 'dangerous space'. Collective Cabinet discussion should be afforded the same protection as any other deliberative process and be similarly subject to the public interest test without the power of a veto.

The concentration of power in one branch of government is undemocratic, and any attempt to legislate for this would be unprecedented in modern democracy. Any move to effectively 'veto' a decision of the courts destabilizes the very principle of the separation of powers.

### **Question 3: Risk assessment**

No special protection should be afforded to risk assessment other than what is currently offered under FOI. Risk assessments in many cases allow the public to have a more informed view of issues and costs involved in major public projects. In many cases these projects are incredibly expensive. The publication of such information allows for better accountability, where cost overruns can be identified, and in some cases may lead to better and more informed decision-making. Public interest tests are an important safeguard and should be protected.

### **Question 5: Enforcement and appeals**

The joke sometimes made about universities that “it would be so much easier without the students” is analogous to the widely publicised commentary about the problems caused in local government by FOI requests. Citizens, like students in a university, aren’t an inconvenience, rather they are the very reason for the institution’s existence. Too many public servants seem to forget this.

Increases in appeals are often a result of poor decisions made by overly-secretive, anti-democratic and poorly trained public officials. A properly functioning FOI decision-making system should push for the release of information in a timely manner, refusing only those things that are clearly exempt. Instead, experienced requesters find that officials very often operate not on default openness but default secrecy, hunting around for exemptions that they can use to meet their objective, which is to withhold information from the public. The statutory time limit is often not met and the public interest exemption frequently abused.

Appeals to the Information Commissioner’s office are beset by delays because of poor resourcing and staffing, leading to requester frustration. If a requester has the wherewithal and resources to appeal to the Tribunal and beyond she will be doing so at her own expense while those who seek to keep information secret from the public will be given money from the public purse. For example, when Professor Brooke fought for the disclosure of MPs’ expenses at the Information Tribunal and High Court, she had to privately organise her legal defence while those blocking the disclosure were able to hire three top barristers and a substantial legal team at public expense. Any private citizen who goes to Tribunal will find themselves similarly outgunned. It is ironic that those seeking to keep information secret from the public do so entirely subsidised by public money.

## Conclusion

FOI is not a panacea for all ills. What properly functioning freedom of information regimes offer is transparency, accountability, and the opportunity for an informed electorate. FOI can be difficult to administer, and it has created difficulties for public bodies, but in large part it has been a tremendous force for good and has transformed the relationship between citizen and the state in the UK. The real problem with FOI in the UK is not how it is being used, but rather how tenaciously the culture of official secrecy persists.

In a truly functioning open government regime, FOI should hardly be necessary. Public bodies would proactively publish information – in the digital age at the stroke of a mouse click – and material not routinely published could simply be requested. Ten years after the legislation came into force in the UK, that hasn't happened. Instead of being able to go to a web page and simply click on a restaurant for its food safety and hygiene inspection report, citizens must still file an FOI to the local council where the restaurant operates. That is simply unacceptable. Rather than filleting the legislation, it should be strengthened. The cost limits should be increased annually in line with inflation, and requesters should be able to make a case on public interest grounds to waive cost limits for important applications. Public bodies should be encouraged to routinely publish far more information digitally in the public interest, in particular open data which is often hopelessly out of date when it is released. Private companies who carry out public work should be covered under FOI laws. And the Information Commissioner's office should be adequately funded so that it can take a far stronger lead in championing the culture of openness.

We thank you for this opportunity to provide evidence.