POST-LEGISLATIVE SCRUTINY OF FOIA
INFORMATION COMMISSIONER'S SUBMISSION TO THE JUSTICE COMMITTEE

1. Executive Summary

1.1 FOIA is working well on the whole and its objectives are largely being achieved. Major amendments to the core principles and scheme of the Act are not necessary.

1.2 The rights of requesters would be strengthened by making internal reviews mandatory and subject to a time limit. Extended compliance times for consideration of the public interest should be subject to a statutory maximum.

1.3 Limited amendments in respect of frivolous requests, Cabinet minutes and the qualified person's opinion are worthy of consideration.

1.4 The criminal offence created by section 77 of FOIA should be triable either way in order to make it of practical use.

1.5 The ICO is keeping pace with the increasing volume of complaints and appeals despite diminishing resources from grant-in-aid.

2. Introduction

2.1 The Information Commissioner ("the Commissioner") welcomes the Justice Committee's exercise in post-legislative scrutiny of the Freedom of Information Act 2000 (FOIA). The Act has now been fully in force for seven years, during which time considerable advances have been made. A considerable amount of information, of greater or lesser significance to the public or to individuals, has been published as a result of FOIA. In addition, valuable experience has been gained by public authorities, requesters, the Commissioner and the Information Rights Tribunal. A body of jurisprudence in information rights law is emerging, which adds clarity and authority to the statutory framework by demonstrating how it should be applied in practice.

2.2 The Commissioner is in broad agreement with the Ministry of Justice's assessment of the key issues which have emerged through implementation, as set out in its Memorandum to the

Committee in December 2011. This submission will address many of the points raised in Part 4 of that Memorandum (Operation of the Act) and will then go on to comment on other issues which have arisen in the first seven years of FOIA's operation.

2.3 Overall, the Commissioner considers that FOIA is working well. Although the FOIA has not been universally welcomed and still has its vocal critics, the successful operation of the legislation has proved its fitness for purpose.

2.4 The Commissioner does not consider that significant changes to the core principles of the legislation are needed. Those core principles mark out the UK FOIA as a good model for public access to information, with a largely free and universal right of access subject to legitimate exemptions, many of which are qualified by a public interest test. Enforcement mechanisms are strong, with an independent commissioner with order-making powers, subject to a right of appeal to the Tribunal.

3. The Role of the Commissioner

3.1 Parliament has given to the Commissioner specific functions in relation to FOIA. Primarily these are:

- to adjudicate on complaints by requesters that public authorities have not dealt with their requests in accordance with FOIA
- to approve publication schemes requiring active, routine publication of information by public authorities
- to promote good practice by public authorities.

3.2 In relation to the first of these, complaints may be concluded with a Decision Notice specifying any steps which a public authority must take to comply with its obligations in relation to the request. If a complaint is upheld, the public authority will usually be required to disclose to the complainant some or all of the requested information. A Decision Notice is binding by law.

3.3 Either party (the complainant or the public authority) may appeal against a Decision Notice to the First-tier Tribunal (Information Rights), formerly known as the Information Tribunal. Thereafter, further appeal lies to the Upper Tribunal on a point of law only.

4. Proactive disclosure and Open Data

4.1 The Commissioner welcomes the policy initiatives by the current government to improve transparency by promoting open data - the availability of datasets in reusable formats and open licensing conditions. The proposed amendments to sections 11 and 19 of FOIA in the Protection of Freedoms of Bill are welcome and allow FOI to keep pace with new ways of using information that weren't envisaged when the legislation was first drafted. It is important that the relationship between FOIA and open data policy is clearly defined and parallel systems do not emerge. The Commissioner responded to the recent Cabinet Office consultation on open data. It is also important that FOIA is not regarded as the same as open data; the two do, and should, overlap but they are different concepts. FOIA offers a much broader concept of information, covering structured and unstructured data (e.g. memos, emails, notes) whereas open data covers access to information and re-use.

4.2 Proactive disclosure should be maintained as an important obligation in FOIA but the Commissioner agrees with the suggestion in the Ministry of Justice (MoJ) Memorandum that the concept of publication schemes requires review and possible replacement with a different approach to proactive disclosure.

5. Scope of FOIA

5.1 The Commissioner has consistently maintained that the scope of FOIA is a matter for Parliament and the Government. While the Commissioner may welcome any extension of the scope of FOIA, his primary concern is that there should be certainty as to whether a body is or is not covered by the Act. This was the key message of his response to the original MoJ consultation on extending the scope of FOIA back in 2008. Clearly this does not arise when a body is specifically named in the relevant legislation, but it can arise where classes of public body are subject to FOIA. For example companies wholly owned by public authorities, covered by virtue of section 6(1), are not easily identified.

5.2 The Commissioner is concerned that there may be further confusion where new arrangements are made for the provision of services currently or previously delivered by

public authorities. A key benefit of FOIA from the outset, in terms of transparency and accountability, has been its use to demonstrate how public money is spent. The presumption of transparency should always follow the public pound.

5.3 The Commissioner understands the concern expressed in some quarters that activities which are or have been regarded as public services provided by bodies which the public would expect to be covered by FOIA, may not be in the future as a result of government reforms. Examples which have already arisen concern Network Rail and the privatised utility companies. These are not public authorities under FOIA, but this surprises some who seek information from them. The Commissioner has been required to consider whether these bodies are public authorities under the Environmental Information Regulations, the parallel access regime for environmental information. Appeals to the Tribunal have been made. This is time consuming and costly litigation which can be avoided if there is certainty as to the bodies which are covered by the legislation.

6. Vexatious Requests

6.1 The Commissioner has been concerned from the outset that some requests might place an excessive or disproportionate burden on public authorities. Section 14 of FOIA discharges the public authority from its obligation to comply with a request that is vexatious. "Vexatious" is not defined by the Act, so the Commissioner applies the normal meaning and has developed guidance which sets out a number of factors to be considered in determining whether a request is vexatious.

6.2 The Commissioner also published a charter for the responsible use of FOI rights in 2007 to advise requesters how to frame effective requests and avoid making requests which might legitimately be regarded as vexatious.

6.3 The Commissioner agrees with the statement in the MoJ's Memorandum that public authorities make less use of the vexatious request provision than they might. He notes the concern expressed by public authorities that the section is difficult and confusing to use. Often it is the individual requester who is perceived as vexatious, whereas FOIA requires the judgement to be made of the request, not the requester.

6.4 The Commissioner recognises that public authorities may consider that it is easier or cheaper to deal with the request than it is to treat it as vexatious. However, in doing so they do not help themselves in the long run, as vexatious requests are often generated by one individual or a group exhibiting repeat behaviour which causes a nuisance and disproportionate burden on the public authority.

6.5 The Commissioner welcomes the acknowledgement that his decisions generally demonstrate support for public authorities' reliance on section 14(1). He is in the course of revising his guidance on this provision in the light of recent Tribunal decisions. However, in the light of experience, he suggests that it may be appropriate to extend section 14(1) to discharge public authorities from their obligation to comply with frivolous requests as well as vexatious requests. This would reduce the burden of compliance with obviously trivial or light-hearted requests, without a serious purpose, even if they did not have the effect of annoying or harassing the public authority. The Republic of Ireland's FOIA takes this approach.

6.6 Section 50(2)(c) of the UK FOIA discharges the Commissioner from his complaint-handling obligations if the application to him is "frivolous or vexatious". For some reason Parliament made a distinction between this provision and that in section 14(1) applying to requests to public authorities. The Commissioner considers that bringing frivolous requests within section 14(1) might give public authorities clear ability and greater confidence to relieve themselves of their FOIA obligations where requests are clearly without merit. In the event of such an amendment, the ICO would issue appropriate guidance for public authorities and requesters. Requesters would, of course, continue to have the right to complain to the Commissioner, who would be able to overturn a finding that a request is frivolous and order the public authority to comply with it.

Exemptions

7. Section 35

7.1 The Commissioner broadly agrees with the comments in the MoJ Memorandum regarding the use of exemptions when responding to FOI requests. He acknowledges the concern expressed in some quarters about the section 35 exemption

for information which relates to the formulation and development of government policy. However, he considers that this is largely overstated and is often based on a misunderstanding of the law and of the Commissioner's approach in difficult cases.

7.2 The most important thing to note is that the government policy exemption is qualified, not absolute. The exemption is expressed in broad terms so is easily engaged in appropriate cases. Most cases turn on the application of the public interest test. The qualification of broadly drafted exemptions by the public interest test is one of the core principles and key strengths of FOIA.

7.3 The need to protect "the policy making space" is fully recognised by the Commissioner, particularly when the policy in question continues to be the subject of live debate. The Commissioner also recognises what is often referred to as a "chilling effect", namely that policy discussions will be less full and frank, with less honest advice given and fewer imaginative policy options put forward, for fear that information about what was said will be disclosed prematurely through FOI.

7.4 The Commissioner rejects any blanket assertions that his decisions fail to have proper regard for these concerns. However, the public interest test must be conscientiously applied in all the circumstances of the particular case. Very often the balance of the public interest is in favour of maintaining the exemption and withholding the information. However on occasions, factors such as the significance of the matters discussed or the limited impact of disclosure after a period of time weigh more heavily, requiring disclosure in the public interest.

7.5 Likewise with Cabinet material. The Commissioner has consistently given considerable weight in his decisions to the convention of collective Cabinet responsibility and the importance of maintaining the confidentiality of policy discussions at the highest level of government. However, the exemption in FOIA for communications between Ministers is again not absolute, but subject to the public interest test. The MoJ Memorandum accurately recites the occasions on which the Commissioner has ordered the disclosure of Cabinet minutes and the occasions, to date, on which the ministerial veto has been exercised to overturn the decision of the Commissioner and the Tribunal.

7.6 There is one further case where the Commissioner has ordered the disclosure of Cabinet material, but has agreed that disclosure should be delayed for some months. This information relates to the Hillsborough football stadium disaster. It has been agreed that the independent Hillsborough panel should first complete its work.

7.7 Finally, the Commissioner would point out that a number of his decisions following complaints about withheld Cabinet papers have upheld the government's refusal to disclose the information. Examples include the minutes of the Falklands War Cabinet and the minutes of the decision to support the bid to host the Olympic Games in 2012. These decisions tend not to be recognised, remembered or referred to by FOIA's critics.

7.8 The Commissioner considers that the exemptions for the formulation and development of Government policy and Ministerial communications are workable as currently enacted. It is inevitable that decisions as to whether information about sensitive political issues will attract media attention and may raise concerns for politicians and senior civil servants. The Commissioner does not consider that experience to date indicates a need for change to this exemption.

7.9 However, he notes the concern about the disclosure of Cabinet minutes themselves and acknowledges that to date this is the one class of information in respect of which the Ministerial veto has been exercised. On the occasions when the veto has been exercised the Commissioner has made a special report to Parliament explaining his position. He would question the extent to which genuine "exceptional circumstances" applied. Rather there appears to be a point of principle over the status of Cabinet minutes.

7.10 Therefore, if Parliament is of the view that Cabinet minutes should never be disclosed under FOIA, then the appropriate course of action would be to amend the exemption so as to make Cabinet minutes themselves subject to an absolute exemption, excluding the consideration of the public interest test. The Commissioner is not recommending this. It is a matter for Government and for Parliament. However, it is not in the public interest for requesters of information to believe that Cabinet minutes may be accessible under FOIA if in reality they are not and Parliament never intended that they should be. Not inconsiderable amounts of public money have

been spent on those cases where ultimately the Ministerial veto has been used to block disclosure.

7.11 In all other respects the Commissioner's view is that the exemption provided by section 35 should continue to be subject to the public interest test. Extending an absolute exemption to all material relating to the formulation and development of public policy would seriously curtail the reach of FOIA, which itself would be contrary to the public interest.

8. Section 36

8.1 The MoJ Memorandum explains how reliance on this exemption is dependent on the reasonable opinion of a qualified person. While this procedural hurdle might mean that the exemption cannot be invoked lightly, it is questionable whether it is strictly necessary now that FOIA has become firmly established in public sector administration.

8.2 Without the requirement to obtain a qualified person's opinion, the exemption would operate as others which require the demonstration of a likelihood of prejudice to a particular interest (in this case the effective conduct of public affairs). It would remain subject to the public interest test. In the Commissioner's opinion this would simplify both the use of this exemption in practice and the investigation by the Commissioner of subsequent complaints, resulting in greater efficiency and speedier outcomes, which would be to everyone's benefit.

8.3 In the meantime the Commissioner has recently issued fresh guidance on the use of this exemption, including the need to demonstrate how the qualified person's reasonable opinion was reached.

9. Section 40

9.1 Personal information is protected from disclosure under FOIA by reference to the data protection principles. This does not mean that personal information cannot be disclosed. The data protection principles require a fairness test which recognises the legitimate interest in disclosure as well as the rights of individuals to respect for their privacy. Cases often turn on whether information concerns public life, official business or the use of public money. The reasonable expectations of the

person concerned (the "data subject") as to whether the information might legitimately become public is often a relevant factor.

9.2 This is an area where jurisprudence has developed significantly since 2005. Information which would previously have been considered personal and inappropriate to disclose, such as salary, expenses and discretionary payments or terms of severance may now be released under FOI, sometimes after the Commissioner or Tribunal has ordered disclosure.

9.3 The Commissioner's expectation is that this is an area where the trend towards greater transparency is likely to continue. Emerging developments at European level, with the proposed revision of the Data Protection Directive, are likely to have an impact in years to come.

10. Environmental Information Regulations (EIR)

10.1 The Commissioner is conscious that the policy responsibility for this access regime does not lie with the MoJ, but with Defra. He agrees with the comments in the Memorandum that the operation of the parallel regimes can be confusing for public authorities and particularly for requesters. The Commissioner's comments regarding the need for clarity in identifying which bodies are covered by FOIA apply to a much greater extent in relation to the EIR. Particularly unhelpful is regulation 2(2) which excludes from the definition of public authority any body designated as a FOIA public authority under a section 5 order, thus excluding ACPO, UCAS and the Financial Ombudsman Service.

11. Timeliness of Response

11.1 As the MoJ Memorandum indicates, the ICO now monitors public authorities which come to its attention for unacceptably poor response times to FOI requests. Formal ICO interventions with 52 public authorities have been made, resulting in significant improvements. Key to this success has been the engagement of top managers at the public authority. Sometimes this has been by way of a personal undertaking to improve performance, as with the Ministry of Defence, Cabinet Office, Birmingham and Wolverhampton City Councils. The Commissioner regards the timely fulfilment of FOI obligations as a key challenge for public authorities when

there is such pressure on resources. However, better tracking systems, a more positive approach to disclosure and active communication with requesters have all been shown to produce positive results. The ICO continues to take forward its work in this area. A further list of authorities to be monitored will be announced shortly.

11.2 FOIA permits an extension of the 20 working day response time where a qualified exemption is applied by the public authority but it requires more time to consider the public interest test. Section 10(3) extends the time for compliance "until such time as is reasonable in the circumstances". The Commissioner considers that an extension of more than 40 working days (giving 60 in total) should never be required. An amendment to provide for this as a statutory limit would strengthen the rights of requesters in this regard.

Sanctions, Complaints and Appeals

12. Internal Reviews

12.1 One area of weakness in the current FOI regime identified by the Commissioner is the lack of provision for a mandatory internal review with a statutory time limit. Currently, provision for internal reviews is made only in the Code of Practice issued by the Secretary of State under section 45 of FOIA. This means that time limits for internal reviews cannot be effectively enforced, which undermines efforts to secure timely compliance. The position under FOIA contrasts with that under the Freedom of Information (Scotland) Act 2002 and under the EIR, both of which provide for mandatory internal reviews with enforceable time limits. The Commissioner would welcome an amendment to FOIA along the same lines to strengthen the current regime.

13. Complaints to the ICO

13.1 The MoJ Memorandum refers to concerns expressed in earlier years regarding the delays in complaint handling at the ICO. This is an area where significant improvement has been achieved in recent years. Table A below shows the annual figures for complaints received and closed, Decision Notices issued, and Tribunal appeals raised from 2005 to 2012. Figures to 31 March 2012 are estimates only at this stage, projected from actuals as at 31 January 2012.

Table A

Financial Year	FoI Casework Received	FoI Casework Closed	Decision Noticed Served	Legal Appeals Raised
2005/06	2713	1666	186	47
2006/07	2592	2601	339	92
2007/08	2646	2658	395	96
2008/09	3100	3019	296	87
2009/10	3734	4196	628	161
2010/11	4374	4369	817	202
2011/12	4384	4606	1098	287

13.2 The increasing number of complaints received continues to present a significant challenge to the ICO. Improvements have been achieved through a focus on efficient throughput, maintaining a stable and thus more experienced workforce, revised and more streamlined systems and greater delegation of decision-making. The ICO continues to make improvements, building on experience and seeking efficiencies in all areas. This is a particular challenge in the face of severe reductions in grant-in-aid. The ICO's funding streams for its data protection activity and its FOI/EIR activity are completely separate. The former is dependent on income from notification fees, but FOI is funded exclusively from grant-in-aid, via the MoJ. No cross-funding is permissible.

13.3 The forthcoming year's grant-in-aid to the ICO for its FOI/EIR work shows a reduction of 23% from 2009/10. For 2012/13 it is set at £4.25m with further reductions projected until 2014/15. The funding profile from 2005/06 to 2014/15 is shown in Table B below.

Table B

	£m
2005-06	5.10
2006-07	5.55
2007-08	5.05
2008-09	5.50
2009-10	5.50
2010-11	5.20
2011-12	4.50
2012-13	4.25
2013-14	4.00
2014-15	3.75

13.4 The Commissioner clearly recognises that such reductions are inevitable in the current economic climate. However, he must point out that this has an impact. Significantly improved performance through efficiency has been demonstrated despite these reductions in funding, but there are limits as to what more can be achieved.

13.5 In particular, the Commissioner points out that any additional responsibilities on his office arising from the transparency agenda or, for example, revisions to the statutory regime for the re-use of public sector information would require commensurate funding. The Commissioner welcomes the steps which are being taken to enhance his independence, but these are of little value if they are not underpinned by adequate funding for the discharge of his responsibilities.

14. Appeals to the First-Tier Tribunal (Information Rights) and Beyond

14.1 This is one area where expenditure incurred by the ICO is significant and unpredictable. Again the ICO has successfully kept costs down despite an ever-increasing number of appeals. It has done this by increasing its team of in-house lawyers, thus reducing reliance on external counsel, and by declining to attend oral hearings in appropriate cases when written ICO representations are sufficient.

14.2 Because the Commissioner is the respondent in every FOIA appeal before the Tribunal, his input is always required. This is kept to written representations as far as possible. However, recent changes to the Tribunal rules, referred to in the MoJ Memorandum, include the right of any party to insist on an oral hearing. Although the Commissioner in these circumstances may decline to be represented, that will not always be in the interests of justice. Again, this increases the resource burden on the ICO.

14.3 Under the Freedom of Information (Scotland) Act 2002, an appeal against the Scottish Information Commissioner's decisions may only be made on a point of law to the Court of Session. This contrasts with the UK FOIA which requires the Tribunal to consider whether the Commissioner's decision is in accordance with the law and whether any discretion should have been exercised differently. The Tribunal may review any finding of facts, allowing a full merits review. While the

Commissioner considers that the appeals system under FOIA has helped with the development of the law and its practical application in the early years, there may be a case for considering whether the time and cost involved in operating the current appeals system is warranted.

15. Section 77 Offence

15.1 One particular provision of FOIA which, in the Commissioner's opinion, is not working as intended is section 77. This is the criminal offence of altering, deleting or concealing disclosable information after a request has been made for it, with the intention of preventing disclosure. Given the inevitable time lapse between a request being made to public authorities and a subsequent complaint being referred to the Commissioner, the six month time limit, running from the commission of the offence, is very problematic.

15.2 The Commissioner's preferred option is for the offence to be triable either way, rather than summary only. This would better reflect the seriousness of the offence and would overcome any difficulties with time limits as none would apply. An alternative would be to amend the law to the effect that the six month time limit only starts to run when the allegation that the offence has been committed is first referred to the Commissioner. This would be an improvement on the current situation, although it is foreseeable that there might still be room for argument over the relevant date.

Christopher Graham
Information Commissioner
3 February 2012