

Commissioner – for discussion

Date: 18 January 2022

Prepared for: Information Commissioner

Topic: Developing our FOI Strategy

Issue: As you embark on a listening tour of key stakeholders, including Civil Society groups, parliamentarians and Government officials and ministers, this note sets out some thoughts on our potential current and future approach to FOI.

Background:

The previous Commissioner established 'Openness by Design' a bespoke strategy for our Access to Information functions, which comes to an end in March this year. The goals of this strategy were:

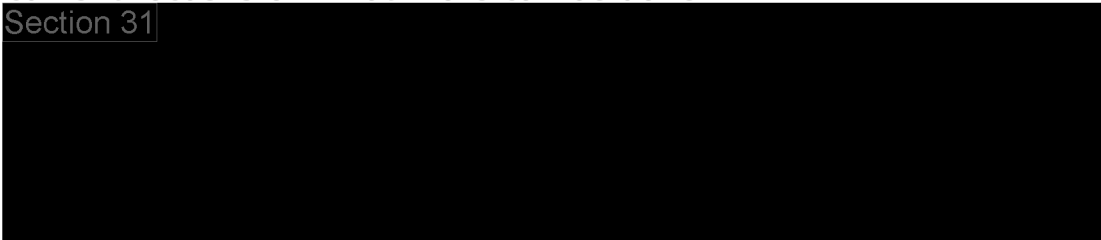
- Goal #1: Ensuring that access to information rights is upheld in a consistent and timely manner and operates effectively in a digital age
- Goal #2: Providing excellent customer service to individuals making requests to us and lead by example in fulfilling our own statutory functions
- Goal #3: Raising awareness of access to information rights and making it easier for the public to exercise their rights
- Goal #4: Promoting the reform of information rights legislation so it remains fit for purpose
- Goal #5: Further developing and sustaining new international partnerships

Despite a lack of additional funding for this area of work, we will be able to make a case that we have completed or made significant progress against Goals 1, 2, 4 & 5. The combined impact of the pandemic on our service, a continual rise in casework (which we have limited flexibility to manage given our statutory framework) and a lack of additional funding mean that little progress has been made against Goal 3.

Current planning is that, rather than creating a bespoke new strategy for our Access to Information work, this will be captured under our single new corporate strategy. This is sensible but given the criticism we have faced from some stakeholders in recent years (see Annex A) of a lack of focus on our FOI work compared to our DP functions, it will be important to demonstrate clearly what our priorities are in this area.

Discussion:

There are a number of live issues that are relevant to our short-medium term thinking and/or may require a response at some stage:

- Casework performance: we currently have a live caseload of just over 2000 cases, compared to a pre-pandemic average at the end of each year of around 1250. Although our productivity has returned to pre-pandemic levels, the same is true of our intake and we have already made significant efficiencies in recent years following previous funding reductions and rising caseload. Our current focus is on what more can be done.
- Section 31 
- Covid Inquiry: it is likely that draft Terms of Reference for the COVID Inquiry will be published in the near future. We will need to consider our response to this and whether we want to take up any opportunity to share views on these. It is also likely that some of the procurement issues emerging from the pandemic period (VIP lanes used by Ministers etc) may bring a spotlight back on our previous report on extending FOI to large contractors delivering public services.
- Social Housing: the Government is currently working on proposals for reform of the social housing sector following the Grenfell Tragedy. The previous Commissioner laid a report before parliament recommending that this sector (and others) should be covered by the FOI regime, but the Government has suggested that it may instead create a new, more limited, regime overseen by a different body. We have raised concerns about this and are likely to be asked our views in more detail as the policy develops – Scotland extended FOI to Social Housing providers in 2019.
- Public Administration and Constitutional Affairs Select Committee (PACAC) Inquiry: this inquiry is looking into the Cabinet Office's performance under FOI and the role of its Clearing House function, prompted by negative media reports. The previous Commissioner gave evidence to this last November and we anticipate it will take evidence from Ministers in the coming weeks and then report, possibly before Easter. We have made recommendations for a number of policy changes to PACAC, including compulsory audit powers and removal of the First Tier Information Tribunal in line with the recommendations of a previous independent review and to bring us into line with Scotland.

Longer term, it is also worth noting that 1 Jan will mark the 25th anniversary of the FOI Act coming into force, and quarter of a Century since it was drafted. This is a timeframe that could factor into some of the options explored below.

Options:

We propose discussing 3 initial options for your early engagement with stakeholders in terms of what you signal our future direction may be:

1. **We can choose to focus on casework, guidance and enforcement work and limit our wider engagement in the policy debate to purely reactive issues.** Given our resource pressures, there is a rationale for this – work to strengthen monitoring and enforcement, which is currently underway, will also be welcomed by many stakeholders given the criticisms we have faced about the use of our statutory powers. It will, however, play into the fears that some stakeholders already have about a lack of focus on FOI in the organisation and may give greater momentum to the argument that these powers should move from ICO to another body. It may also be difficult to maintain in light of some of the learning that is likely to emerge from our casework and investigations in the coming months and make responding to any recommendations from PACAC difficult.
2. **We can highlight our priority is to get casework back on track, but that we will continue to be active on live policy issues and indicate that you are considering what the ICO's longer term views on Access to Information should be.** This could mean:
 - a. We would continue work that is already in train on substantive policy issues such as the extension of FOI to social housing providers and highlight the benefits of changes we have already recommended to PACAC and that we would welcome them including in their report. This is manageable in our current resources.
 - b. We can bring options to you (likely in March) Section 31 [REDACTED] around the longer-term policy options that flow from our findings in this case and how these could play into our public positioning in this area. This will likely then set the tone for our approach going forward in the context of issues such as responding to PACAC, future

Select Committee appearances and our approach to the Covid Inquiry.

- c. You can use your engagement with civil society, the government and others in your first hundred days as a real listening exercise and test the proposals we put to you against what you hear more widely.
- d. This also gives us the space to finalise a new monitoring and enforcement policy, which will also be an opportunity should we so wish to highlight how we will use the evidence that follows from this approach to inform our future policy work.
- e. We can discuss with you and explore any other policy issues that you may wish us to look at longer term. This may include how to better highlight the role of Environmental Information in the context of government commitments to net zero and the transparency of environmental information at a local level.

3. We can prepare a future looking FOI report (potentially to lay in parliament) for you to publish early in the next financial year, which brings together the work of previous reviews, the conclusions of PACAC and evidence from work such as Section 31 [REDACTED] into a single comprehensive case for reform.

Given FOI as a piece of legislation was largely drafted in the last century and the changes to working practices that have taken place since that time, there is a case for this. Scotland is also about to review and strengthen its FOI Act (which already has more teeth than our own) which will likely be used to highlight the weaknesses our own system faces. The former Commissioner requested a similar piece of work towards the end of her tenure, which she decided not to publish, but that could provide a foundation for such a report. There is little political will behind comprehensive reform at this time, however, and as with Outsourcing Oversight, recommendations of this nature may fall on deaf ears.

Recommendations:

I recommend option 2 is the focus of our initial discussion and we can then flesh this out further if you agree. Equally, if during the discussion you would like us to expand further on the other or any alternative options we can do that.

We propose the initial focus on Option 2 as this gives us the space for a number of the current live issues to conclude [Section 31](#) in particular, as well as the development our new monitoring and enforcement approach) and then take stock of our next steps. It also gives you the space to hear the views of stakeholders and reflect this thinking into our future approach, while maintaining our visibility and slight momentum we do have on the more piecemeal policy calls we have already made.

[Section 31](#)



Risks Register Link:

The following risks are impacted by the proposal, option 2 acts as a mitigator by recognising the challenges:

1. R90, R91 & R85. – failure to be relevant / deliver regulatory action in effective way / reputation are all engaged. These are all mitigated by Option 2 as we will be making clear our commitment to improving performance (albeit within constrained resources) while also pushing for incremental improvements for the legislation where live policy debates are taking place.

Values:

Ambition – this approach allows us to continue developing our service in ways that will be welcomed externally, for instance by strengthening our approach to monitoring and enforcement in a way that facilitates greater visible use of our statutory powers. It also lets us maintain a visible policy presence, without overstressing resource at a pressured time.

Independent – this approach makes clear the ICO will not be retreating into its shell on the Access to Information brief and continuing to make its

presence felt beyond casework but doing so in an evidence based and consultative way.

Next Steps:

Following our discussion, we will flesh out your preferred approach as needed and provide you with further background/briefing as required for your meetings with key stakeholders in the coming weeks. We can also discuss in the meeting which areas you are comfortable with us continuing to progress while you do this.

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Reviewed/cleared by: James Dipple-Johnstone

Annexes: Annex A: summary of stakeholder landscape

Decision:

Signed:

Dated:

Annex A: Summary of Stakeholder landscape

There have been a number of concerns raised in recent years that are likely to come up in some of your introductory meetings. We can provide further briefing on any specific issues as needed, but a high-level overview of the key issues (excluding our handling of our own FOI requests, as opposed to the complaints we receive) includes:

- Organisational focus on FOI: Post GDPR, MySociety have suggested that the Access to Information brief should be split out of the ICO's functions, with a new body focussed just on this area created. They argue that GDPR has become such a significant focus that FOI and related legislation is suffering in comparison. We have disagreed with this arguing that there are clear benefits of regulation in this area sitting with one body [Section 31](#) [REDACTED] Other bodies have held back from calling for this for now, but there is a risk that others, such as the Campaign for FOI may join this camp if they feel there is a lack of focus in our efforts in this space.
- Use of 'enforcement' powers: There has been regular criticism over the years of the extent to which we have some of our powers under FOI. Decision Notices, which we produce hundreds of each year, are of course enforcement in themselves, which sometimes gets lost in the debate around this, in part because of the specific 'enforcement notice' powers in the legislation. It is true, however, that these powers are arguably underused, or at least there is a lack of evidence about their effectiveness and what may be needed instead. Our new enforcement policy will be designed to address this.
- Stonewalling: Once cases reach the internal review stage, there have been concerns raised about the lack of statutory timeframe at Internal Review stage and how this can be used by public authorities to 'stonewall' applicants, leaving them in limbo. We do raise this with authorities when we are made aware of it and can/do take cases before an internal review has been conducted or completed in egregious cases. The Independent Review on FOI in 2016 did argue that statutory timeframes should extend to Internal Review Stage.

- ICO Delay/backlogs: Given the importance placed on the timeliness of accessing some information (particularly journalists) delays in our complaint handling system do understandably draw criticism from some high-profile groups, including the Campaign for FOI and Open Democracy. We are working to address this as much as we can but are hampered by the resources available to us. Civil Society Groups are both privately, and sometimes publicly, sympathetic to our position and have called for us to be accountable directly to parliament for our FOI work. This could enable us to develop a more direct relationship with the Treasury akin to that of the Parliamentary and Health Service Ombudsman, who has received significant funding increases in recent years thanks to this arrangement.
- Keeping pace with Scotland/scope of FOI: although our legislation is very similar to Scotland in many ways, the Scottish Commissioner already has compulsory audit powers and the Act was extended to social housing providers in 2019. Scottish Ministers have also recently indicated that more reform is likely in the near future to extend the scope of the Act in ways that we have previously called for in the rest of the UK. Stakeholders are likely to increasingly point to this as a reason why reform is needed in our jurisdiction, although this has not been a source of tension with civil society for example, as we have made similar points to them in the recent past (the covid inquiry may give further impetus to this depending on how far it explores issues such as procurement).
- Research/understanding of FOI: civil society have expressed frustration at the lack of information there is about FOI performance outside of central government, which produces its own statistics on quarterly/annual performance. We have sympathy with this but do not have the resources to conduct regular research in this space, nor does the legislation require information to be provided to us in this regard. The Independent Commission on FOI did recommend this should be rectified with larger bodies required to share this information.
- First Tier Tribunal (FTT): the Independent Commission on FOI recommended that the FTT should be removed (bringing us into line with Scotland, where this has never existed) with a right of appeal on points of law maintained to the upper Tribunal and Courts. We would support this. The FTT conducts a full review of matters decided by the Commissioner, it can often delay information being released as a result and extends the wait for a final outcome for

citizens. We and some public bodies have to expend significant resource on dealing with these cases, which is resource that could be better utilised improving frontline and our own complaint handling.