ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Submission to the UK Department for Constitutional Affairs

in response to the supplementary consultation paper on the

Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007

June 2007

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1. Statement of interest

1. ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information. We are well known for our expertise in the area of access to information legislation, and have played an important role in the adoption of a great number of domestic access laws in recent years. We are also a leading member of the Global Transparency Initiative, which has successfully pressured international financial institutions – entities such as the World Bank and regional development banks – into adopting or improving their disclosure policies.

2. Summary of submission

2. In our view, the proposed new regulations would enfeeble the still young freedom of information regime on questionable grounds and in questionable ways. We make the following arguments in this Submission:

    a. The FOI Act is responsible for only a tiny fraction of total public expenditure and there is little ground to believe that frivolous requests are overrepresented amongst the 5% most expensive requests which the regulations aim to cut out.
    b. The savings that would be achieved by the proposed regulations are nominal by any standards and are probably even less than the figure of £11.8 million put forward by the government.

c. The counting of consideration time would disproportionately impact on information requests which have a genuine public interest element while favouring light-hearted requests.
d. The proposed regulations would enable the selective aggregation of requests on improper grounds.
e. Access to information is increasingly being recognised as a human right protected by international law. Consequently, even if cost-cutting is necessary, the government should take care to choose those means which are least detrimental to this right.
f. Alternative cost reduction measures exist which would discriminate more carefully between public interest requests and those which place an unwarranted burden on the public purse.

We therefore conclude that the draft regulations attached to consultation paper CP 28/06[1] are unnecessary and should be withdrawn.

3. Summary of relevant facts

3. The Freedom of Information Act was passed in 2000 and entered fully into force on 1 January 2005. The Act was adopted, in the words of the Home Secretary, in order to "transform the culture of Government from one of secrecy to one of openness."[2] The Department for Constitutional Affairs (DCA) has praised the "constructive and positive way" the Act has been used and described its operation in its first year as a "significant success".[3]

4. Under current rules, requests for information under the Act can be refused if the cost of processing them exceeds the "appropriate limit", which has been set at £600 for central Government and Parliament, and £450 for the wider public sector. Costs are assessed at £25 an hour. In calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. To prevent requesters from circumventing the appropriate limit by breaking up their request, the cost of multiple requests may be aggregated. Aggregation is possible when two or more requests relate to similar information, are received within a period of 60 working days, and are made by the same person, or persons who appear to be acting in concert or in pursuance of a campaign.

5. In December 2006, the DCA published consultation paper CP 28/06, outlining a proposal to amend the way the costs of processing requests are estimated. Broadly speaking, the existing rules will remain in force, but public authorities will be permitted to take additional factors into consideration when calculating whether a request exceeds the appropriate limit.

6. First, the time spent examining documents, consulting with others and considering whether the information is covered by an exemption will be included in the calculation of the total, up to a maximum of £400 for central Government and Parliament and £300 for

[1] Available online at http://www.dca.gov.uk/consult/dpr2007/cp2806-condoc.pdf.
[2] Jack Straw, then Home Secretary, on the introduction of the Freedom of Information Bill: Hansard, House of Commons Debates, 7 December 1999, col. 714.
[3] Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

the wider public sector. Reading, consulting and consideration costs will not be taken into consideration if they fall below a floor, set at £100 for central Government and Parliament and £75 for the wider public sector.

7. Second, public authorities will be permitted to aggregate unrelated requests if it is "reasonable in all the circumstances" to do so. The Draft Regulations do not elaborate on what constitutes reasonableness, although the DCA proposes a number of possible considerations.[4]

8. The proposed changes are based on recommendations from an independent economic review of the operation of the FOI Act commissioned by the DCA.[5] Salient conclusions from this review are that the overall cost of administering the FOI Act is approximately £35.5 million annually; that 5% of requests account for 45% of this amount; and that the proposed measures would lead to annual savings of £11.8 million.

9. The stated purpose of the amendments is to address the top few percent of requests which "are imposing a disproportionately large burden on public authorities."[6] Under the heading "Types of Requesters", the independent review of the FOI Act lists a number of examples of frivolous requests, such as one for the total amount spent on Ferrero Rocher chocolates in UK embassies and another for the contact details of eligible bachelors in the Hampshire Constabulary. This has led to a widespread public belief that the amendments are simply designed to put a stop to abuse of the Act. In fact, the four categories of requesters identified by the government itself as making up the lion's share of 'disproportionate' requesters are journalists, MPs, campaign groups and researchers.[7] It concedes these groups would be hardest hit by the proposed changes.[8]

4. The FOI Act is not unreasonably expensive; there is little evidence that frivolous requests account disproportionately for expensive requests

10. The government has rejected the option of leaving the current cost rules intact because "[public authorities] would continue to be obliged to comply with requests that impose disproportionate burdens on them, which would in turn affect their ability to deliver other core public services effectively and efficiently."[9] This argument turns on three claims: that the overall cost of the Act is too high; that the 5% of requests which cost more than £1000 impose a 'disproportionate', in other words unjustified burden; and that complying with these requests compromises the delivery of public services.

11. As noted, the cost of implementing the FOI Act, including the cost of the Information Commissioner and Tribunal, is £35.5 million annually or about 67p for every person in England and Wales. Total government expenditure stood at £555 billion in 2006,[10] of which the FOI Act accounted for just 0.0064%. This seems to us a modest amount and it is comparable to the costs of FOI systems in other developed democracies.[11] Furthermore,

[4] Consultation paper 28/06, pp. 13-14.
[5] Available online at http://www.foi.gov.uk/reference/foi-independent-review.pdf.
[6] Partial Regulatory Impact Assessment, para. 20.
[7] *Ibid.*, para. 40.
[8] *Ibid.*, para. 41.
[9] *Ibid.*
[10] Pre-Budget Report 2006, Summary, at http://prebudget2006.treasury.gov.uk/page08.html.
[11] For example, the US FOIA was estimated to have cost some $330m in 2004, or just over $1/citizen. See

the government's cost estimate ignores the high start-up costs associated with familiarising for the first time the 100,000 public authorities covered by the FOI Act with the new rules.

12. The economic review commissioned by the DCA proceeds from the implicit assumption that all requests are of equal value, meaning that a loss of 5% of requests leaves 95% of the Act's utility intact. But it is reasonable to suppose that, in practice, the most useful requests are often amongst those that are most expensive to process. The fact that it is mainly journalists, MPs, campaigners and researchers – collectively the public watchdogs which hold government to account – who make up the top 5% of most costly requesters, lends strong support to this supposition. While the amendments would serve to rule out the more expensive of the genuinely 'disproportionate' requests, they would equally affect complicated but sensible requests made in the public interest. Furthermore, there is no evidence to suggest that disproportionate or frivolous requests are concentrated among the more expensive requests; the proposed measures do nothing to address such requests where they fall below the cut-off level.

5. The estimate of savings achieved is distorted

13. The government's estimate of savings of £11.8 million ignores the potential of those public interest requests which will be ruled out to save costs elsewhere in the long run. Rather than compromising the delivery of public services, a robust freedom of information regime fosters efficiency in the public sector, generally by putting civil servants on notice that waste or corruption may not go undetected and specifically by exposing and bringing to an end inefficient and corrupt practices. Indeed, tolerating a bit of (probably unavoidable) waste in running a good FOI system is good overall value given that the system has been used to expose serious inefficiencies in the way larger budgets are used, such as the £96 billion spent on health services.

6. Counting consideration time will work disproportionately against public interest requests

14. It is reasonable to assume that, in general, the amount of time required to read, consult and consider increases with the sensitivity of a request. This means that the new rules, far from ruling them out, would actually favour light-hearted requests when compared to those which raise serious political issues. Little time would be needed, for example, to assess the applicability of exemptions for the requests involving Ferrero Rocher chocolates or eligible bachelors noted above. This problem is mitigated slightly by the facts that the draft regulations permit only time spent determining the applicability of a Part II exemption to be counted as consultation or consideration and that an overall ceiling is placed on these costs. It remains the case, however, that this system creates a bias for bland or silly questions since these require proportionately less consideration under Part II.

15. The proposed regulations also create an incentive for public authorities to engage in excessive consultation or consideration with a view to breaching the appropriate limit so

http://www.freedominfo.org/countries/united_states.htm.

as to deny access. The DCA consultation paper is confident that abuse can be prevented by providing proper guidance to public bodies. We do not share this optimism, which is not supported by the experience of other established democracies with long-standing FOI regimes, such as Canada and Australia. There will always be strong secretive tendencies within government, particularly where corruption, mismanagement or even simple waste is involved, and no amount of guidance will prevent this. We note that for similar reasons the US Freedom of Information Act specifically excludes such costs[12] and this was presumably the reasoning behind the existing UK exclusion of such costs from the appropriate limit calculation.

7. Aggregation of non-similar requests may be applied selectively

16. The DCA has set out four criteria which public authorities may employ to decide whether aggregation of non-similar requests is "reasonable in all the circumstances": 1) the level of disruption caused by dealing with the requests; 2) whether the applicant is acting in an individual capacity or for a business or professional reason; 3) the number of requests the applicant has made in the past; and 4) whether the applicant has previously been "uncooperative or disruptive".

17. Lord Falconer has said:

> [O]ur FOI regime is blind to both the identity and purpose of requests. It is rightly blind. The decision whether to disclose must be based on an objective application of the principles to the information requested, irrespective of who has asked, and for what reason.[13]

This statement reflects the position in a great majority of jurisdictions with access to information legislation.

18. Points 2-4 above contradict the principle of applicant-blindness, since in varying degree they entail value judgements on the person and motive of the requester. In effect, point 2 allows an assessment of the purpose of the request; point 3 permits a judgement of whether he/she has already benefited from the Act enough; and point 4 whether he/she is a good partner and warrants further assistance.

19. The combined import of points 2-4 is that public authorities may place institutional requesters, such as journalists and NGOs, on an "FOI diet" of as little as £600 per 60 working days, although "cooperative" partners may be rewarded with a higher allowance. It is not hard to see how the discretionary element in disclosing information might be used to favour 'loyal' reporters.

20. It has been suggested that any threat of abuse of the new aggregation rules is effectively countervailed by the possibility of appeal to the Information Commissioner. This is at best only a very partial solution. The time and cost, including in terms of human resources, of such an appeal act as a significant disincentive to most requesters. For many information requesters, especially the journalists who will be amongst those most affected by the new rules, time is of the essence and information loses its value if it cannot be obtained quickly. Furthermore, it will often be very difficult for the Commissioner to identify

[12] Freedom of Information Act, 5 USC § 552(4)(iv) states that "review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section".
[13] See Westminster Hall debates, Wednesday, 7 February 2007. Available online at http://www.theyworkforyou.com/whall/?id=2007-02-07a.295.1&s=speaker%3A10709#g318.1.

clearly abuse of this nature. These problems are further exacerbated by the fact that the Commissioner is already burdened with a serious backlog of cases.

8. Any cost-cutting should be minimally deleterious to the right to know

21. Even supposing that the proposed amendments were based on a sound cost-benefit analysis, their simple economical rationale fails to take due account of the importance of the right to access information, which has been recognised as a fundamental human right under international law.[14] The Inter-American Court of Human Rights, which fulfils a role similar to its European namesake, recently held:

> [R]estrictions imposed [on the right to information] must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest.[15]

22. It is a fundamental principle of international law that restrictions on freedom of expression and information should be carefully designed to cause the smallest possible degree of harm to the right. In the case noted above, the Court stated:

> If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.[16]

The European Court of Human Rights has frequently reiterated that restrictions must be proportionate.[17]

23. It may be doubted that any court applying these rules would find the nominal savings of £11.8 million (0.0021% of government expenditure) a sufficiently "compelling public interest" to justify a significant curtailment of the right to know. Indeed, the savings are so modest compared to the fact that a fundamental human right is being restricted that one may be led to question the government's motives.

9. Alternative cost-cutting measures exist which are more carefully targeted

24. Should the government insist on reducing the already modest cost of the FOI Act, ARTICLE 19 believes two alternative measures which are possible under the Act and which would have a smaller impact on public interest requests should be explored.

1. Disproportionate requests can be refused as "vexatious"

25. Defending the proposed regulations at a recent adjournment debate in the House of Commons, the Parliamentary Under-Secretary of State at the Department for

[14] See Toby Mendel, *Freedom of Information as an Internationally Protected Right*, available at http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf. See also *Claude Reyes et al* v. *Chile*, judgement of 19 September 2003, Case 12.108, Inter-American Court of Human Rights (not yet published).
[15] *Ibid.*, para. 91.
[16] *Ibid.*
[17] See, for example, *Barthold v. Federal Republic of Germany*, 25 March 1985, Application No. 8734/79, para. 55. See also *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995 (UN Human Rights Committee), para. 13.6.

Constitutional Affairs, Vera Baird, held the media culpable of wasting taxpayer money through "open-ended trawling and unspecific and unfocused inquiry."[18]

26. It is probably true that some journalists use the FOI Act to mount fishing expeditions. To the extent that such requests are disproportionately burdensome, public authorities could make more extensive use of their power under Section 14 of the Act to refuse requests that are 'vexatious'. The meaning of that term, as interpreted in the Information Commissioner's Awareness Guidance 22, goes beyond the narrow dictionary definition requirement of intention; the Guidance allows for the consideration of the *effect* of the request, such that:

> Even though it may not have been the explicit intention of the applicant to cause inconvenience or expense, if a reasonable person would conclude that the main effect of the request would be *disproportionate inconvenience or expense*, then it will be appropriate to treat the request as being vexatious.[19] [emphasis added]

27. The Information Commission has said he is 'very surprised' by the lack of use of the Act's provisions on vexatious requests.[20] Indeed, less than a year ago the DCA has recommended that:

> [P]roblems with 'frivolous' requests should be dealt with through the existing provisions in the Act. We do not consider that this is an appropriate reason for reviewing the fees regulations.[21]

28. We believe this point of view is still valid. The government should instruct public bodies to make better use of Section 14, and perhaps to interpret it more along the lines of, for example, Section 24 of the Australian FOI Act, which allows requests to be refused if the work involved in processing them "would substantially and unreasonably divert the resources of the agency from its other operations." Public authorities should, of course, at the same time heed the Australian Law Reform Commission's warning that this ability to refuse a request without even beginning to process it is a powerful one and should only be used as a last resort."[22] Applicants should certainly not be penalised for the added costs involved where a public authority has a poor information management system.[23]

29. Compared to the proposed regulations, more frequent use of Section 14 has two advantages. First, it allows disproportionate requests to be tackled while leaving expensive but justified requests untouched. Second, it allows requests which do not breach the appropriate limit, but are nevertheless disproportionate, to be refused.

2. Excessive expenses can be charged to the requester

30. The setting of an appropriate limit above which requests may be refused is highly unusual and may well be unique to the UK. ARTICLE 19 nor leading experts consulted by us are aware of any other law where a similar ceiling operates, with the exception of Scotland, which is governed by a separate law based on the law applicable in England and Wales. In

[18] See note 11.
[19] Freedom of Information Act Awareness Guidance No. 22: Vexatious and Repeated Requests, p. 3.
[20] See note 3, p. 32.
[21] *Ibid.*
[22] Australian Law Reform Commission, ALRC Report 77: Open government: a review of the federal Freedom of Information Act 1982, para. 7.14.
[23] *Ibid.*, para. 14.14.

Australia, the FOI Act specifically states that no financial limit of this kind will be set by the government.[24] It is notable that even many of the EU's poorer members, including Bosnia and Herzegovina, Bulgaria, Estonia and Romania, will process requests up to any cost.

31. We believe the appropriate limit is not in keeping with the proportionality principle under international law, discussed above. When applied, it operates as a complete bar to expensive requests, regardless of the public interest therein and regardless of whether the requester is willing to carry the excess part of the cost him/herself. Under the proposed regulations, this problem will be aggravated, since the calculated cost of requests will rise.

32. At present, public bodies have a discretionary power under Section 13 of the FOI Act to comply with requests which exceed the appropriate limit, in which case they may impose fees on the requester. A more appropriate approach would be to require public bodies to respond to all requests not covered by an exemption, but allow them to charge fees over a certain limit. This is already done in Canada, where the Access to Information Act similarly provides, in Section 11(2):

> The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

33. Charging the requester for costs in excess of the appropriate limit would act as a deterrent to fishing expeditions, while still ensuring that a requester sufficiently convinced of the usefulness of his/her request could obtain the desired information. The principal risk of this approach would be to deter less wealthy requesters or impose a large cost on serial requesters working genuinely in the public interest. This problem could be largely mitigated by adopting the approach of the US FOI Act, under which requests from educational, non-commercial, scientific and news media representatives enjoy a discounted rate, while requests deemed in the public interests are processed for free.[25]

10. Conclusion

34. The right to information is now widely recognised not only as a fundamental human right, but also as a key underpinning of democracy, a central tool in the fight against corruption and incompetence, and an invaluable means of promoting public accountability. To save what is ultimately a very minor sum of money, the government is proposing changes which will undermine the country's fledgling FOI regime just two years after it was put into place. Furthermore, less harmful ways of achieving savings, should this really be deemed necessary, exist. We accordingly strongly urge the withdrawal of the proposed regulations.

[24] As discussed above, Section 24(1) of the Australian Freedom of Information Act 1982 allows an agency or Minister to refuse a request if the agency or Minister is satisfied that the work involved in processing the request would "substantially and unreasonably divert the resources of the agency from its other operations". However, sub-section (3) further states that while considering this they are "not to have regard to *any maximum amount*, specified in regulations, payable as a charge for processing a request of that kind."
[25] Freedom of Information Act, 5 USC § 552 (4)(A)(i).