Access Info Europe

Cava de San Miguel 8, 4C

28005, Madrid

20 November 2015

Attn: [foi.commission@justice.gsi.gov.uk](mailto:foi.commission@justice.gsi.gov.uk)

# Evidence on aspects of the UK Freedom of Information Act 2000

This document sets out question-by-question, Access Info Europe’s submission to the Independent Commission on Freedom of Information’s call for evidence on aspects of the UK Freedom of Information Act 2000.

Access Info Europe is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights, for facilitating public participation in decision making, and for holding governments accountable.

Our expertise on international standards has fed into the development of our Global RTI Rating ([www.rti-rating.org](http://www.rti-rating.org)), which is regularly referenced by civil society, national governments and inter-governmental organisations.

Access Info Europe has based its submission on the existing international standards for the right of access to information, a right which has been confirmed as a fundamental human right by, inter alia, the European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee.

It is worth noting that UK legislation is often the basis of, and can significantly influence, legal developments in other countries - particularly those with *common law* systems. The UK in this respect often sets a precedent that other countries follow and copy. A restriction to the right of access to information held by public bodies in the UK would therefore be likely to have a significantly negative effect on the content and scope of transparency laws in other jurisdictions.

Access Info Europe also notes that, in terms of international leadership on transparency, the UK government is a founding member of the Open Government Partnership and that Prime Minister David Cameron has publicly pledged to make the UK the “[*most transparent government in the world*](http://www.opengovpartnership.org/country/united-kingdom).” An essential pillar of achieving this goal is to ensure that the UK Freedom of Information Act is one of the strongest in the world, setting a high standard that others can follow.

***Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?***

It is appropriate to have an exception which protects decision making and this is supported by international standards. The [Council of Europe Convention on Access to Official Documents](https://wcd.coe.int/ViewDoc.jsp?id=1377737), still not yet ratified by the United Kingdom, recognises that the protection of “*deliberations within or between public authorities concerning the examination of a matter*” is a legitimate limitation to the right of access to information. The Convention however, states that this is not an absolute exception - it is only applicable when the protected interest may be harmed by its publication, unless there is an overriding public interest in disclosure.

The transparency rules of the European Union ([Regulation 1049/2001](http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf)) also require a harm test and public interest test when considering the application of an exception to protest the decision-making process (Article 4.3 “*if disclosure of the document would seriously undermine the institution's decision-making process*”).

Absolute or blanket (class) exceptions to access such information on internal deliberations are never acceptable in any access to information legal framework. The European Court of Justice has stated, in a [case that referred specifically to the decision-making exception](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11), that “*it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception*.”

Hence, Access Info Europe takes that stance that in the UK all and any information relating to the internal deliberations of public bodies should fall under the scope of the access to information law, and information may only be refused to a requester wherethere is a demonstrable harm in releasing the information in that particular case, and there is no overriding public interest in the public obtaining the information.

Where information is withheld, it should be released when the reason for applying the exception cases to apply. This may be caused by changes in circumstances (such as a stronger public interest due to ongoing public debate) or with the passage of time, which results in the release of the information no longer posing a harm to the protected interest. As a result, the application of exceptions should be periodically reviewed by public bodies so as to ensure that once an exception lapses the information will be made public. The EU’s access to documents rules require that “*The exceptions … shall only apply for the period during which protection is justified on the basis of the content of the document*.”

Wherever possible, requesters should be notified when an exception might cease to apply. There should be no artificial time limits on keeping information secret, although it is acceptable under the Council of Europe Convention on Access to Official Documents to establish absolute maximum limits.

To further support this point, Access Info notes that the UK Information Commissioner has stated that damage to the protected interest is significantly reduced as time passes, and particularly once the decision has been made. International standards are robust on this as well, with the Council of Europe making clear that, “T*he outcome of the “harm-test” is closely connected with the lapse of time. For some limitations, certain events inevitably lead to the cessation of that limitation. In other instances, the passage of time may reduce the damage of release of the information*.”

It is also important to clarify a reference in the Call to Evidence regarding Spain. It is not the case that information is absolutely exempt where its disclosure would undermine the confidentiality or secrecy of decision-making. Rather, there is a protection for the ***necessary*** confidentiality/secrecy of decision making, something which is balanced by both harm and public interest tests.

In many other countries, the principle of a harm test rather than a blanket exception is clearly established in law or even in the Constitution. In Poland, for example, the harm test is enshrined in the Constitution (Article 31.3) whereby public authorities must measure the proportionality of protecting the interest against the harm it would cause by releasing the information requested, as well as consider the public interest in disclosure.

It is also worth mentioning European Union case law on decision-making transparency. During a 2013 case which was won by Access Info Europe, [The Opinion of the Advocate General](http://www.access-info.org/wp-content/uploads/OPINION_OF_ADVOCATE_GENERAL.pdf)stated that, “*In a representative democracy, it must be possible for citizens to find out about the decision-making procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate.”*

*“Inconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation ‘easier’, if easy is taken to mean ‘hidden from public scrutiny’,”* the Advocate General added.

The European Court of Justice in this [case](http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/11)found *“If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process”* and that they should *“have access to all relevant information.”*

***Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?***

As stated previously in answer to question 1, absolute or blanket (class) exceptions, for example to access information on Cabinet discussions and agreements, are never acceptable in any access to information legal framework.

Consistent with international standards, Access Info Europe considers that any limitation on accessing information about Cabinet discussions, may be applicable only wherethere is a demonstrable harm in releasing the information in that particular case and it is not outweighed by the public interest test.

The Information Commissioner and Tribunal already give significant weight to the need to protect ongoing government discussions. Even in those cases where disclosures are made, the principle of collective decision making is preserved as the [minutes of Cabinet meetings do not attribute comments to particular members of Cabinet](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61207/Guide_20to_20Minute_20Taking.pdf).

***Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?***

Access Info Europe does not believe that here should be special protection for risk assessments and certainly not an automatic blanket exception, something which is not permitted by international standards and which is adequately covered by the decision making exception as defined above and (potentially) other exceptions where relevant.

Risk assessments should only be denied when it can be demonstrated that there is a probable harm to the decision-making process, and that such harm is not outweighed by the public interest in obtaining this information.

In many instances, there will be a public interest in providing access. It is important that the public is able to ensure that all risks have been identified and that there is no risk missing. It is also essential to know that the risks have been adequately evaluated and that the degree of each risk is correctly assessed.

Publicity of risk assessments also ensures that policy decisions are based on the evaluation of the wider public interests and not on purely political risks to proceeding or not with policy options.

In many cases, members of the public, including academics, professional experts, civil society organisations and others, may be aware of and able to contribute to or comment on the way in which risks are assessed. This knowledge may be essential to ensuring that decisions are based taking all the facts into account.

Publication of risk assessments may generate public debate, but this is something that policy makers have to work with. Indeed, such public debate may lead to a greater public understanding of the context in which decisions are taken and of what has happened should the potential risks eventually become reality.

***Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?***

Access Info Europe takes the stance that the ministerial veto is unacceptable and should be abolished.

When it comes to decisions by the Information Commissioner, which is how the UK FOIAct originally intended the veto to be used according to Supreme Court decisions, public bodies have the alternative to the veto which is to appeal an Information Commissioner decision to the Information Tribunal and then to the courts.

The possibility of a veto over decisions of the courts is of particular concern. In any healthy democracy the decisions of judicial bodies should be final and binding. A ministerial veto over such decisions would raise serious problems about the rule of law. If such a veto were to be proposed by a less democratic state than the UK, it would undoubtedly meet with international criticism. The fact that the UK is a developed democracy does not permit it to push against established human rights principles.

When it comes to the right of access to information – which is a right as recognised by international human rights instances – this consideration also applies. Indeed, here there is a particular concern that the motives for invoking the veto could be purely political or ‘face-saving’.

Access Info notes that comparative law in the realm of access to information does not support the existence of a ministerial veto, nor do international standards on the right of access to information.

***Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?***

Access Info Europe believes that UK’s current system is functioning well and should not be tampered with as it ensures an effective administrative appeal process, the existence of an independent body charged with defending the right, and a proper level of judicial scrutiny.

Given that access to information is a fundamental human right is it essential that there be recourse to a body which can, rapidly and at low or no cost, evaluate violations of this right.

To this end, the Council of Europe Convention on Access to Official Documents specifically refers that, “*An applicant shall always have access to an expeditious and inexpensive review procedure*.”

Access Info Europe notes that many of the new access to information laws have an oversight body such as an Information Commissioner or Information Commission whose decisions are mandatory. Examples include countries in Europe such as Croatia, Slovenia, and Serbia, and globlly Brazil, India, Indonesia, and Mexico, and a number of others.

The fact that more European countries, such as the Nordic countries, do not have binding decisions but rather recommendations by the Ombudsman or Commission is also due to the fact that they have much longer traditions of a legal regime for freedom of information than the UK, and that the decisions of the Ombudsman are normally followed, something which is also true of the recommendations of the European Ombudsman. In countries with new access to information regimes, there is a measurable difference in compliance with the right where there is a binding oversight body.

In all countries with access to information laws, requesters have the right to appeal to the courts when information is denied as for other violations of the right. The UK has the Information Tribunal, which has the huge benefit of being a specialised body, something that ensures that both requesters and public bodies receive a fair hearing and that all the arguments are given due consideration. As such it is a model that Access Info and other civil society organisations actively promote globally as a model to be followed.

The data from the call for evidence demonstrates a reasonable use of the appeals procedures, with relatively few requests needing to be appealed. Access Info Europe notes that statistics from the Call for Evidence also demonstrate that only 5.2 % of request result in internal reviews. This is similar to other jurisdictions such as the EU, where the EU Commission in its latest report stated that 4.8% of all the requests made led to an internal review. This number drops as the appeals move up through the appeals system, with the data from the Call for Evidence also showing that the system can effectively filter out decisions that should not be appealed (around 70% of such appeals at the first stage and Upper Tribunal stage are withdrawn, dismissed or refused from the outset).

In terms of the cost of processing appeals, it is consistent with access to information being a fundamental right that this not be something that requesters have to pay for. Furthermore, given the right to appeal to a judicial body, the cost of operating that judicial body has to be assumed by the government. Given the importance of the right of access to information in a democratic society, not just as a right in and of itself, but as a right that permits full exercise of freedom of expression as well as public participation in government, and also accountability of government activities, there is a huge public interest in ensuring that barriers of access to the appeals system are as low as possible. Permitting requesters to move up the appeals system without a lawyer and free of charge is consistent with the government’s obligations to uphold this right and also sets a positive standard globally.

***Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public’s right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?***

It is of concern to Access Info that the question of the burden of the right of access to information arises repeatedly in the UK. This question points to the fact that it has still not been fully internalised within government that this is a right of members of the public, consistent with 21st Century democratic values, and that it should be a priority to ensure that the infrastructure is in place in order to make it easy for public authorities to process and respond to requests.

There are various ways in which the burdens and costs of FOI laws can be reduced. They include ensuring good information management so that information is easy to find and deliver.

Access Info notes that in the Call for Evidence there is evidence of a levelling off of the quantity of requests year on year. Such stability enables government to plan ahead to make sure that enough resources are provided to deal with the numbers. There is no need to assume that requests will continue to rise and hence that the burden will increase. Indeed, the push towards proactive publication and open data should decrease the number of requests, without in any way invalidating the need for the FOI Act.

Hence, in order to help reduce times and the cost of accessing information in order to publish it for requesters, there should be investments and improvements made in the way information is stored by public bodies. The information should be stored effectively and in a manner than enables the searching of it quickly and easily. Good information management in reducing burdens and requesters should never be penalised for failures to manage information well by a public body.

As an example of the way in which the UK system is currently limiting transparency comes from Access Info’s work on accessing information about respect for human rights. In a pan-European survey, [we were given information by 9 European law and order authorities](http://www.access-info.org/wp-content/uploads/Police-and-Protest-Report_Final.pdf) (including Northern Ireland) on the amounts of equipment and number of times used by the police in protest situations. Our requests to four English police forces however, led to refusals by the Metropolitan, Greater Manchester, and West Yorkshire police due to an alleged excessive cost of compiling the information. Only West Yorkshire Police estimated the actual amount of time needed, with other forces telling us it would simply take more than 18 hours of work, worth £450 at £25 an hour (the national threshold according to the three police forces). The Thames Valley Police provided some of the information requested. This leads Access Info to reaffirm the need to place the burden of finding information on public bodies - it is not acceptable to place the burden on requesters to narrow the scope of their request to compensate for inefficient searching of files by some public bodies when others are perfectly able to provide the information.

In order to further reduce the burden, the UK government could also embark on an even more ambitious proactive publication strategy, in specific areas of government activity that are the regular focus of requests such as decision making. In the case of Poland for example, documents and communications between the government and third parties are published online, as part of a live legislative footprint. A similar process in UK institutions could help to reduce the burden of answering such requests for example.

Access Info adds that the fact the local authorities have had their budgets reduced does not mean that they have any less requirement to need to answer access to information requests. The reduced budgets of local authorities should not be allowed to affect the exercise of a fundamental right like the right of access to information, as recognised by the European Court of Human Rights, the UN Human Rights Council, and other International Courts and Bodies worldwide.

Furthermore, and as recognised by international standards, and already covered by the current legislation on access to information held by UK public bodies, the only kinds of requests that can be declined are those that are vexatious in nature, although this must be narrowly interpreted. Hence if a particular request is genuinely unduly burdensome, it can be refused.

**Focus on the Benefits**

There could also be more effort made to evaluate the benefits of the FOIA in a number of ways. These include by exposing areas of government activity where there can be efficiency and cost saving and reduction in wastage. There is also the societal benefit of better policy making, with greater citizen participation.

The UK is a leading member of the Open Government Partnership and through this alliance has been promoting the benefits of opening up government information. These benefits range from stimulating entrepreneurship to saving lives (the example of data about medical mortality rates). Such benefits do not only flow from open data but also from information made available under access to information requests.

**Fees**

International standards on access to information are clear when it comes to the costs of access to information requests – they should be free to make and come at no cost to the requester, other than for the production of physical copies. Any other cost that is placed upon requesters when making requests is equal to charging them for something which they have already paid for as taxpayers. This double-taxation is not acceptable and is not in line with the vast majority of international practice. The following is a list of countries that do not charge fees for making access to information/FOI requests:

*Albania, Angola, Antigua, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Belize, Bosnia and Herzegovina Brazil, Bulgaria, Chile, Colombia, Cook Islands, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Ireland, Italy, Jamaica, Jordan, Kosovo, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Macedonia, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Peru, Poland, Portugal, Romania, Russia, Rwanda, Serbia, Slovakia, Slovenia, South Korea, Sweden, Switzerland, Thailand, Trinidad, Tunisia, Turkey, Ukraine, United Kingdom, United States of America, Uruguay, Yemen.*

The following is a list of countries that DO charge fees for making access to information/FOI requests

*Canada (One off request fee is Canadian $5 which is about £2.47), China, India (a very low rate that can be waived for impecunious requesters), Israel, Japan, Malta (often not applied in practice as is optional for public bodies),Nepal, Pakistan, Saint Vincent and the Grenadines, South Africa, Taiwan, Tajikistan, Uganda, Uzbekistan, Zimbabwe*

As demonstrated, the vast majority of countries and the common practice internationally is to not charge fees to make access to documents requests. It was in recognition of this that Ireland recently dropped charges for FOI requests. The UK should not buck this trend and introduce any fees for making requests, but rather should assess ways in which information can become public even more rapidly and cheaply, through good information management and increased proactive publication.

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*Submission made by Access Info Europe, 20 November 2015.*

For more information, please contact:

**Helen Darbishire,** Executive Director  
**Andreas Pavlou,** Campaigner & Researcher  
**Access Info Europe |**<http://www.access-info.org>  
Phone: +34 913 656 558  
*Email*: [info@access-info.org](mailto:info@access-info.org)