BIG BROTHER WATCH
DEFENDING CIVIL LIBERTIES, PROTECTING PRIVACY

Independent Commission on Freedom of Information - Call for Evidence
November 2015

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaign group that was founded in 2009. We have produced unique research exposing the erosion of civil liberties in the UK, looking at the dramatic expansion of surveillance powers, the growth of the database state and the misuse of personal information.

Specific to this consultation we have made use of the Freedom of Information Act on a large number of occasions. Producing reports on subjects as varied as the use of Communications Data by police forces, breaches of data protection within the NHS and the number of council officials who can enter your home without a warrant.

Additionally the organisation is dedicated to ensuring transparency at all levels of government, a call which flows throughout our work.

Key Points

- **Introducing mandatory charges will do more harm than good.**
- **The case-by-case approach to publication under the Act are preferable to a catch-all scheme.**
- **Good leadership and a renewed emphasis on pro-active publication are more effective at reducing the burden of the Act than implementing charges.**

Big Brother Watch's use of the Act

As an organisation Big Brother Watch has made extensive use of the Act since 2009. For a full breakdown please visit the report section of our website: https://www.bigbrotherwatch.org.uk/research-and-reports/ .

A few examples of this are:

1. In September 2012 we released Class of 1984 a report which showed for the first time the number of CCTV cameras that were being used to monitor children in schools.[1]
2. Our March 2013 report found that a number of councils were circumventing the Protection of Freedoms Act 2012 by hiring private investigators to carry out surveillance.[2]
3. In November 2014 we used Freedom of Information requests to show that NHS bodies suffer 6 data breaches every day.[3]

[1] Big Brother Watch, *Class of 1984*, September 2012: https://www.bigbrotherwatch.org.uk/files/school_cctv.pdf
[2] Big Brother Watch, *Private Investigators*, March 2013: https://www.bigbrotherwatch.org.uk/wp-content/uploads/2013/03/Private-Investigators-Final-Report.pdf
[3] Big Brother Watch, *NHS Data Breaches*, November 2014, p. 3: https://www.bigbrotherwatch.org.uk/wp-content/uploads/2014/11/NHS-Data-Breaches-Report.pdf

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Response

Ware concerned that Questions 1, 2, 3 and 4 all call for a suggested time limit for the release of sensitive information. To avoid pointless repetition throughout this response we will address this issue here.

The Act already deals with sensitive information. If a response is deemed to be sensitive in some way it can be refused. Under Section (2) 36 information can be refused if it may "*prejudice, the effective conduct of public affairs*".[4]

The current process of releasing data on a case by case basis, after deliberation and scrutiny of the public interest value should remain. The alternative, of treating all data with the same level of sensitivity in order to restrict access to it until 30 years have passed, would, if implemented be an absolute attack on government transparency and the ability of the citizen to engage in government activity.

It should also be noted that the timing of this Independent Commission, given that it comes just two years after the Justice Select Committee carried out post-legislative scrutiny of the Act could be seen as inexplicable.

> **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?**

Big Brother Watch believe that the current arrangements offer sufficient safeguards to the decision making process.

Making it difficult to access information used as part of a decision making process has the potential to exempt a lot of important material from disclosure.

The decision making process which can reveal:

- Factual material
- Research reports
- Opinion polls
- Statistics relating to decisions not yet taken
- Scientific or technical evidence
- Contact with lobbyists
- Consultation responses.

[4] Freedom of Information Act 2000, Section 2, Clause 36: http://www.legislation.gov.uk/ukpga/2000/36/section/36

This material can under the right circumstances promotes transparency and improves understanding of the process of government and beyond

It is worth noting that the Justice Select Committee's post legislative scrutiny of the Act considered this issue and found that the existing provisions of the Act "*could be used more effectively to give assurance that there was no need for high-level policy discussions, and the recording of such discussions, to be inhibited by the Act*".[5]

> **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?**

Big Brother Watch believe that the current arrangements offer sufficient safeguards to the decision making process.

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

Big Brother Watch believe that the current arrangements offer sufficient safeguards to the decision making process.

> **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?**

It is sensible to allow the government a veto over the release of certain information. Although it is important that this veto; as with other methods of refusing the disclosure of certain information, can be challenged, as was the case when the Supreme Court overturned the use of a ministerial veto on Prince Charles' correspondence with ministers. Any veto must not be used to permanently block the disclosure of information.

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

The Information Commissioner's Office is the correct body for an appeals process. It has the knowledge and expertise to be able to handle appeals efficiently as well as being a recognisable and trusted body.

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[5] Information Commissioner's Office, *Working Effectively: lessons from 10 years of the Freedom of Information Act*, 1st October 2015: https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/10/working-effectively-lessons-from-10-years-of-the-freedom-of-information-act/

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?

The burden on public authorities is not as onerous as is often claimed. The Ministry of Justice's statistics show that between 2005 and 2014 there was an overall increase of 8698 requests to central government bodies. This is the equivalent of 22.9%. This shows that the burden, broadly speaking, has remained consistent since the introduction of the Act in 2005. It would be wrong to argue that the burden on public bodies has risen exponentially or has seen a sudden and dramatic increase.

The cost in terms of staff time sounds significant when taken in isolation, but when set against the bigger picture the £35.5m per year cost to central government is not as big as it may at first seem. The £108m which is spent annually on funding trade unions puts the £35.5m figure into perspective. Importantly uncovered through Freedom of Information requests by the Taxpayers' Alliance .[6] Additionally the Daily Telegraph have used the laws to reveal that 186 councils had spent around £40m on things such as "*dinners at Michelin-starred restaurants, leisure trips and expensive gifts including iPads and video games*".[7]

There are already a range of options open to organisations if a request appears as though it may be too burdensome to respond to. Already requests can be refused if they threaten to exceed cost and time limits:

1. £600 for central government.
2. £450 for local government.

Related requests and questions can be aggregated to remove the need for officials to duplicate work. This does not take into account the money which can be, and indeed has been, saved by public bodies as a result of inefficiencies uncovered by requests. The Justice Select Committee noted the cost of meeting the requirements of the Act can be reduced by good leadership and a clear strategy for dealing with requests. It warned that authorities complaining about the Act will "*ring hollow*" if they have "*failed to invest the time and effort needed to create an efficient freedom of information scheme*".[8]

[6] City AM, *Trade Unions received £108m from the taxpayer last year*, 9th September 2014: http://www.cityam.com/1410222716/trade-unions-received-108m-taxpayer-last-year
[7] http://www.telegraph.co.uk/news/politics/council-spending/8542909/Councils-spend-100m-on-taxpayer-funded-credit-cards.html
[8] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 38: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf

In light of this it would be a grave error to introduce a system of mandatory charges. Even something as low as £10, a figure suggest by Rt. Hon Jack Straw MP in his evidence to the Justice Select Committee's inquiry into Freedom of Information, would have a negative impact on the ability of people to make use of the Act.[9]

FOI is predominantly used by members of the public. The Campaign for Freedom of Information has noted that individuals of limited means will be effectively excluded from using the Act if they need to use it to question multiple bodies, as is often the case when attempting to resolve a complex issue.[10]

For campaigning organisations such as Big Brother Watch, the £10 charge would impose real penalties on the work we do, work which has brought awareness to the general public and has assisted MP's and Peers in drawing attention to unfair and costly practices. As an example, for us to afford to make the number of requests we have made from October last year to October 2015 it would have cost us £18,050 if a £10 charge had been in effect.

When the Irish Government began charging for Freedom of Information requests in 2003 the following year the Irish Information Commissioner recorded a 50% drop in the number of requests (this is excluding requests for personal information, equivalent to DPA requests in the UK as charges were not introduced for this type of information). The Irish Information Commissioner called the changes "*a major obstacle to the use of the Freedom of Information Act*".[11]

She added that the move risked sending a signal that "*people are seen as adversaries and nothing more than lip-service is being paid to the principles of open, fair and accountable government*".[12]

It's unclear as to what exactly a charge would achieve, it may cut the number of requests but it would not bring the Act any closer to being more self-funding than is already the case. If the local government had charged £10 for every request made in 2010 it would only have recouped £1,977,370 of the £31.6m cost. This is a point recognised by the Justice Select Committee, their final report on the issue argued that "*fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act*".[13] A far more effective way of cutting costs and reducing the burden of the Act would be to follow the Information Commissioner's advice and become more effective at publishing information in the first place.

[9] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 30: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf
[10] Campaign for Freedom of Information, *Stop FOI restrictions*: https://www.cfoi.org.uk/campaigns/stop-foi-restrictions/
[11] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 36: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf
[12] Ibid p. 36
[13] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 36: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf

In summary it is worth considering the Information Commissioner's evidence to the Justice Select Committee. When asked about the potential for charging the Commissioner responded that it was "*a bit rich*" to see organisations complaining that they received a large number of requests "*when they do not have an adequate publication scheme*".[14] As stated earlier a way to cut the number of requests and make savings in this area, removing the need for charges, is for organisations subject to FOI to focus on ensuring as much pro-active publications as possible as was originally proposed when the Act was made law.

[14] Ministry of Justice Select Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000*, 26th July 2013, p. 36: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf