



Public Administration and Constitutional Affairs Committee

Oral evidence: The Work of the Information Commissioner, HC 1214

Tuesday 6 June 2023

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Members present: Mr William Wragg (Chair); Jo Gideon; Mr David Jones; Damien Moore; Tom Randall; Lloyd Russell-Moyle; Karin Smyth.

Questions 1 - 52

Witnesses

I: John Edwards, Information Commissioner, Information Commissioner's Office; and Warren Seddon, Director of Freedom of Information and Transparency, Information Commissioner's Office.

Examination of witnesses

Witnesses: John Edwards and Warren Seddon.

Q1 **Chair:** Good morning, and welcome to the Public Administration and Constitutional Affairs Committee. Today the Committee is holding a session into the work of the Information Commissioner's Office. In this session we will be revisiting some of the issues raised in our April 2022 report on the Cabinet Office Freedom of Information Clearing House and the work of the Information Commissioner's Office promoting and enforcing the Freedom of Information Act 2000.

We are joined this morning by the Information Commissioner, John Edwards, in his first appearance before the Committee since his appointment last year, and Warren Seddon, Director of Freedom of Information and Transparency at the Information Commissioner's Office. Good morning to you both. I will ask you to introduce yourselves for the record, starting with Mr Edwards, please.

John Edwards: Kia ora koutou katoa. Ko John Edwards tēnei. I open with a greeting in te reo Māori from my homeland of Aotearoa New Zealand. I am the Information Commissioner and I have been in post since January last year. Prior to that I was Privacy Commissioner in New Zealand.



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Warren Seddon: I am Director of FOI Transparency at the ICO. I think it was suggested that I declare that between 2004 and 2006, many moons ago, I worked in the original iteration of a clearing house at the then Department of Constitutional Affairs.

Q2 **Chair:** Thank you both very much indeed. Mr Edwards, you have been in post as Information Commissioner for nearly 18 months. What are your key priorities and what challenges do you foresee?

John Edwards: I will begin by rather than looking ahead looking back just a little bit, if you will indulge me for a moment. For the three years prior to the pandemic, we began at the ICO with a caseload of 1,250 FOI matters. When I took the post in January last year, we had a backlog of something like 2,300 cases. It was taking up to nine months to assign an application for review to a case officer. I made freedom of information my top priority. I set objectives and provided some resources, but I want to right at the start acknowledge the extraordinary effort and initiative of a team of about 70 people, mostly from the Wilmslow office, who have applied themselves to transforming our approach to transparency and freedom of information. That has meant that we have been able to reduce that caseload to its lowest level since the early days of freedom of information. It now stands at about 800 and we have done that not just by throwing in new resources but by thinking about new ways of discharging those review functions.

Sorry to take that opportunity to boast on behalf of the team. I think it is important as I account to you, but you have asked about the future and I want to keep that trend going. We need to look for new ways of influencing practice and behaviour. We need to work upstream. The Whac-A-Mole game of investigating and reviewing one decision at a time is not an efficient use of resources. We need to help public authorities to improve their practice, to get it right first time and respond to reviews in a timely way, and that is what we will continue to do.

I want to continue to encourage the proactive disclosure of information, which is a trend that we have seen influence some of the statistics that I know that you are interested in from our casework.

Q3 **Chair:** The research suggests that there has been an issue with the timeliness of some public authorities' responses to freedom of information requests. How are you enforcing compliance with the Act, and how effective has that strategy been to date?

John Edwards: In the last year we have issued more enforcement notices under the Freedom of Information Act than in the 17 years prior to my taking up this office. We are seeing public authorities sitting up and taking notice of this more assertive approach. In addition to that stick, we are offering the carrot of practice recommendations. We are learning from the matters that are coming across our desk and communicating that back out into the FOI community, so I think that we are seeing an improvement in practice.



It is probably too early to quantify that impact, but I hope that on the next opportunity that I have to speak to the Committee we will be able to report some statistics on the changes that we have been able to effect in that way.

Q4 Chair: Are there any public authorities with whom you are working to reduce their backlogs and processes and could you describe those processes they are able to put in place so that they can perform better?

John Edwards: We have issued an enforcement notice in respect of the Department for International Trade, and we have seen them come into conformity as a result, so that is very encouraging. In addition to that Department, we have issued enforcement notices against a couple of local authorities.

We still see a tail of backlog in some authorities that is related to the pandemic. I have said to those authorities that the pandemic is an explanation but it is not an excuse, and it is time limited. The most prominent among the public authorities in our casebook is the Cabinet Office. They have a high volume. Their cases are typically more complex. They often involve a range of other Departments and the approach that we have begun with them is they have drawn a line across the calendar and are dealing with all new matters in accordance with the statutory obligations. We have had conversations with them about how we can work on that backlog and bring it down. At our end, we are communicating with requesters and asking if the need for the information that led them to file a complaint with us remains high or relevant at this time distant.

I might pass to my colleague to discuss some of the more practical ways in which we are bringing those backlogs down in some of the other Departments that we are working with.

Q5 Chair: That would be helpful because my next point is you mentioned the carrot and stick approach. How are you supporting and encouraging those public bodies? Maybe Mr Seddon could expand on that as well.

Warren Seddon: As John says, we have been doing quite a lot in the upstream space over the last few months. We have built that team up on the back of some additional funding that we received last year, and we have been looking at the different ways we can do that. We have commissioned research that we will shortly be publishing to hear from public authorities directly about the kinds of things that we can do, and we will be publishing a workplan alongside that, setting out clearly the types of steps that we will take. In the interim we have been doing what we can based on what we think are the best approaches. For example, we took our own internal training for our own staff on FOI, and we have digitised that and uploaded videos to our website so people can use the training that we use ourselves to train their own staff. We are developing different tools and toolkits on different elements of the Act and we have



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had positive feedback about that. For instance, the issue of vexatiousness is a toolkit that we published recently.

On central Government, you asked about the Departments that we were looking at particularly. We have issued practice recommendations to the Department for Work and Pensions and BEIS, when it existed, looking at specific issues within those organisations and highlighting them, setting out what we expected to improve and suggesting ways that they could do that, where we had guidance to help them.

Q6 Chair: The question of a public interest test is there in the exemptions to the Freedom of Information Act. How are you monitoring how public authorities are undertaking public interest tests and what are you doing to ensure that the application of such tests is not simply being used to delay?

John Edwards: We have seen no evidence that the extra time allowed for undertaking a public interest balancing exercise is being gamed in the way that your question implies. As to how we review those, we take them in the round. As you know, we are obliged to take a case-by-case approach. Warren, do you want to discuss the balancing and how we go about reviewing the kinds of questions that we are asking?

Warren Seddon: It is case by case in a lot of instances. We have published guidance on how the public interest test should be used by public authorities. That is the same guidance that our caseworkers use, so there is regulatory certainty there, that they understand where we are coming from when we are looking at it case by case. We look more broadly as well at central Government statistics, about the use of PI extensions. We are looking at that as part of our new approach to monitoring and enforcement. It is an area that we are exploring potentially for future audits within the next 12 months, to look specifically at that issue in those Departments that use a lot of public interest extensions, not necessarily because we think there is something wrong there but just because we want to sense check if everything is working as it should be.

John Edwards: We have also updated our guidance on the public interest test in July last year, so that sets out what we have learned and how it is applied for the future. Again, we are interested in improving the quality of decision making and reducing the need for ex-post reviews.

Q7 Mr Jones: Good morning, Mr Edwards. Since the Act was implemented in 2005 there has been a consistent increase in the proportion of partially or fully withheld FOI requests by Government Departments. What do you think has been driving that and are the changes you have outlined having an effect to reduce that?

John Edwards: It is difficult to understand that. Counterintuitively that could be a sign of an increase in maturity, that more information is being released proactively, the low-hanging fruit are being accessed by the



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community much more readily and the more complex line call cases are coming to us and being reviewed. It is difficult to estimate the volumes and the shifts in volumes of information being made proactively available on gov.uk and the like.

Q8 Mr Jones: What are you doing or what can you do to reduce that trend?

John Edwards: It is not ever going to reduce to zero. The fact is there are legitimate exemptions and limitations on people's right to access information and there is an almost unfettered right to have those decisions reviewed. You might almost say that when the system is operating optimally and ideally, we will be upholding 100% of decisions to withhold information because they were properly made at the beginning and on review we have found no basis to impugn those.

Q9 Mr Jones: It is not a trend that causes you concern?

John Edwards: No, it is not a trend that is causing us concern at this stage. If I were to find through more detailed analysis of those figures any trends that led me to think that there is gaming or resistance or some backsliding going on, we would certainly act on that. We are not seeing that.

Q10 Mr Jones: You have mentioned the Cabinet Office. Our report of 2022 recommended that the Cabinet Office should try to achieve a cultural shift to improve the principles that underpin transparency of FOIs. Do you think that the Cabinet Office is making sufficient effort to advocate for greater transparency and what more do you think could be done?

John Edwards: It is difficult for me to answer the question as to the Cabinet Office's advocacy. I do not necessarily have visibility over that, but certainly I think as a consequence of the Langley review, which the Cabinet Office commissioned having declined our invitation to undertake an audit, we are seeing positive signs. We are seeing a greater willingness for the Cabinet Office to be open about its processes and to be open, for example, about the functioning of what was called the clearing house and will evolve into a centre of excellence and advice. I encourage that and welcome those developments.

Q11 Mr Jones: What does your office do to advocate for greater transparency generally?

John Edwards: We try to ensure that the entire sector that is covered by this legislation has access to the things that we learn from each case. That is the way we get the greatest return on the investment that is a review of a particular matter. It is incumbent on us to the greatest extent possible in a case-by-case system to communicate what we have learned and what we find as best practice. We are issuing more practice recommendations and, with your leave, I invite my colleague to discuss some of the contents of those practice recommendations and what we have seen because of those.



Warren Seddon: We have had some positive feedback from practice recommendations that we have issued. For instance, on the recommendation that we made to DWP recently about how it was managing its requests, another Government Department came to us proactively in one of our regular contacts with them and said that they had used it themselves to go through all of their processes to look at how they could improve what they were doing in line with what we were recommending to another Government Department. That is exactly the kind of thing that we are hoping for when we publish these regulatory decisions and support tools so that other public authorities can proactively use them that way.

On the broader point you are asking about what we do as an office to advocate for greater transparency, we are also doing a piece of work with our international colleagues, co-chairing a working group on transparency by design. We have an initial meeting about that later this month to look at the work we have done so far. The aim is to develop a set of principles at the international level. We want to take those and bring them back in domestically and think about how, for instance, our system of publication schemes works within the context of what we can learn from what other countries are doing about more proactive transparency in designing systems that are more transparent right from the outset.

John Edwards: While I am eager to present a positive picture to the Committee, I am not Pollyanna and there is still work to do. I am disappointed that we do not have greater clarity and consistency around the application of exemptions to policy advice. For me, that would be a challenge for the next level of maturity in transparency, that we see more proactive publication of material that illuminates the workings of government.

Q12 **Mr Jones:** Do you think that legislative changes are necessary to achieve greater transparency or do you think you can achieve them by the sort of measures that have been outlined this morning?

John Edwards: I will not comment on the necessity of legislative change. We will continue to effect as much change as we can with the legislation and the resources that we have. The work that the team has done in getting rid of that demand-driven ex post has opened up space for us to be more proactive and to advocate more for those principles and to demonstrate how we can achieve that increased transparency. I am very proud of those achievements.

As to legislative reform, it is not within my remit to advocate for change. These are matters for government policy. There have been changes suggested. Our colleagues in Scotland have reformed their legislation. We have seen legislation exempt an organisation from coverage of the Act. I would not like to see that trend continue. I think that is unhealthy, it was unnecessary and ultimately it would be counterproductive. I think that we must be vigilant in maintaining the direction of travel towards increased transparency and avoid any temptation to slide back.



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Q13 **Karin Smyth:** Mr Edwards, at an event in November last year you talked about a network of FOI practitioners to learn lessons. I am interested if there has been any further work in that space.

John Edwards: We established last year, with the co-operation of the then DCMS and Cabinet Office, a network of data protection officers at the chief operating officer level or a senior civil servant network to promote data protection. At the November event I floated the idea that a similar kind of network may have value for FOI. We have not had the same degree of buy-in from the Cabinet Office for that kind of co-ordinating role and it is not something that I think we can necessarily organise ourselves without partners.

There is a six-monthly gathering of FOI practitioners across Whitehall that is co-ordinated by the Cabinet Office. I think that, in the absence of the kind of forum that I floated in November, that would be a forum that we can use to send out the sorts of messages that we hope will ensure that everybody gets the benefit of the practice improvements that we are seeing in some quarters.

Q14 **Karin Smyth:** Do you think that is not something that will come in place? Your ideas about what is missing are interesting. What could that look like from your perspective and what is it not doing?

John Edwards: Better communication is very often the answer to complex questions. If we can have FOI practitioners coming together and sharing notes and getting the benefit of each other's experience, that is all for the better.

Karin Smyth: That seems fairly basic.

John Edwards: I agree.

Karin Smyth: It is not happening.

John Edwards: We can do that to a certain degree. We can provide online forums and conference events. Warren brings together FOI practitioners from time to time. Do you want to describe some of that engagement?

Warren Seddon: Yes. In addition to central Government, we have also established a network of local government practitioners where we talk to them about data protection and freedom of information issues together. We are looking to do the same across the other sectors that we get a lot of complaints about as well.

In the central Government space one of the things that we suggested at the time a broader senior level group could do was support the work the Langley review recommended around implementing a centre of excellence, and so on, but as we understand it that is work that is progressing and information will be published on shortly, so we will wait to see what that one says.



Q15 **Karin Smyth:** Why do you think that the Cabinet Office is not encouraging that level of learning and sharing and wider network?

John Edwards: I would not say that they are not encouraging sharing and learning. You would have to ask them for their reasons, but they did write to us and explain a reticence about the proliferation of networks and so on and that they were already doing work in this area off the back of the Langley report. They are focused on improving FOI across the sector and I think the message was that they did not want to duplicate and perhaps dilute messaging by having multiple fora. You would need to take it up with them.

Q16 **Karin Smyth:** We may well take your advice on that one. Mr Seddon, on the ICO website you recently suggested that you were putting together a bespoke plan for the Cabinet Office for reducing the backlog, which is currently 10% of the caseload. Why was that necessary and do you think progress has been made?

Warren Seddon: This is what John touched on earlier. For context, in our caseload now around 12% of the complaints that we have are Cabinet Office. Last year they were 3% of the volume of complaints going into it and it is a significant number of cases above what you would say is a usual number in the system. John explained earlier that we are looking at setting a line in the sand with them from April this year and all the new complaints coming in and making sure that they are being delivered to the same standard that we expect of the rest of the public sector. We are working with them behind the scenes on the complaints caseload with the aim of over the next six months working that down as much as possible back to what you would say is a usual number of cases in the system. The aim is to review that in six months, and we will see at that point whether further action is needed.

Q17 **Karin Smyth:** For the completeness of our record, what is your view about the Cabinet Office's co-operation in that work and ability to deliver?

Warren Seddon: We have a good working relationship with them. My manager who leads on the Cabinet Office's cases meets regularly with his counterpart and they have good discussions about how they can combine cases where they cover similar issues to reduce the amount of work that goes into them, so at the operational level we get good engagement from Cabinet Office. That has not always been the case and that has improved over the last couple of years. The deliverability of it is going to be a challenge. We have been told that they are not going to get more resources to support the working down of that complaint volume, so there is no getting away from the fact that it will be challenging, which is why that review point in a few months will be important to see what more needs to be done.

Q18 **Jo Gideon:** The ICO announced a new framework to prioritise complaints made under the FOI Act where there is significant public interest. How effectively has this been implemented so far and what is the next stage?



John Edwards: It is too early for us to say how effective it has been. We floated the idea last year that given the struggles we were having, the challenges with the backlog and delivering timely decision notices, that perhaps a remedial step might be to pluck some out of the queue and fast-track them. We consulted on that idea, and on what criteria we might apply. The idea was not universally supported, but we had sufficient support to warrant a pilot. We will be evaluating that and I will be able to come back and report on this for you the next time you call for me. At the end of May we had prioritised 32 of the complaints from the workbook. We closed nine of those, four by decision notice and one upheld complaint. That tells us that 40% are being found upholding the original decision.

One of the criticisms that we saw in our consultation on this prioritisation policy was that even accelerating a case through the queue based on public interest was a decision that may influence the merits. There may be a sense of predetermination, that there would be a release bias. Our early results show that that is not the case, that it is possible for us to identify that a matter is of significant public interest but that none the less there is a legitimate reason for withholding that information. It shows that in those five cases we have been able to give more timely access to time-critical public interest information and I am very pleased about that. That is an encouraging early sign.

Q19 **Jo Gideon:** I appreciate you are saying that you need to come back at a later stage to give us more detail on that. Of the five, do you have any detail about how the stakeholders found the framework and if it was useful for them to get their cases heard earlier?

John Edwards: It is an important question, because for us to prioritise does not change the dynamic if the other side does not come along with us. If they decide to stand on their rights and use the full time available to them and extensions, it will defeat the purpose of the framework. Warren, do you want to comment on that engagement?

Warren Seddon: It is early. We did have positive feedback through the consultation from a good majority of organisations that responded. We only implemented it on 1 April, so it is too soon and the sample size is really small. We can say that we are going to review it twice over the course of the next 12 months and look not just at the data but also do that qualitative outreach where we ask people for their feedback. We will have that, but it is just a bit soon now.

Q20 **Jo Gideon:** Of course. We understand that the Cabinet Office opposed the framework at the consultation stage. Has this affected its implementation?

John Edwards: It may be an oversimplification to say that Cabinet Office opposed it. They did participate in the consultation. They shared some misgivings they had, but they could see a case. The words they used were, "Exceptional cases might warrant an urgent application of



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resources". I have met with Cabinet Office and heard their concerns. As I mentioned in my response to your first question, I think that some of those are not borne out. It is helpful having those challenges at the beginning because it helps us to frame our evaluation and monitoring framework so that we can report on whether those concerns are borne out.

I do not think the Cabinet Office's initial reticence is any threat to the success of the trial. It is important to remember that our caseload consists of only about 20% to 25% central Government public authorities and the rest is out there in the community. They have public interest matters arising in local authorities and the like as well.

As Warren says, it is early days. I am encouraged by the first forays. My ideal position is that we would not need a prioritisation framework because we would get our caseload down to a point where we can deliver a timely response to everyone.

Q21 Jo Gideon: At the beginning you said that the caseload was going in the right direction with numbers. What other new processes and systems are you putting in place to deal with complaints more quickly and to ensure that that level of complaint stays low and at a manageable level going forward?

John Edwards: A range, and this is where again I must take my hat off to and express my gratitude to the team who, when I started, figured that there was only one way to do these reviews and we were doing it and if you wanted more you must give us more resources. They have risen to the challenge and looked at their process end to end. We are undertaking rigorous triage at the outset, undertaking a broker function, trying to resolve disputes, so dispute resolution. More technically, we are issuing shorter decision notices that require less legal review, more instructive notices. Warren, do you want to come in and add to this?

Warren Seddon: To add to what John says, we have challenged the team on this. A lot of our processes went back to 2005 when the Act was first implemented, and we did it properly. When we published ICO25 last July where we set out our ambitions to reduce the backlog, we did not just dive headfirst straight into it. We took two months to talk to the team, understand what we could do, and we have done everything from redesigning our digital front end to reducing the number of premature complaints that we get.

That frees up staff to do more complaints casework itself on substantive issues, all the way through as John says, to shorter decision notices where we are not repeating lots of law at people, members of the public who probably do not care about it, to more experienced requesters, journalists and so on, who know it but again want to know are they getting information or not. We are focusing our efforts on the longer decisions where we think there is potentially wider value to other regulated bodies on that particular case where we will do a longer notice,



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and everything in between from our allocation system to the length of time we were giving to public authorities and ourselves to complete different stages of the work.

We did a proper overhaul in that two months before we started the work in earnest in October to reduce the backlog.

Q22 Jo Gideon: What about the premature cases? Are you basically saying to people it is not ready to be FOI'd yet or how does that work?

Warren Seddon: The way the law works is that if there is an internal review stage in place at the public authority, we can only accept the complaint once that has been completed. Quite often people would come to us before that stage. You have to look at the case and then contact them to let them know. We have redesigned the digital front end to give more proactive prompts, to make sure that people are checking if they have been through that stage, have they asked for it, has it been a sufficient length of time for us to look at it, even if there has not been an internal review, to cut down the number of those cases that come through. It is difficult to identify from the data exactly how many that has worked on, because we are counting slightly different things, which I will not go into the detail of, but it seems to have worked anecdotally in reducing the volumes we get in that space.

Q23 Lloyd Russell-Moyle: Given the increasing caseload—and you mentioned at the very beginning the need to move to a more strategic approach to some of these complaints—do you think that you have sufficient funding to fulfil the dual functions of promoting and enforcing FOIs?

John Edwards: We must make do with what we have in the best way. We did find some extra funding to help get rid of the backlog but, like every other publicly funded organisation, we are under pressure. That is why again I think the work that has been done to identify system improvements that creates space for us to act more proactively and upstream will ultimately improve practice across the sector.

We are shifting from a more demand-driven model to a more proactive system improvement model, and we simply must do that whatever our level of funding is. We must create space for that.

Q24 Lloyd Russell-Moyle: Will you be able to recover costs more efficiently from organisations that continue to breach and therefore create workloads for you?

John Edwards: It is an interesting proposition and I am very keen to explore what mechanisms there might be for that. We were very pleased last year on the data protection side of the business to get the Treasury's agreement for a fines retention policy, which meant that part of the legal cost of executing our enforcement penalties was recovered from the fines that were paid rather than disappearing into the public accounts. It may be that some similar model can be structured with public authorities, and



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I will be interested to find out if that were so. It would certainly create an incentive for them to improve their practice.

- Q25 **Lloyd Russell-Moyle:** You said to create an incentive to improve their practice and it would also mean that those who take shortcuts do not benefit at your expense. Are you effectively able to balance that role of compliance handler and promoter of good practice?

John Edwards: I do think so and we have found, as I say, if you have tools as a regulator and you do not use them, it becomes exceptional when you do. What we have done by starting to use enforcement notices more habitually is send a signal to the sector that there are consequences and if you do not take the opportunity to improve of your own volition you could be forced to and there could be legal consequences for that.

- Q26 **Lloyd Russell-Moyle:** The ICO is now sponsored by the Department for Science, Innovation and Technology but the policy for FOIs remains reserved to the Cabinet Office. Does this division of responsibility help you in providing a separation between funder and policy or does it hinder, meaning that you have one paymaster and one director?

John Edwards: I will say that the dynamic has not changed with the creation of a new Department, so that division used to be between DCMS and Cabinet Office. It is now between DSIT and Cabinet Office, so that separation and the tensions and dynamics remain constant. Does it help or hinder? In theory I can see the argument. It is hard to figure out an alternative model. Perhaps we could achieve funding directly through this Committee, for example, as a way of a different kind of independence. I think that these policy questions are not on the table, so they are theoretical exercises only.

- Q27 **Lloyd Russell-Moyle:** Apart from the Ombudsperson, which does receive direct from Parliament, almost all are sponsored by a Department or another. Do you think it would be helpful to have more income generation abilities yourself through fines, extending that ability to recover fines for yourself, or does that then give the wrong incentives to you to go punitive rather than collaborative?

John Edwards: It is not a matter I have given much thought to.

- Q28 **Damien Moore:** The Cabinet Office mostly rejected the Committee's recommendations in our report on the FOI clearing house. Do you agree with their assertion that the Cabinet Office was compliant with the FOI Act and operating in a transparent manner?

John Edwards: In addition to rejecting the Committee's recommendations, the Cabinet Office declined repeated invitations from my predecessor to undertake an audit, preferring to commission its own review, which I think we have all now had the benefit of seeing. I think that that was an exercise entered into in good faith, with a genuine desire to improve processes and transparency. Some of the concerns that underlay your report and some of the commentary around the clearing



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house have been illuminated and found to be largely unsubstantiated. The concern that the requester-blind principle was at threat by the round-robin process has been addressed in the Langley report and that is being implemented by the Cabinet Office.

I believe that the co-ordination role of the Cabinet Office in dealing with those round-robin requests is legitimate and is an administrative efficiency. I think that the Cabinet Office has a valuable role to play in providing a centre of excellence and a hub for advice further out into Whitehall and beyond.

Q29 **Damien Moore:** Are you seeing better changes in the Cabinet Office with how they are operating?

John Edwards: I believe so. Time will tell. Let me put it this way, neither this Committee nor my office thought that the Cabinet Office commissioned review was the right way to go. However, having seen that and been assured of its implementation, I no longer advocate to apply my scarce resources to a subsequent audit or review of Cabinet Office. I think it is now time that we give them an opportunity to show that they have learned from those lessons.

Q30 **Damien Moore:** Is the Cabinet Office publishing its casework according to the FOI Act and ICO guidelines and doing it in a timely fashion?

Warren Seddon: On publishing its casework, I assume you mean for the types of cases that the clearing house is accepting. That is something that we are waiting to see. We have been told by the Cabinet Office that it is about to publish a range of information following the Langley review about how they are transitioning from that clearing house model to a centre of excellence. We are not sure whether that will include that level of information, but it is not happening now. Having said that, the Act does not require that anyway because the clearing house is very much a behind the scenes operation advising other public bodies on the handling of their requests. It is not required by the FOI Act.

Q31 **Damien Moore:** Touching on something that was said before, is the Cabinet Office handling of FOI requests on an applicant-blind basis and their maintenance of the round-robin system in line with the letter and spirit of the FOI legislation and ICO guidance?

John Edwards: I believe so.

Warren Seddon: They said in terms in response to the Langley review that they had stopped doing that and we certainly have not had any complaints since, as we had in the kind of cases that led to the Committee's original inquiry. We have not had anything through since to suggest that is happening any more.

Q32 **Tom Randall:** You touched just a moment ago on the Cabinet Office's internal review of the FOI clearing house. Do you think that review provided satisfactory recommendations to improve transparency and



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compliance with the Act?

John Edwards: I think so. It was a response to public expressions of concern. It has investigated those and published a report, so we now have transparency about transparency and that is a positive development.

Q33 **Tom Randall:** Do you think the recommendations were ambitious enough?

John Edwards: I have not refreshed myself as to the terms of reference, but to be more ambitious in a working organisation such as that would require a remit that included legislative reform. The review was a reactive one in response to concerns that had been raised publicly. It was not a greenfields, "How can we do transparency better across Whitehall?" If it was that, I would expect to see greater advocacy of routine proactive disclosure and expectations of timeliness in the regular disclosure of routine documents and taking out the transactional element of freedom of information. I do not think it was that review. It was ambitious, as the drafters of the terms of reference intended it to be.

Q34 **Tom Randall:** Now that has been published, have you seen evidence that the recommendations are being implemented? What evidence of that have you seen so far?

John Edwards: I have met with the Minister responsible and the senior officials responsible and have had assurances. I have not seen evidence. I think it is quite early days.

Warren Seddon: We understand that there is about to be a tranche of information published about the implementation. We have not seen it yet, but we understand that that is work that has been done, so hopefully it should be coming imminently.

Q35 **Tom Randall:** One of the recommendations was that the Cabinet Office replace the clearing house with a centre for excellence. Do you know if this has been done and if it has made any discernible difference to the compliance with your organisation's guidelines and the legislation?

John Edwards: I am told that the nomenclature has changed. I think in a meeting the clearing house was described as "defunct". Many of the functions that the clearing house used to discharge are still necessary and are still being carried out but as I understand it, the team charged with that is branded as this new centre for excellence.

Q36 **Tom Randall:** The Cabinet Office refused an ICO request to audit the clearing house. Do you think that by refusing an external audit the Cabinet Office has set a bad precedent across government and other public bodies?

John Edwards: I do think it is an unhelpful precedent. Our influence and ability to improve practice depends on organisations recognising the value that we can bring and welcoming us in. Members asked about the



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potential for law reform. One area that could be explored is enabling us to do non-consensual audits where we felt that was necessary to get to the heart of a systemic problem. I do not think we have experienced lasting damage from that rebuff.

Q37 Tom Randall: Now the internal review has been published, do you think the external audit could have done anything that the internal review did not do, or do you think the outcome is broadly the same?

John Edwards: It is very difficult to know because we do not know what we could have done, unless we got in there and did it. We take on face value the findings of the Langley review and I have no reason to impugn those or suggest that the reviewer was not given access to all the material and information she needed to discharge her terms of reference.

Q38 Tom Randall: Have any other public bodies refused any similar offer from the ICO?

John Edwards: I think the BBC.

Warren Seddon: Last time when the previous Commissioner appeared before the Committee, we mentioned that the BBC had refused and we wrote to the Committee outlining the detail of that.

Q39 Tom Randall: You take the internal review at face value. Do you think it would still be useful to conduct an audit of the Cabinet Office's process or has that moment passed now?

John Edwards: It could be useful. It could be useful for them. I touched on this before. I think it is a live question on whether it would be a prudent and responsible application of the scarce resources of the ICO now. I do not know that I would be offering that service now, given where else I could deploy that to good effect. I think now that the Langley review has been done and the Cabinet Office has begun to put those reforms in place, we need to give it a bit of time and see if it delivers on its promise.

Q40 Tom Randall: Finally from me, looking more broadly at the relationship between the Cabinet Office and the ICO, the evidence that we received during our inquiry last year suggested that the Cabinet Office had poor and delayed communication with the ICO. Do you think that the Cabinet Office has improved its engagement with the ICO and is there anything more that could be done in that space?

John Edwards: My impression is yes, but I am going to ask Warren.

Warren Seddon: I think again we touched on this in the last session. There had been an issue a couple of years ago. I think that is largely resolved. We do have good working relationships at the team lead level on these cases and also I meet regularly with my counterparts at the Cabinet Office, so its working-level relationships are operating pretty well at the moment.



Q41 **Jo Gideon:** Do you think that the Cabinet Office is providing sufficient guidance and advice to other Government Departments to prevent them falling short of best practice in discharging their obligations under the FOI Act?

John Edwards: Cabinet Office faces the same resource constraints as everybody else. It is difficult to provide guidance to do that kind of proactive work when you have a mountain of backlog and Warren chasing around after 80 unassigned cases. I think it is important that organisations learn to rub their tummy and pat their head at the same time and get that guidance out there.

Warren Seddon: If it was to get more resource, I would ideally want it on the complaints front now. Cabinet Office does work in this space. As I think we mentioned earlier, it convenes FOI practitioners around Whitehall and arm's length bodies to come together and talk about issues that are being confronted and that gives it intelligence on where organisations might need support. We go along to those meetings and present on things that we think are important as well and have that dialogue with them. Cabinet Office is doing work in that space. We understand that it is shortly going to be convening a new group bringing together some of the civil society organisations that are interested in this area with Cabinet Office and that we will be invited along to that, again to hear about issues from that kind of requester group to find out what is going on. It does activity in that area but, as John says, resources are what resources are in how much you can do.

Q42 **Jo Gideon:** What more do you think it could do?

Warren Seddon: How long is a piece of string, I guess, to a certain extent. One thing that I want to make clear is that Cabinet Office is not the regulator. It holds the policy responsibility and I think the onus is on us to do more. That is why we have been creating the space to do more of the upstream regulation work that we are trying to do more of, doing more strategic regulation, where we are looking not just at complaint, complaint, complaint, but taking a step back, looking at what the trends are and doing more practice recommendations and enforcement notices. I think that a large part of it is for us to step into that space as the regulator and set where the lines are more clearly. Of course, working with Cabinet Office as part of the development of the new centre for excellence is hopefully where we can have more of a discussion about where there would be value in central Government-specific type products, where Cabinet Office voice added to ours can help set the tone of the system.

John Edwards: It could convene the network that I was discussing with your colleague earlier. That is one extra thing it could do. I think it has a valuable role as a conduit. It sits at the centre and can take messages from us and push them out much more easily and with greater authority in some sense, and that might well improve practice. We will continue to work with them productively.



Q43 **Jo Gideon:** In response to our report, the Government provided guidance to the Committee on the circumstances under which it may be appropriate for Ministers and special advisers to become involved in responding to FOI requests. Does this guidance align with the letter and the spirit of the FOI Act?

John Edwards: We don't have any concerns with the guidance. It is fairly high level. It is consistent with the spirit and the letter of the law. We have not seen—and I have questioned the team quite closely on this—any influence of special advisers that would cause concern.

Warren Seddon: Specifically on Cabinet Office cases, where we see it more widely we call it out. For instance, in the practice recommendation that we issued to BEIS there was, as part of their processes for clearing requests, a so-called sighting procedure. We found that of 70 cases sitting with special advisers, 65 of them were outside of the 20-day limit. We said that was not acceptable and made recommendations for that process to be improved, which was before the machinery of government changes were happening. We specifically look for that in our casework and in addition to having previously mentioned it on decision notes, we are trying to take that step back and, where we see repeated offences, use the practice recommendation approach to call it out and identify where processes need to be improved.

Q44 **Chair:** A couple of final closing questions from me, Mr Edwards. There is a degree of topicality to them. Do you think that the Cabinet Office's new guidance on the use of non-corporate communication channels for government business on private devices provide reassurance and guarantees transparency within government?

John Edwards: I think that they go some way towards that. It is important that government business has the benefit of new technologies that improve efficiency, but we need to go into those deliberately, supported by policies that ensure the security of the data and the maintenance of the public record. That was the emphasis of our report last year to Parliament, which we called "Behind the Screens". We were concerned that there was potential with some of these practices that records might not find their way to the official record.

Q45 **Chair:** Do you think Ministers should allow the function of disappearing messages on their personal WhatsApp if that contains matters of government business?

John Edwards: I think that the Cabinet Office is clear that if government business is being conducted on a non-corporate communication channel it must be retained as part of the official record. No, they should not be using disappearing messages in the conduct of government business.

Q46 **Chair:** How does this guidance balance the need for official communication and maintaining the public record? An overview, if you would.



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John Edwards: The guidance requires that if a non-corporate communication channel is used for government business a copy should be forwarded to the official record. That means that there is an ongoing duty for Ministers and others to consciously assess the content of their message. The frothiness of their coffee, as I think one of your colleagues described it yesterday on the radio, does not need to be forwarded to the record but a discussion setting up a meeting at which a decision is to be made ought to form part of the official record.

Q47 **Chair:** Apart from a Minister being particular about the nature of their morning coffee, what would be the sanction if a Minister was found to have disappearing messages enabled on their WhatsApp and transacting government business and the messages not being forwarded? How would it be known?

John Edwards: It is a little perilous for me to speculate on hypotheticals. There are criminal sanctions for failing to maintain a record or destroying a record.

Q48 **Lloyd Russell-Moyle:** Disappearing messages on WhatsApp require both parties to support that but also either party can insist on it. A Minister might not insist on it but the other party might. How does that put a Minister in a difficult situation, if they are required not to have that, as you say, but the other person communicating with them just puts it on?

John Edwards: That Minister faces a choice about whether they continue to use that channel of communication with that individual.

Q49 **Lloyd Russell-Moyle:** In spoken correspondence you would not necessarily record the oral conversation but you would record that a conversation took place. WhatsApp really is used as spoken correspondence rather than written correspondence. That is how it is used in day-to-day use. "Get me a coffee" you would not write in a letter but you would say it or you would put it in a WhatsApp message. WhatsApp is a form of spoken communication that just happens to be written, isn't it?

John Edwards: No, I disagree with that. The freedom of information legislation is very clear that it depends on the presence of a written record, unlike other jurisdictions that use a more intangible concept of information that is recorded in any form or in no form at all. The coverage of the FOI requires a record. A WhatsApp message is a record. It may have the cadence and informality of speech but it is not speech.

Q50 **Lloyd Russell-Moyle:** What about WhatsApp voice notes?

John Edwards: They are a record.

Warren Seddon: They would be held. These are good questions and I think one of the reasons we recommended the review is to work through all these.

Q51 **Lloyd Russell-Moyle:** The reason I am asking these questions is not



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because I have a view necessarily one way or another but just to point out that with changing technology there has become a grey area that we need to have some clarity on, isn't there?

John Edwards: As Warren said, this is why we recommended to Parliament that government undertake an end-to-end review of how these technologies are deployed and when and under what controls.

Q52 **Chair:** Drawing on some of the valedictory remarks of your predecessor concerning the Advanced Research and Invention Agency and its exemption from the Freedom of Information Act, in your view what are the conditions and circumstances under which public institutions or bodies should be allowed to be exempt from that Act?

John Edwards: I do not think they ought to be allowed to be exempt from the Act. It undermines the legitimacy of the legislation. It undermines the confidence that public servants must have in the ability of the legislation to protect protected interests but to provide for accountability to you as parliamentarians and to members of the public directly. That was a mistake and I think it was ill-founded and ought not to be repeated.

Chair: A very clear answer on which to end. Mr Edwards, Mr Seddon, I thank you both for your time this morning. It was a particularly informative and succinct session, which is usually a good sign for this Committee.