

Mr William Wragg MP
Chair
Public Administration and Constitutional Affairs Committee
Houses of Parliament
London
SW1A 0AA

Our reference: ICO/O/JDJ/L/RFM/0332
By email only

03 December 2021

Dear Mr Wragg MP,

RE: Information Commissioner's Evidence

I would like to thank the Committee for giving the then Information Commissioner, Elizabeth Denham CBE, the opportunity to give oral evidence to its inquiry into the Cabinet Office's Freedom of Information (FOI) Clearing House. We welcome the Committee's scrutiny of this issue.

During Ms Denham's appearance, the Committee asked whether there was any further detail the Commissioner could provide on a small number of additional areas. The Commissioner left office on 30 November, and I am therefore responding on her behalf.

I have addressed the points raised by the Committee during the evidence session below. I have also annexed to this letter the list of the Commissioner's meetings that the Committee requested.

British Broadcasting Corporation (BBC) audit refusal

In September 2021, the BBC declined an offer made by the Information Commissioner's Office (ICO) of an audit. This offer was made as a result of concerns we had identified through our routine monitoring of the performance of public authorities through our casework. We had already identified a small number of issues with the BBC's handling of some information requests that had been escalated to our office. We also then received a specific complaint in relation to the BBC's handling of a request related to Lord Dyson's review into Martin Bashir's interview with HRH, Diana, Princess of Wales.

Rather than accepting the proposed audit, however, the BBC informed the ICO it had instead conducted an internal review of its FOI handling and records management processes as part of an ongoing improvement programme. The BBC

deemed this *"the most beneficial course of action ... rather than diverting our resources into participating in the audit offered by the ICO"*.

The BBC also then laid out steps it had taken to improve its FOI handling processes, which included:

- Considering ICO's findings from its consensual audit of the Northern Ireland Civil Service Departments (October 2020 – April 2021) and incorporating recommendations into its improvement programme.
- Rolling out a refreshed training and awareness programme for those involved in the BBC's FOI process.
- Updating its FOI request templates so they are more accessible to requestors
- Refocusing its efforts to provide redacted information where possible, rather than refusing requests.

While these actions are welcome, as the Commissioner set out in her evidence to the Committee, it is not good practice for regulated bodies to be able to pick and choose when or if the regulator can audit their compliance. This is not the case in other jurisdictions or areas of regulation, including Scotland, and in our view the law should be updated to remove this blinker to regulatory oversight in this key area.

Use of the Act by elected representatives and journalists

During the hearing, Committee Members asked if there was further information we could share from our case management system about the use of the FOI Act by certain categories of requestors. Specifically, the Committee asked whether it was possible to identify:

- whether there had been an increase in requests/appeals from journalists;
- the percentage of requests from journalists by sector; and
- an estimate of the number of requests/appeals we receive from MPs.

Our casework system does not collect information on the occupation of requestors (where they have one), nor is it of course necessary for appellants to declare their occupation when bringing their case to the Commissioner. In his response to the Committee on the day Mr White, who accompanied the Commissioner, provided an estimate of this based on his 16 years of practical experience regulating the Act.

Providing a more accurate statistic would require a manual trawl and analysis of the thousands of appeals we receive each year. Even then, it would not be certain that occupation would be noted on the file so any figure would still be an

estimate. Our view, therefore, is that Mr White provided a reasonable estimate of the number of cases that come to us where a journalist has identified themselves to us as such.

It is a little easier to identify requests that involve an elected representative. Again, it is only where the individual has chosen to disclose this to us in raising their matter with us, but of our current active caseload we estimate that four are from individuals who have identified themselves as an elected representative. Of the more than 7,000 cases we have completed since 2 April 2020, 29 have identified themselves as such.

Environment Act and exemptions applying to the Office for Environmental Protection

The Environment Act 2021 received Royal Assent last month and will establish a new Office for Environment Protection (OEP).

In highlighting her concerns in relation to the potential exclusion from the FOI Act of the proposed Advanced Research and Invention Agency (ARIA), the Commissioner also referenced to the Committee the debate that had taken place in relation to the OEP as the Environment Act progressed through parliament.

To expand on the points raised by the Commissioner, some organisations, including the Campaign for FOI, had highlighted a concern about s.43 of the Act and the potential impact this could have on the disclosure of material in response to information requests, specifically the Environmental Information Regulations (EIRs). Taken alongside the ARIA Bill, which was proceeding through parliament at the same time, there was concern that this represented a trend of new bodies being exempted from Access to Information legislation.

Reassurance was provided during the Bill's passage through the House of Lords, however, that the new agency would indeed be subject to EIR regime. The explanatory notes to the Bill also made clear that the definitions used in s.43 of the Act did not have wider application than the Act itself (and therefore did not apply to the interpretations used in the EIRs).

It is therefore now clearer, which was not the case when the Bill commenced its passage, that the EIRs will apply as we would expect to the information captured by s.43 of the Environment Act. The OEP will be required to consider requests for disclosure of information made under the EIR on a case-by-case basis, including assessing whether any appropriate exception will apply. For completion I can also confirm that Schedule 1, Section 21 of the Act does add the OEP to the scope of FOIA.

Deemed refusals

During the session the Commissioner was questioned on the potential benefit of legislative change regarding "deemed refusals". This is where requests are not replied to in the permitted twenty working day timeframe are deemed to have been refused, thus allowing the regulator to take action from this point. This is the position adopted explicitly in the FOI law in the Republic of Ireland and implicitly in Scotland.

We are not opposed to this position being adopted in our jurisdiction, although we feel it would merit consideration alongside the recommendations made by the Burns Commission to introduce statutory time limits for both considerations of the public interest and the internal review process.

Taken together with the compulsory audit power, the extension of the FOIA remit to cover privately contracted public services, and the removal of the overlap with the tribunal as also advised by Burns then this would be in our view a powerful package of reform that could strengthen individual rights and provide a more efficient system that could inform stronger regulatory action where needed.

Funding and scrutiny of our work

In response to a question from the Chair about our funding relationship with the Cabinet Office, the Commissioner said correctly that the grant in aid we receive to fund our access to information work comes through DCMS as the sponsor Department. However, it should be noted that it originates from the Cabinet Office's budget, as the department with responsibility for FOI policy.

Finally, I would like to reiterate the Commissioner's message from the session that the ICO welcomes continued parliamentary oversight of our access to information work, as is the case with our data protection work.

I hope this information is useful and if we can be of any further assistance to the Committee's inquiry, please do not hesitate to get in touch.

Yours sincerely,



James Dipple-Johnstone
Deputy Commissioner and Chief Regulatory Officer

Annex

During Ms Denham's five year term, she or a Deputy Commissioner met Cabinet Office Ministers twice, Chloe Smith MP and Oliver Dowden MP, however there were also meetings with senior officials. To put this into context with our data protection remit, over the same time period, Ms Denham or a Deputy Commissioner met with Ministers at the Department for Digital, Culture, Media and Sport at least 10 times and more frequently in response to the COVID-19 pandemic.

Year	Ministerial level meetings with Cabinet Office
2016	0
2017	0
2018	1
2019	1
2020	0
2021	0