

Written Evidence from Martin Rosenbaum (FOI 12)

Public Administration and Constitutional Affairs Committee The Cabinet Office Freedom of Information Clearing House inquiry

Introduction

1. I am submitting evidence to this inquiry since I have extensive experience over many years of dealing with the Cabinet Office's FOI unit. For sixteen years I was the leading specialist in BBC News in applying freedom of information for journalism, from the time FOI came into force in 2005 until I left the BBC in April this year. During this period I worked with and trained many other BBC journalists in using FOI, reported on relevant developments, and made many requests myself and initiated stories arising from them.¹ This included numerous requests to the Cabinet Office, giving me broad (and frustrating) experience of dealing with their FOI operation. I now write a blog which covers freedom of information amongst other matters,² and am writing a practical handbook on how to use FOI effectively.
2. This evidence focuses mainly on my own personal experience along with research conducted by myself and my then colleagues while at the BBC. It is submitted in a personal capacity.
3. I am very glad that the Committee decided to launch this inquiry, since the Cabinet Office's highly unsatisfactory track record on FOI in practice would benefit from full outside scrutiny. I am also pleased that the Committee decided to examine the overall compliance by the Cabinet Office with FOI, not just the issue of the Clearing House, since the Clearing House is only one part of a much bigger problem.

Summary

4. The Cabinet Office's compliance with the FOI Act is extremely poor and is marked consistently by delay, obstructiveness and inefficiency. This is a long-standing problem. In this evidence I provide case histories, Cabinet Office documentation, statistical data and analyses of documents from the Information Commissioner's Office to confirm this. This is an unacceptable situation, not least because the Cabinet Office should be setting a good example to the rest of the public sector, given both its central role in government and indeed its departmental responsibility for FOI policy. As someone with practical experience of putting FOI requests to many public bodies and a knowledge of many other requests made by BBC colleagues, I can say that in my judgment the Cabinet Office has over time one of the worst records on FOI compliance in the public sector, and quite possibly the worst record of all public authorities.

Case histories

¹ <https://www.bbc.co.uk/news/topics/cx6p27961e1t>

² <https://rosenbaum.org.uk/blog/>

5. The Cabinet Office's persistent inadequacies and obstruction can be illustrated by a number of examples from my own experience (some of which fall under the Environmental Information Regulations as well as the Freedom of Information Act).
6. In February this year I wrote a story for the BBC News website exposing gaps in the vetting process for honours appointments, based on FOI material which took over two years to obtain from the Cabinet Office.³ The article revealed that a businessman had been awarded an OBE despite complaints his company had been overcharging the NHS for medicines, because civil servants had failed to properly conduct their internet searches about his background. Officials admitted that lessons needed to be learnt from this episode, and in my view it is in the public interest to report such procedural failings. Yet the Cabinet Office fought against disclosing this information for over two years, including taking the case to the First-Tier Tribunal after the Information Commissioner ruled that the material should be released.⁴ During the investigation into this case the Commissioner even had to serve a formal Information Notice on the Cabinet Office because of the latter's delays and failure to cooperate with the ICO and respond at all to communications.⁵
7. One therefore has to ask whether the Cabinet Office hopes that by drawing out the FOI process it can postpone the publication of potentially embarrassing or uncomfortable information for as long as possible, even where its release is in the public interest.
8. In another case, which took even longer at nearly four years, I had to make four separate complaints to the Information Commissioner about the Cabinet Office. This was to obtain information revealing how Prince Charles had lobbied Tony Blair against the development of genetically modified foods.⁶ During the various convoluted stages of this long-drawn-out process, the Cabinet Office first failed to respond at all to my request until the ICO intervened, then it refused to confirm whether it held any information, then it simply ignored the ICO's ruling that in fact it had to confirm or deny whether it did so, then after further ICO intervention it denied that it held any relevant material, and then finally - after my fourth complaint to the ICO - the Cabinet Office was eventually forced to release the document involved.
9. In a third example I made an FOI request to the Cabinet Office on 7 January 2020 (about procedures if the prime minister were to have lost his seat during the general election). Having not received a substantive reply to the request or to a follow-up email, I then complained to the ICO which issued a Decision Notice on 16 June, stating that "the Cabinet Office did not submit any mitigating arguments to justify its continuing failure to comply with the FOIA in relation to this request."⁷ It instructed the Cabinet Office to respond within 35 days - which the Cabinet Office then failed to do. I complained again to the ICO, who told me they were informing the Cabinet Office that unless it replied by 3 August the ICO would refer this non-compliance to their legal department. I then received a Cabinet Office response on 3 August,

³ <https://www.bbc.co.uk/news/uk-politics-55834106>

⁴ <https://www.bailii.org/uk/cases/UKICO/2020/fs50830858.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/information-notice/2617122/fs50830858.pdf>

⁶ <https://www.bbc.co.uk/news/uk-politics-46844454>

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2617893/fs50917051.pdf>

refusing to supply any information, nearly seven months after my request was initially made, and in stark contrast to the legal deadline of 20 working days.

10. In a fourth case of mine (relating to 1997 cabinet sub-committee papers) the ICO also needed to issue a formal Information Notice just to get the Cabinet Office to cooperate, because the Cabinet Office was repeatedly ignoring all the ICO's attempts to proceed with an investigation.⁸
11. And to quote one final example of mine (which concerned former prime ministers and the Public Duty Costs Allowance), in its Decision Notice the ICO sharply criticised the Cabinet Office on the following grounds, amongst others: "The Commissioner's investigation encountered significant and unnecessary delays in waiting for the Cabinet Office to provide the withheld information ... The Commissioner is concerned that the Cabinet Office may have applied exemptions to information it had not reviewed or was even certain it held."⁹
12. I could give further instances from my own work but I think these are sufficient to illustrate a frequent and entrenched pattern of delay and obstruction on behalf of the Cabinet Office.
13. I am aware that many others (including colleagues with whom I discussed cases when at the BBC) have had similar experiences with the Cabinet Office. To take just as one example the case which I believe led to this very inquiry, I note Cabinet Office failings in that included: It did not carry out an internal review for eight months until after Jenna Corderoy had complained to the ICO; it did not get the necessary qualified person's opinion until six months after refusing disclosure under section 36 of the FOI Act, making that refusal legally invalid; the eventual submission from officials to the minister giving the qualified person's opinion was inaccurate and misleading; that error was repeated in the Cabinet Office's appeal submission to the Tribunal and only corrected at the actual hearing; and faced with an imminent hearing, the Cabinet Office caved in and released most of the information still at issue just seven weeks before the hearing after resisting for 31 months, while also suddenly raising a new exemption for some remaining documents at this late stage.¹⁰

Cabinet Office internal guidance

14. The underlying attitude to FOI within the Cabinet Office is shown by a revelatory extract from its internal guidance on dealing with information requests, which was obtained by the BBC via an FOI request in 2020. One slide (reproduced below) states: "If you don't want to appear in tomorrow's newspapers, make sure you consider carefully what you send out."¹¹

⁸ <https://ico.org.uk/media/action-weve-taken/information-notice/2617123/fs50811968.pdf>

⁹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2258491/fs50639272.pdf>

¹⁰ See the Tribunal judgment at https://www.bailii.org/uk/cases/UKFTT/GRC/2021/2020_0240.pdf

¹¹ See <https://twitter.com/rosenbaum6/status/1238478540607311875>

What will they ask?

If you want to know what tomorrow's FOI requests will be, look in today's newspapers.

If you don't want to appear in tomorrow's newspapers, make sure you consider carefully what you send out

The Cabinet Office receives a wide variety of requests (1,781 in calendar year 2019) = 148 a month on average)

- cost of upkeep of Cabinet Office cats
- correspondence and meetings relating to the Glastonbury festival
- number of Conservative Party members who voted for Mike the Cameraman as leader
- minutes of Royal Mint Advisory Committee



15. This should be an entirely irrelevant consideration. The fear of embarrassment and bad publicity is not a legally valid reason under the FOI Act to keep material secret. That approach would keep material out of the public domain which should be available in the public interest. There is no exemption clause in the FOI Act for information which might “appear in tomorrow’s newspapers”. Instead the Cabinet Office should release information in line with its legal obligations and the overall balance of the public interest, whether or not this material will be worth reporting. The use of this slide is very worrying, and suggests the Cabinet Office is more concerned about bad publicity than proper compliance with the law.

ICO Decision Notices

16. Detailed research which was conducted by the BBC suggests that the sort of examples I have quoted from my own experience are entirely typical of the Cabinet Office’s woefully bad FOI performance. In 2017 and 2018 the BBC carried out comprehensive analyses of the ICO’s published Decision Notices for complaints against selected government departments, and we discovered a sorry state of affairs in relation to the Cabinet Office, which I reported at the time.
17. Our 2017 analysis found dozens of instances where the ICO had condemned the Cabinet Office's slow responses. In various different cases the ICO described Cabinet Office delays as "unacceptable", "extremely unhelpful", "extreme", "protracted", "considerable", "notable", "unreasonable", "unsatisfactory", "excessive", "prolonged" and "severe".¹²
18. In one case the ICO accused the Cabinet Office of "obvious unfairness" to the requester and described its behaviour as "extremely unsatisfactory". In another the ICO ruling said: "Taking such an inordinate amount of time to complete an internal review goes completely against the spirit of the FOIA, and in the Commissioner's view, is tantamount to denying an applicant their information access rights." In a third case the ICO stated that "although the Commissioner cannot conceive of any

¹² <https://www.bbc.co.uk/news/uk-politics-40189828>

justification for such a lengthy delay, she notes that the public authority has not even sought to provide one and that is also extremely concerning."

19. These criticisms were accompanied by the ICO frequently telling the Cabinet Office to improve its processes, urging it to act "more promptly", handle requests "appropriately" and in line with "expected standards", and to make "greater efforts to provide useful and meaningful advice to requesters".
20. Our 2018 analysis also showed the Cabinet Office coming in for continuing criticism from the ICO. This included references to delays which were "excessive", "unacceptable" and "clearly against the spirit and intention of FOIA". And the Cabinet Office was reprimanded by the ICO for its "poorly conceived submissions", lack of "meaningful detail", arguments which were "illogical", "erroneous", "unsustainable" or "generic", and casework handling which "clearly fell short".¹³
21. I have not since repeated the time-consuming task of exhaustively analysing such Decision Notices, but the personal examples I have quoted above suggest that little has changed.
22. It is also worth noting that the Cabinet Office had a similar consistently inadequate record going further back into the past. I wrote for the BBC in 2015 about its FOI delays, including the ICO not wanting to publicise measures it had taken against another authority because it would "provoke more questions and comment" about its apparent lack of firm action against the Cabinet Office;¹⁴ and in 2014 I wrote about the then Information Commissioner Chris Graham criticising the Cabinet Office for its "serious shortcomings" in processing FOI requests.¹⁵ In 2014, and before that in 2010/11, the Cabinet Office was subjected to additional intensive monitoring by the ICO of its FOI case handling due to its particularly poor performance (an enforcement strategy which the ICO has since abandoned).¹⁶
23. All this evidence points towards the Cabinet Office's pattern of delay and obstruction being a long established and deeply entrenched part of its culture. It will need strong and determined action to rectify this situation.

ICO Information Notices

24. The same pattern emerges from an examination of the ICO's Information Notices. These are formal documents served on a public authority in cases where the authority fails to comply properly with an investigation into an FOI complaint, and the ICO feels it needs to take such action to ensure cooperation.
25. The ICO has listed these publicly on its website since 2019. At time of writing it has issued 41 Information Notices in this period. Of these 13 have been against the Cabinet Office (including the two in my cases already referred to) – which is more than for any other public body.¹⁷

¹³ <https://www.bbc.co.uk/news/uk-politics-44864770>

¹⁴ <https://www.bbc.co.uk/news/uk-politics-33696753>

¹⁵ <https://www.bbc.co.uk/news/uk-politics-25879459>

¹⁶ <https://ico.org.uk/action-weve-taken/monitoring-compliance/>

¹⁷ <https://ico.org.uk/action-weve-taken/information-notices/>

26. Furthermore this is not a new phenomenon. In 2017 I obtained a list of Information Notices in the previous two years (at that time it required an FOI request to the ICO). This showed that of the 50 in that period, 15 were against the Cabinet Office, again more than any other public body.¹⁸
27. In other words the Cabinet Office has consistently the worst record of non-compliance with ICO investigations into FOI complaints, which is a dreadful situation for an organisation which should be setting a good example to the rest of the public sector.

FOI statistics

28. The official FOI statistics for UK central government bodies also clearly show the poor comparative track record of the Cabinet Office.
29. In 2020 the Cabinet Office had the worst record on complying in time with FOI requests of all the 22 UK departments of state, with the single minor exception of UK Export Finance. Cabinet Offices responses were late in 25% of cases.¹⁹ It also demonstrated a distinctive lack of openness, fully withholding all information requested in 54% of cases - a higher proportion than any other department.²⁰
30. The pattern was very similar in 2019. The Cabinet Office was again the second worst department for timeliness. And in terms of openness, it was then the department with the second highest proportion of complete refusals to supply any material requested.²¹
31. It is also noticeable that requesters are more likely to be dissatisfied and complain to the ICO about the Cabinet Office than other departments. In 2020 the Cabinet Office received only 7% of FOI requests made to government departments;²² but it accounts for 22% of FOI complaints about departments to the ICO, more than any other department, according to a recent ICO dataset of current casework which I obtained and published.²³

The Clearing House

32. I have the following key concerns about the operation of the FOI Clearing House within the Cabinet Office.

¹⁸ <https://www.bbc.co.uk/news/uk-politics-40189828>

¹⁹ p8,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981527/foi-statistics-2020-bulletin.pdf

²⁰ p11,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981527/foi-statistics-2020-bulletin.pdf

²¹ pp 8, 11,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881833/foi-statistics-annual-2019-bulletin1.pdf

²² Table 2,

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/981645/foi-statistics-2020-statistical-tables.xlsx

²³ <https://rosenbaum.org.uk/wp-content/uploads/2021/08/ICO-FOI-and-EIR-complaints-Aug2021.csv>

33. The published criteria for referral to the Clearing House are very wide-ranging and vague, including for example “Implementation of significant or high profile policy initiatives” and “Expectation there will be significant wider interest in the topic of the request at the time”.²⁴ This means that very many requests will be referred. It goes way beyond the justifications that are sometimes put forward for the existence of the Clearing House, such as a need to ensure consistent replies to ‘round robin’ requests sent to multiple departments.
34. Inevitably this process must add significant delay in many cases, given that another team of officials will be considering the request as well as those within the original receiving department. These delays are likely to be exacerbated by the clearly dilatory approach taken by the Cabinet Office to FOI matters. (One consequence of this is that departments may then find they are blamed for delays which are actually the fault of the Clearing House, something that departmental FOI officers have complained to me about in the past).
35. Of even greater concern would be cases where the Clearing House imposes the Cabinet Office tendency to obstructiveness on other departments and blocks them from releasing information which the department itself is happy to disclose. It is hard to assess how often this may happen without much more information being made public about the operations of the Clearing House (or indeed the opposite situation of the Clearing House insisting on openness against the wishes of a reluctant department). However, there is some evidence of this occurring, for example from this inadvertent release of Clearing House information recently reported by Politico: “The trade department data breach shows the Clearing House working to block the release of documents to journalists against the advice of the trade department’s information officers.”²⁵

Recommendations

36. a) There needs to be a fundamental change in the FOI compliance culture within the Cabinet Office, to ensure it is much more prompt and responsive and no longer resorts to obstructive delaying tactics.
- b) Cabinet Office internal training materials should be revised so that they fit with the law and do not include extraneous references to the threat of bad publicity. The full set of training materials and internal guidance should be published proactively so that it is clear this has been done.
- c) The Information Commissioner’s Office should take much firmer action to focus on and improve the FOI compliance record of the Cabinet Office. This should include issuing an Enforcement Notice to require the Cabinet Office to comply properly with the law.

²⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970672/Cabinet_Office_FOI_Referral_Criteria_FINAL_.pdf

²⁵ <https://www.politico.eu/article/uk-trade-department-referred-to-information-watchdog-over-data-breach/>

d) The referral criteria for the Clearing House should be revised and made much more specific and narrower, avoiding the use of vague catch-all terms like “high profile policy initiatives”.

e) The Cabinet Office should routinely publish statistics on the number of cases referred by each department to the Clearing House and the time taken to process them within the Clearing House.

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