

Written evidence from Ben Worthy¹ (FOI 21)

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

Overview

- The Cabinet Office has performed poorly in terms of dealing with its own FOI requests.
- The Clearing House's official role has been to 'coordinate requests'. There is evidence of a secondary 'hidden' role, where the Clearing House has monitored and flagged requests and requesters, especially around 2005-2006 and again from 2019 onwards. This has likely caused delay and had a wider chilling on government responsiveness.
- Poor institutional performance and interference in the FOI process is part of a wider set of problems and resistance FOI is encountering in 2021.

The Cabinet Office and FOI

- In terms of signals and serving as an exemplar, the Cabinet Office has performed consistently poorly. According to the IFG, the Cabinet Office has rarely gone above 40-50% of requests released in full, rising higher during only four quarters between 2005 and 2020. In the last two years timeliness has also dipped².
- While this may in part be due to the sensitivity of certain topics, and the Cabinet Office's closeness to the heart of decision-making, other departments dealing with similarly sensitive issues, such as the Ministry of Defence, have performed better and been more open.
- As the Cabinet Office helped develop the law, and has, at numerous times, overseen the operation of FOI, the concern is that the poor record sends a signal to other bodies.

The operation of the Clearing House 2004-2021

- In attempting to trace the work of the Clearing House, it is important to keep in mind that it has changed form, location, and function. The Cabinet Office explained in 2021 how it 'was established in 2004 and has operated in different forms since the Freedom of Information Act came into force in January 2005'³. It has also been criticised on numerous occasions for a lack of transparency about its work
- In 2004, the then DCA established a central Clearing House as an 'expert advice centre to which cases can be referred by central government departments for further assistance when assessing the duty to release or withhold information'⁴. However, it

¹ I am a Senior Lecturer in Politics at Birkbeck College, University of London. I have studied FOI and transparency in the UK and elsewhere since 2003. I was also co-author on the book cited by the Cabinet Office, (2017) *The Politics of Freedom of Information: How and Why Governments Pass Laws That Threaten Their Power*. Manchester: MUP

² See IFG (2021) Whitehall Monitor <https://www.instituteforgovernment.org.uk/publication/whitehall-monitor-2021/transparency>

³ See First-tier Tribunal (General Regulatory Chamber) Information Rights Decision notice fs50841228 Appeal Reference: EA/2020/0240 Heard on CVP platform On 29/30 April 2021

was hinted at the time that the Clearing House was a short-term innovation, with a limited existence or life-span. In 2021 the work was described similarly as ‘providing assistance on complex FOI requests while also making sure sensitive information, including that related to national security, is handled appropriately’⁵.

- It is hard to assess how the system has worked, and its exact operation and caseload fluctuated. In 2005, it ‘had provided advice on over 3,100 cases in 2005, which represents about 10% of the requests made to central government’. ⁶ MOJ data supports the idea that referrals and work lessened after 2005.

Referrals to the Clearing House

Year	Number of requests	% of central government requests
2005	3168	16
2006	2428	14
2007	1228	7
Average	2275	13

(MOJ 2008)⁷

- Our research in 2010 found that numbers had declined further and revealed more specific details as to the work of the Clearing House, with ‘requests...referred to the clearing house if they hit certain ‘triggers’. The triggers concerned ‘requests which are complex, high-profile or have broader ramifications...rather than simply being time-consuming or awkward’⁸.
- At the time of writing in 2021, it is unclear quite how many FOI requests are dealt with by the Clearing House. Several requests on WhatDoTheyKnow.com asking for precise numbers via different departments are still awaiting response.

The impact of the Clearing House on the FOI regime

- The central question, as the Information Commissioner put it, is whether the ‘Clearing House is dictating to departments how to respond to FOI requests or offering advice in an expected manner’⁹.
- There is a grey area between the two activities. Looking at an equivalent request system in Canada, Professor Alasdair Roberts described how ‘co-ordination’ could lead to delay as ‘routines that are set up for perfectly legitimate reasons – to advise on FOI policy in difficult cases – could soon be bent to serve illegitimate purposes... an excessive preoccupation with damage control and ‘spin’ can...lead once again to unjustified delay in processing FOI requests’.¹⁰

⁴ See CASC (2006). Seventh Report: Freedom of Information: One Year On, 29

⁵ Quoted in First-tier Tribunal (General Regulatory Chamber) Information Rights Decision notice fs50841228 Appeal Reference: EA/2020/0240

⁶ See CASC(2006), p.29 and First-tier Tribunal (General Regulatory Chamber) Information Rights Decision notice fs50841228 Appeal Reference: EA/2020/0240 9

⁷ Cited in Hazell et al 2010-note % are different from those given to CASC

⁸ See Hazell et al 2010 , page 119

⁹ Quoted in First-tier Tribunal (General Regulatory Chamber) Information Rights Decision notice fs50841228 Appeal Reference: EA/2020/0240

¹⁰ CASC (2006). Seventh Report: Freedom of Information: One Year On, 72

- There is evidence, from leaks and FOI requests, that the Clearing House has, at certain points, adopted a dual role between public co-ordination and more hidden or private monitoring of certain types of requests and requesters.
- Writing in 2005, one study concluded that the Clearing House had ‘helped to ensure a far more consistent approach across Whitehall to the interpretation of exemption provisions and application of the public interest test’¹¹. However, doubts about the role of the UK Clearing House began to surface in parallel. According to the Times, the ‘Orwellian’ Clearing House was a ‘symptom’ of the ‘instinct to resist disclosure’ and had ‘assumed the de facto role of blocking the release of information’. As an example, the Times further cited a leaked memo from the Clearing House advising departments to ‘neither confirm nor deny’ the existence of requested documents that deal with sensitive or media related issues, as even acknowledgement of a document’s existence can be ‘damaging’.¹²
- The 2006 investigation by the Constitutional Affairs Select Committee pointed out that ‘there is no evidence either to support the allegations that the clearing house causes delays and blocks information requests, or to refute those allegations’. However, it went on ‘this is primarily because the clearing house has not provided information about its activities, even in response to specific FOI requests’¹³.
- By time of our work in 2010, which was cited by the Cabinet Office in 2021, it was claimed by officials that the Clearing House had taken a more ‘pastoral’ role and there was sense it had declined in influence and importance. As ‘over time the triggers have been relaxed...the clearing house has moved from being ‘directive’ to more ‘pastoral’, allowing departments to answer more requests autonomously’.¹⁴ It was staffed by officials who, like FOI officers themselves, were often engaged in other roles simultaneously. It is important to note that we did not specifically examine or investigate in any depth claims around the hidden or informal role.
- Between 2019-2021 there was mounting evidence, from requests and leaks, that the Clearing House had shifted further towards suppression and secrecy. Again, as in 2005, the Clearing House was described as having an ‘Orwellian’ role¹⁵. The evidence included circulated lists of requests and requesters, potentially in breach of privacy laws, and advice around seeing drafts¹⁶. In attempting to assess how weighty the Clearing House ‘advice’ is perceived, the judgment argued ‘it is noteworthy that, while they do not follow the advice of Clearing House, Ms Atkins confirmed “they have to explain”’.¹⁷ It is likely, as in Canada, the Clearing House is a cause delay and interference.

¹¹ See Birkinshaw, Patrick . (2005). Freedom of Information: the law, the practice and the ideal. Butterworths: London

¹² The Times [Editorial]. (30/9/2005). ‘Open up: Britain’s bureaucracy is still far too fond of secrecy’ and Times (30/9/2005). ‘How Requests are Stalled’.

¹³ CASC 2006). Seventh Report: Freedom of Information: One Year On, 30

¹⁴ Hazell, R., Worthy, B., & Glover, M. (2010). The Impact of the Freedom of Information Act on central government in the UK. Does FOI Work, p118-119.

¹⁵ Peter Geoghegan, Jenna Corderoy and Lucas Amin (2020) UK government running ‘Orwellian’ unit to block release of ‘sensitive’ information <https://www.opendemocracy.net/en/freedom-of-information/uk-government-running-orwellian-unit-to-block-release-of-sensitive-information/>

¹⁶ Ibid

¹⁷ First-tier Tribunal (General Regulatory Chamber) Information Rights Decision notice fs50841228 Appeal Reference: EA/2020/0240 Heard on CVP platform On 29/30 April 2021 CASC 2006, 29

The Challenges to FOI in 2021

- The influence of the Cabinet Office and Clearing House is part of wider set of political challenges and resistance to FOI in the UK. Efforts to avoid FOI and public scrutiny have involved a combination of ‘hiding’, ‘fighting’ and ‘undermining’¹⁸.
- Claims around interference by the Clearing House match with evidence of political resistance elsewhere in the UK at senior levels. In 2018 the Scottish Information Commissioner spoke of claims of political interference and some ‘deliberate delaying tactics and requests being blocked or refused for tenuous reasons’ under the separate Scottish FOI Act. The RHI Inquiry in Northern Ireland revealed worrying signs of poor record keeping and avoidance of minutes at senior levels, with allegations of interference¹⁹. Allegations around the use of private emails and WhatsApp to avoid official records are the flipside of such activity.
- More generally, the poor performance of leading departments at the Cabinet Office can encourage others to deprioritise and neglect FOI, and signal that poor performance invites no repercussions. Work by the IFG has shown a constituent downward trend in compliance with FOI requests across central government: ‘Across the first three quarters of 2020, 43.6% of ‘resolvable’ requests were granted in full, 14.5% were partially withheld and 41.9% were withheld in full. This compares to 64.2% being granted in full and only 21.3% withheld in full in 2005’²⁰. This neglect can lead to a kind of ‘collective irresponsibility’, whereby broad non-compliance means delay and non-compliance go unpunished and spread further in a negative spiral of neglect.
- As well as systematic problems, a succession of senior politicians and officials have created a narrative of failure around the law. In 2010 Tony Blair argued FOI was hampering decision-making and was a tool used only by opponents and journalists. In 2012 David Cameron described the law as something that was ‘furring up the arteries of government’. The former Cabinet Secretary Gus O’Donnell claimed in 2015 that it has ‘hamstrung’ government, though when pressed he could only offer three isolated examples²¹. There is a very little evidence to back up these claims, but the fact they are stated by such senior figures give them credence and frame the law as a ‘problem’-and could even provoke further poor behaviour and neglect.

Recommendations

- Given the continued questions around the Clearing House, there should be greater openness around its operations, with data around the percentage of requests and more detail about its procedures made available.

¹⁸ Ben Worthy (2021) From private emails to Post-it Notes: How politicians avoid scrutiny Open Democracy <https://www.opendemocracy.net/en/freedom-of-information/private-emails-post-it-notes-how-politicians-avoid-scrutiny/>

¹⁹ see Ben Worthy (2020) What the RHI Inquiry tells us about the ‘chilling effect’ of freedom of information laws The Constitution Unit <https://constitution-unit.com/2020/04/23/what-the-rhi-inquiry-tells-us-about-the-chilling-effect-of-freedom-of-information-laws/>

²⁰ See IFG (2021) Whitehall Monitor <https://www.instituteforgovernment.org.uk/publication/whitehall-monitor-2021/transparency>

²¹ See Worthy, B (2017) The Politics of Freedom of Information: How and Why Governments Pass Laws That Threaten Their Power. Manchester: MUP.

- Greater support and championing of FOI by senior politicians should be encouraged, especially Ministers in charge of poor performing departments. This should involve speeches, articles and other initiatives underlining the importance of compliance with law.

August 2021