

## Written evidence from openDemocracy (FOI 24)

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

#### Summary

openDemocracy is an independent global media organisation. Through reporting and analysis of social and political issues, we seek to educate citizens to challenge power and encourage democratic debate across the world. An area of particular importance for us in the UK is the Freedom of Information Act 2000 (FOI Act) and the extent to which citizens are able to effectively exercise their rights under the Act. Through our research and investigations into the operation of the FOI Act, we have become deeply concerned about the Cabinet Office Clearing House.

The Clearing House is ostensibly an administrative unit but it also performs a political function, which impedes the intended operation of the Freedom of Information Act (FOIA). Via the Clearing House, the government has created an additional, centralised layer of FOI clearance, which is used to manage and mitigate the reputational risk posed by public-interest disclosures likely to receive media coverage.

This submission explains how the Clearing House works. It shows that government departments can refer FOI requests with “high political sensitivity” to the Clearing House, and that those whose requests are referred, often journalists and campaigners, are identified by name in widely circulated documents.

The Clearing House, which is run by the Cabinet Office, also signs off on – or “clears” – departmental drafts of FOI responses and their submissions to the Information Commissioner’s Office (ICO). But rather than providing technical expertise on FOI, the Clearing House exercises political authority to withhold damaging information. This appearance of an aversion to transparency at the heart of government is supported by the Cabinet Office’s FOI compliance record – the worst in Whitehall – and its problematic policy sponsorship of the underfunded ICO, which are both briefly described in this submission.

openDemocracy believes it is in the interests of both British journalism and democracy that the Clearing House is investigated, held to account, and disbanded.

The general public and openDemocracy readers appear inclined to agree. A public opinion poll of 2,075 people conducted by Savanta ComRes for openDemocracy in August 2021 found that 73% of respondents believe government transparency is important for the health of the UK’s

democracy. Conservative voters (83%) are more likely to see transparency as important than Labour voters (76%).

Meanwhile, a separate survey conducted by openDemocracy of almost 4,000 of its readers shows that 87% of respondents said they were much less likely to vote for a party with a record of government secrecy.

## **Recommendations**

openDemocracy is asking the PACAC inquiry to:

1. Undertake a short, sharp investigation into the role and operation of the Clearing House
2. That this investigation examines the use of ‘round robin lists’ that include individuals and organisations drawn into the Clearing House system, with a view to assessing whether a type of blacklisting of journalists, researchers and others has taken place
3. That this investigation examines who has had access to and has used the Clearing House system, including who has directed and had influence over its operation, also inquiring into the role of ministers and special advisers
4. That this investigation assesses the compliance of the Clearing House operation with Data Protection Law
5. That this investigation examines the effectiveness of the current regulatory system and whether an alternative governance structure is required, including whether the ICO's FOI work should be funded by and accountable to Parliament

## Introduction

The Freedom of Information Act (FOI) has not proved popular with leaders in power. Tony Blair called himself a “nincompoop” for passing the legislation, while David Cameron complained that FOI “furs up” the arteries of government. Their discomfort suggests the act does a good job of delivering transparency and accountability, and it is no surprise that those at the heart of power should seek to undermine and evade journalistic FOI requests.

We need only look to Scotland for an example. In 2017, following complaints from journalists that special advisers were screening requests for potential political damage, the Scottish Information Commissioner assessed the handling of requests by the Scottish government. The inquiry found that journalists’ requests were subject to different clearance rules, which led to delays in accessing information. An intervention report, action plan and two progress reports have since been published<sup>1</sup>.

It now appears that, via the Clearing House, the Cabinet Office is running a similar operation in Westminster. This can be demonstrated by information obtained by openDemocracy in the course of its reporting and during Information Tribunal proceedings against the Cabinet Office. The remainder of this submission sets out how the Clearing House works and why it is a problem.

### 1. The Clearing House’s excessively broad referral criteria conceal a malign subtext

The primary reason for running the Clearing House, according to the Cabinet Office, is that it helps to ensure responses to ‘round robin’ requests – those sent to more than one department – are consistent<sup>2</sup>.

However, copies of the Clearing House ‘round robin lists’<sup>3</sup> – updates of the Clearing House’s casework that are circulated across Whitehall – reveal that many requests processed by the Clearing House are sent to only one authority: the Cabinet Office. The rationale for processing these requests is that they are “sensitive”. Until recently, it was not clear exactly what “sensitive” implied.

For example, Michael Gove’s letter to PACAC of 9 March 2021 stated that the Clearing House “also looks at requests for particularly sensitive information relating to national security or personal data”. Yet it now transpires that this is a misleadingly narrow characterisation.

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<https://www.itpublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

<sup>2</sup> The need for a central body to ensure consistency is questionable but for the sake of brevity openDemocracy will not discuss this here.

<sup>3</sup> Round robin lists created by the Cabinet Office Clearing House:  
<https://unredacted.uk/dcviewer.php?dcid=20734490>

In the run-up to an Information Tribunal hearing of an appeal against the Cabinet Office over its refusal to release unredacted copies of ‘round robin lists’ to an openDemocracy journalist (EA/2020/0240), the full referral criteria of the Clearing House were disclosed for the first time by the Cabinet Office. The criteria show there are at least 19 reasons why requests can be referred. These include:

- *“Cases involving high political sensitivity, including confidence and supply agreement, passage of legislation, high profile policy issues, unauthorised disclosures of information”*
- *“Expectation there will be significant wider interest in the topic of the request at the time”*
- *“Ministers/very senior officials (past and present) including collective responsibility, conduct, diaries and personal information, cross-cutting scope.”*<sup>4</sup>

Hidden within the excessively broad formulation of the 19 referral criteria is a malign subtext: they allow referring departments to effectively submit any request which might receive media attention and therefore lead to criticism of the government. There is no other credible administrative rationale for such broadly formulated criteria.

These broad referral criteria allow the Clearing House to function as an early warning system in the same way a press office might. The government now has central access to FOI requests that might damage its reputation and can take action to mitigate and manage them.

The referral criteria also reveal that the Clearing House has oversight of, and can input into, the internal reviews, ICO complaints, and tribunal cases of referring departments. This shows that the Cabinet Office is not only monitoring and centralising responses to FOI requests, but also extending its influence into the appeals process.

This is alarming – because the appeals process is where the majority of complex requests, including those with a strong public interest, are settled. It is unclear what administrative value or expertise the Clearing House could contribute to the appeals process of Whitehall bodies’ FOI cases. But the usefulness of access to this pipeline of potentially embarrassing disclosures is clear, from the government’s risk-management perspective.

## **2. Journalists and campaigners’ requests are monitored by the Clearing House**

openDemocracy has seen copies of the Clearing House’s ‘round robin’ lists’, which are circulated several times a week across Whitehall. They contain the names of journalists from the BBC, The Times, The Guardian, openDemocracy and many other media organisations. Campaigners and opposition politicians have also appeared on the lists.

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<sup>4</sup> <https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>

The sharing of names appears to undermine a core principle of FOI – that requests are applicant-blind. The applicant-blind principle holds that a public authority’s response should not consider the requester’s identity or motive.

Michael Gove’s letter to PACAC states that, while requester names are shared, “The identity of the requestor is not a material consideration.” It continues: “It is appropriate for departments to prepare for possible media interest in information released under FOI, but this consideration does not form part of the decision on whether or not to release information.”

It stretches credibility to claim that the impact of media interest is considered, but not in a way that influences the FOI response. How exactly can this be done in practice? It is harder still to accept this in light of the Cabinet Office’s poor FOI compliance record (as described in point 5 below).

The sharing of requesters’ names across government may also constitute a failure to protect personal data in line with the requirements of the UK General Data Protection Regulation (UKGDPR) and the Data Protection Act 2018. Requesters are not told by referring departments that their personal data is shared and therefore they cannot consent to it.

There is no obvious need or reason to routinely share requesters' names, other than to identify the source of the request and subject it to extra-legal procedures. It is for these reasons that a range of stakeholders – including the National Union of Journalists and press freedom advocates Reporters Without Borders, as well as opposition political parties – have voiced concerns about the potential blacklisting of journalists.

### **3. The role of the Clearing House is not simply advisory. It signs off on draft FOI responses and departmental submissions to the ICO**

Internal correspondence between the Clearing House and Whitehall departments, seen by openDemocracy, suggests the Clearing House does not simply advise referring departments. Instead it performs a more hands-on role which involves clearing draft responses.

For example, in emails to the Ministry of Housing, Communities and Local Government regarding several FOI requests about the Grenfell tragedy, the Clearing House stated: “We’re happy with these draft responses,” “We’re content with these draft responses apart from [redacted],” and “We would like to see drafts for all responses please.”<sup>5</sup> This language implies that the Clearing House has the authority to approve or deny draft FOI responses.

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<sup>5</sup>[https://drive.google.com/drive/u/1/folders/1oxi1dj3xUg\\_wMExPsFAUEBSuSQT81O52](https://drive.google.com/drive/u/1/folders/1oxi1dj3xUg_wMExPsFAUEBSuSQT81O52)

In another case, in emails to the Treasury regarding requests about the infected blood scandal, the Clearing House states it is “happy to clear your draft responses. We are currently doing the same for DH”. openDemocracy has encountered numerous similar cases, some of which lead to the failure of public authorities to meet the statutory deadline of 20 working days in which to provide their response.

### **Case study: Martin Fletcher**

In FOI 18184, a Department for Transport (DfT) employee forwarded a request from the freelance journalist Martin Fletcher, writing for The Times on this occasion, to the Clearing House.<sup>6</sup> An attached email states: “Please find attached a draft FOI response... I’d be grateful for clearance to allow us to meet our deadline of the 28th Feb.”

On 28 February 2020, a DfT employee wrote again to the Clearing House and stated: “Sorry to chase but any news on this one? If we cannot obtain clearance today, we could always PIT [Public Interest Test] extend again for a few days. Grateful for confirmation.”

The request was refused and Fletcher made a complaint to the ICO. The DfT then liaised with the Clearing House over its submissions to the ICO. An email of 20 October 2020 states: “Please find attached a draft ICO response and accompanying documents which engages the [redacted] exemptions... Can you please arrange for CO and [redacted] to clear this by cop Friday 23rd October to allow us to meet the ICO’s deadline.”

The approval of the Clearing House was sought again when the ICO caseworker reverted with follow-up questions. Another email of 24 November states: “The ICO case officer has come back with some follow-up questions (first attachment) and our policy officials have drafted a reply (second attachment)... I’d be grateful for Cabinet Office and [redacted] clearance of our reply to the ICO.”

The Clearing House, as its name suggests, appears to *clear* FOI responses – and not only offer advice. Indeed, a job advertisement for a position in the Clearing House states that the role includes “forwarding drafts for clearance, reverting to departments with advice and *negotiating redrafted responses*”.<sup>7</sup> (Emphasis added.) On a 2018 FOI ‘round robin list’ disclosed to openDemocracy, the Clearing House requested to see drafts in almost half of all cases.

The Information Tribunal has also picked up on the nature of the Clearing House’s advice, and whether authorities are bound by it. In the same case referred to above (EA/2020/0240), the

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<sup>6</sup> FOI 18184: <https://drive.google.com/drive/u/1/folders/1ECJmDLv4PQ2TTOqoIfLyzpeSx822B8pU>

<sup>7</sup> Job advertisement: <https://cabinetofficejobs.tal.net/candidate/so/pm/1/pl/16/opp/4942-4942-Multiple-B1-roles-PBT-Office-Manager-FOI-Clearing-House-Adviser/en-GB>

Tribunal stated in its judgement: : “While the Cabinet Office has emphasised that individual departments as public authorities remain responsible for responding to FOIA requests it is noteworthy that, while they do not follow the advice of Clearing House, Ms Atkins confirmed ‘they have to explain’.”<sup>8</sup>

It should also be noted that much of the advice offered by the Clearing House is actually verbal, according to a Cabinet Office submission to the ICO following a complaint from openDemocracy<sup>9</sup>.

Even more troubling was the revelation by Greg Hands MP in a written response on 24 June 2021 to an answer from Emily Thornberry MP. Ms Thornberry had asked how many times the Department for International Trade had referred FOI requests to the Clearing House for advice in each year since 2016. In response, Mr Hands explained that advice is sought on “an ad hoc basis” and that it is “an informal process” in which the “interactions are not recorded”.

The evidence therefore suggests there are a large number of requests that do not make it onto the round robin lists or are not recorded in correspondence between the relevant department and the Cabinet Office. Self-evidently, this makes it even more difficult for the PACAC and others to exercise proper scrutiny over advice being given by the Clearing House.

#### **4. The Clearing House does not provide technical expertise. It exercises political authority**

There is good reason to question why the Clearing House should provide *any* advice *at all* to government departments. It does not understand the information architecture of referring departments the way their own staff do. Nor does its three-person team possess the equivalent departmental expertise on the (wide-ranging) subjects of requests, which might vary from issues regarding the NHS to defence procurement to the private prison system.

There is little, if anything, the Clearing House can offer from a technical point of view that departments couldn't do themselves in-house. What the Clearing House does have, however, is political authority. This allows it to intervene in cases and instruct departments according to a logic that prioritises the mitigation of reputational risk. This also effectively gives referring departments permission to avoid complying with their statutory duties under the Freedom of Information Act.

#### **Case study: Jason Evans**

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<sup>8</sup> 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

<sup>9</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2618028/fs50841228.pdf> para 26

One FOI request by the infected blood campaigner Jason Evans is particularly revealing. Evans' request to the Treasury for a historical document was referred to the Clearing House. The Treasury told the Clearing House that it was "keen to release the information". However, numerous times and over a number of months, Cabinet Office staff urged against immediate disclosure.

The Clearing House cautioned the Treasury to "bear in mind whether releasing information might prejudice the course of the inquiry. We would like to see draft responses." The Cabinet Office, which runs the Clearing House, is also the sponsor of the Infected Blood Public Inquiry.

Almost three months after Evans' request, the head of the Clearing House, Eirian Walsh Atkins, wrote that "the information is very much of its time, and is unpalatable when viewed alongside the Inquiry and the very many letters I know you will have read from infected parties".

The following week the Cabinet Office's director general of propriety and ethics, Sue Gray, wrote: "Personally I would favour the Inquiry releasing the information in a managed way (as we tried to do with Chilcot)... The HMT team will need to do a lot of consultation with former Ministers who I suspect will be very sore about this. Much better to do as part of a release with the Inquiry."<sup>10</sup>

The involvement of the Cabinet Office director general of propriety and ethics raises a further important question: who exactly has access to and influence over the deliberations of the Clearing House?

Separate correspondence between DfT and the Clearing House, disclosed to openDemocracy under FOI, reveals that draft FOI responses and ICO submissions are shared with a wider group of government stakeholders that includes ministers' special advisers for clearance.

For example, in FOI 18077 a DfT employee forwarded a FOI request to the Clearing House and stated: "Please find attached a new case referral form along with a proposed draft FOI reply and the information for release... Our SpAds office have also expressed an interest in the case and we are currently clearing the attached draft with them."<sup>11</sup>

In FOI 17760 a DfT employee forwarded a draft ICO submission to the Clearing House and stated: "We propose to maintain our position and withhold all of the letters in reliance on

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<sup>10</sup> openDemocracy article:

<https://www.opendemocracy.net/en/freedom-of-information/revealed-governments-orwellian-unit-blocked-infected-blood-scandal-disclosure/>

<sup>11</sup> FOI18077: <https://drive.google.com/drive/u/1/folders/158XynTMLLPXR3RIuntQvShCp1eWX5V3t>

s35(1)(a)&(b), s40 and s43(2)... HS2 colleagues have consulted HMT and they agree with this position. We have obtained legal clearance from our lawyer and are clearing the response through our SpAds office, press office and a Director in HS2.”<sup>12</sup>

## **5. The Cabinet Office has the worst FOI compliance record in Whitehall**

The contributions of the Clearing House must be considered in the context of the Cabinet Office’s own FOI compliance record, which is the worst of any government department. openDemocracy’s Art of Darkness report revealed that:

- Between 2015-16 and 2019-20 the Cabinet Office granted the fewest (26%) and withheld the most (60%) of requests in full across all of Whitehall
- The Cabinet Office was found guilty in ICO Decision Notices of ‘stonewalling’ requesters – providing no response at all, including a refusal – 40 times during the same period. Only the Home Office and the Ministry of Justice had worse records
- The Cabinet Office has even stonewalled the ICO with regularity. Thirty per cent of all ICO Information Notices in the past two years were sent to the Cabinet Office after it failed to provide the commissioner with information she needed to conduct investigations<sup>13</sup>

These statistics reflect an attitude in which FOI is simply not taken seriously. The committee should consider this both in the context of the Clearing House, and the inquiry’s wider investigation into the Cabinet Office’s compliance with FOIA 2000.

## **6. The Cabinet Office’s policy sponsorship of the ICO comprises the regulator’s autonomy**

openDemocracy’s Art of Darkness report made the following findings regarding the ICO:

- Although the Department for Digital, Culture, Media And Sport (DCMS) sponsors the ICO’s data protection work, the Cabinet Office is the department responsible for FOI policy
- The ICO’s FOI budget is allocated annually. This arrangement makes the commissioner vulnerable to political pressure because she depends on government ministers to sign off her budget
- The ICO has been sorely underfunded over the past decade. Its budget, in real terms, was cut by 41% between 2011 and 2020, while the number of casework complaints it received increased by 46% in the same period. This has obviously hampered its ability to enforce the FOIA.

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<sup>12</sup> FOI17760 [https://drive.google.com/drive/u/1/folders/1o\\_evNrpj4s9ZtctIltf5gPkIAAJ4NWpv](https://drive.google.com/drive/u/1/folders/1o_evNrpj4s9ZtctIltf5gPkIAAJ4NWpv)

<sup>13</sup> <https://www.documentcloud.org/documents/20415987-art-of-darkness-opendemocracy>

Furthermore, openDemocracy understands that the ICO received complaints about the impact of the Clearing House on both FOI and GDPR in 2018, but chose not to investigate. This raises serious questions about the capacity of the commissioner to robustly enforce information rights on its politically powerful – and hugely influential – departmental sponsor.

An alternative governance structure – in which the ICO reports to and receives funding from Parliament – may be more appropriate. This approach is taken elsewhere – by the National Audit Office, the Parliamentary and Health Service Ombudsman and the Scottish Information Commissioner – to insulate oversight bodies from political pressure.

Previous committees including the Constitutional Affairs Committee (2006)<sup>14</sup> and the Public Administration Committee (2014)<sup>15</sup> have, of course, made recommendations to this effect.

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<sup>14</sup> <https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/991/991.pdf> (recommendation 22)

<sup>15</sup> <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubadm/110/11009.htm> (recommendation 19)

## Annexes

- **Round Robin Lists** : Here is a link to the round robin lists created by the Cabinet Office Clearing House. These were disclosed just weeks before the tribunal: <https://unredacted.uk/dcviewer.php?dcid=20734490>.
- **The Cabinet Office disclosed further information** after the tribunal, received by the committee: <https://committees.parliament.uk/publications/7145/documents/75490/default/>
- **FOI response in regards to Grenfell Tower**: [https://drive.google.com/drive/u/1/folders/1oxi1dj3xUg\\_wMExPsFAUEBSuSQT81O52](https://drive.google.com/drive/u/1/folders/1oxi1dj3xUg_wMExPsFAUEBSuSQT81O52)
- **Department for Transport FOI releases for FOI17760, FOI18077, FOI18184**: These documents were obtained through Freedom of Information legislation. It took many months to obtain these documents.
  - FOI17760: [https://drive.google.com/drive/u/1/folders/1o\\_evNrpj4s9Ztctllt5gPkIAAJ4NWpv](https://drive.google.com/drive/u/1/folders/1o_evNrpj4s9Ztctllt5gPkIAAJ4NWpv)
  - FOI18077: <https://drive.google.com/drive/u/1/folders/158XynTMLLPXR3RIuntQvShCp1eWX5V3t>
  - FOI18184: <https://drive.google.com/drive/u/0/folders/1ECJmDLv4PQ2TTOqoIfLvzpeSx822B8pU>
  - **Jason Evans Infected Blood request correspondence**: Here is a link to the documents obtained by Jason Evans: <https://drive.google.com/drive/u/1/folders/1hjUFkJTH82vaVol5soyTILo8iRuZs7eU>
  - They can also be viewed on the WhatDoTheyKnow website: [https://www.whatdotheyknow.com/request/corr\\_relating\\_to\\_treasury\\_foi\\_48](https://www.whatdotheyknow.com/request/corr_relating_to_treasury_foi_48)

## Public opinion

openDemocracy wanted to demonstrate that transparency and Freedom of Information are of interest to the wider public. To that end, we commissioned polling from Savanta ComRes on government transparency and Freedom of Information. It interviewed 2,075 UK adults aged over 18. This was carried out online between 13 and 15 August 2021.

Firstly, respondents were asked to rate the importance of government transparency on a scale from 0 to 10, where 0 is “not at all important” and 10 is “extremely important”.

The answers to the question “How important or unimportant do you consider government transparency for the health of the UK's democracy?” are as follows:

	All
Sum: 0-3	3%
Sum: 4-6	18%
Sum: 7-10	73%
Don't know	6%

- Conservative voters were significantly more likely than Labour voters to say that government transparency was important for the health of the UK's democracy (83% vs 76%).
- Older adults were more likely to see government transparency as important for the health of the UK's democracy, with 84% of those aged over 55 saying it was important, compared to those aged 35-45 (73%) or 18-34 (58%).

Secondly, respondents were asked about the fact that the percentage of requests under Freedom of Information legislation that government departments have refused to answer in full has increased in recent years. (This has risen from around 40% of requests in 2010 to nearly 60% in 2020.) They were asked how concerned, if at all, they were about this.

	All
Very concerned	33%
Somewhat concerned	38%
Not very concerned	15%
Not at all concerned	4%
Don't know	11%
CONCERNED	71%
NOT CONCERNED	18%

- Seven in ten (71%) said they were concerned about the government not releasing information in a higher proportion of requests, while just one in six (18%) were not concerned.
- Generally speaking, adults of all ages were similarly concerned, but those aged 55+ (75%) were more concerned than those aged 35-54 (69%) and 18-34 (68%).

*Savanta ComRes interviewed 2,075 UK adults aged 18+ online between 13 and 15 August 2021. Data were weighted to be demographically representative of UK adults 18+ by age, gender,*

region, and other socio-economic characteristics including social grade. Savanta ComRes is a member of the British Polling Council and abides by its rules. Full data tables are available on request.

Separately, openDemocracy also carried out a survey of visitors to our website to gain an understanding of people’s attitudes towards government secrecy. Nearly 4,000 people filled out our survey.

It was clear that they were “much less likely” to vote for a party with a record of secrecy.

Are you more or less likely to vote for a party with a record of government secrecy?	Total	Percentage
Much more likely	112	2.9%
More likely	16	0.4%
No difference	35	0.9%
Less likely	341	8.7%
Much less likely	3412	87.1%

Those who completed the survey were asked to submit one word which describes how government secrecy made them feel. “Angry”, “cheated”, “suspicious” and “betrayed” were the most common words.



Full results of our survey are available on request.

*September 2021*