

Written evidence from Transparency International UK (FOI 25)

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

Executive Summary

Freedom of Information (FOI) laws are the bedrock of government openness and integral to a well-functioning democracy. The UK's Freedom of Information Act (FOIA), introduced in 2000, gives the public the right to know information held by over 100,000 public bodies ranging from local government to the Cabinet and so is an essential tool to hold our decision makers to account. It provides citizen-led checks and balances on concentrations of power and without the light it shines, hidden corruption can thrive. As an organisation that actively uses Freedom of Information in our monitoring and research, Transparency International UK (TI-UK) welcomes the committee's inquiry into the Cabinet Office Freedom of Information Clearing House.

Key recommendations:

- In line with the recommendations in the Boardman Review on lobbying, government departments should have to provide data in their annual reports about the timeliness of responses to FOIA requests. Accounting Officers should be required to explain to their responsible Select Committees any failure to respond to FOIA requests in a timely manner.
- FOIA should be extended to cover private bodies undertaking public contracts.
- The ICO should respond to stonewalling complaints by using enforcement notices to order authorities to respond to all overdue requests immediately.
- Future legislative change should introduce an administrative silence rule whereby a failure to respond to a request within the requisite time period is deemed to be a refusal and can be appealed in full to the ICO (enabling the ICO to rule on whether the requested information should be disclosed and not only on the fact that the response is late)
- The UK Government should properly resource the Information Commissioner's Office (ICO) enabling it to carry out its work effectively
- We invite the committee to consider whether an alternative governance structure - in which the ICO reports to and receives funding from Parliament - is more appropriate. This approach is taken elsewhere - by the National Audit Office, the Parliament and Health Service Ombudsman and the Scottish Information Commissioner - to insulate oversight bodies from political pressure.

The Cabinet Office's compliance and implementation of the Freedom of Information Act (FOIA)

1. Previous research¹ and Select Committees have concluded that FOI has made central government more transparent and accountable, with the post-legislative review of the

Act in 2012 stating that FOIA “has contributed to a culture of greater openness across public authorities, particularly at central Government level which was previously highly secretive.”²

2. The FOIA has been fundamental to the uncovering of important stories and worthwhile research such as how hospitals have responded to alerts about patients’ safety³, revelations about the Iraq War⁴ and, most recently, the Greensill lobbying scandal.⁵
3. However, there are several worrying trends in FOI implementation that the Cabinet Office are allowing to arise. As the department responsible for FOI policy and the department who play a central role in determining the scope of FOI, the Cabinet Office should be seeking to address these issues. These trends are the timeliness and completeness of replies to requests, refusal to implement longstanding recommendations, the emergence of bodies escaping FOI, the hollowing out of the overarching architecture of the Act and the recent spotlight on the workings of the ‘Clearing House’.

Timeliness and completeness of requests

4. The first concerning trend in the implementation of the Freedom of Information Act over the past five years is the increase in request refusals and delays.
5. The Institute for Government has found that the completeness of requests - whether or not requests are granted in full - has fallen⁶. Across the first three quarters of 2020, 42 per cent of ‘resolvable’ requests were withheld in full, this compares to only 21 per cent withheld in full in 2005⁷. Of particular note is that the Cabinet Office has the worst record of granting requests in Whitehall. Open Democracy found that between 2015-16 and 2019-20 the Cabinet Office granted the fewest (26 per cent of requests) and withheld the most (60 per cent of requests).⁸
6. According to official data analysed by the Institute for Government, there has been a noticeable decline in the timeliness of FOIA responses, including by the Cabinet Office. In 2019, 13 out of 20 departments (65 per cent) met the Information Commissioner’s Office’s benchmark of responding to 90 per cent of requests within 20 days of receipt and in the first three quarters of 2020, this dropped to only eight departments (40 per cent). Whilst the pandemic may have contributed to this decline,

¹ *Parliamentary Affairs*, Volume 70, Issue 1, January 2017, Pages 22–42, <https://doi.org/10.1093/pa/gsv069>

² House of Commons Justice Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000* (July 2012) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf>

³ Avma, *Patient Safety Alerts: Implementation; Monitoring; And Regulation In England*, (February 2014), https://www.avma.org.uk/wp-content/uploads/2015/05/Feb_2014-PSA-Report.pdf

⁴ <https://www.reuters.com/article/britain-iraq-oil/uk-held-talks-with-oil-firms-before-iraq-invasion-paperidUSLDE73I00J20110419> [accessed 31 August 2021]

⁵ <https://www.theguardian.com/business/2021/apr/14/what-is-greensill-lobbying-scandal-who-involved> [accessed 31 August 2021]

⁶ Institute for Government, *Whitehall Monitor 2021*, (2021), https://www.instituteforgovernment.org.uk/sites/default/files/publications/whitehall-monitor-2021_1.pdf

⁷ Resolvable requests are requests, which public bodies can respond to, an example of a request which is not resolvable would be where a body does not hold the information.

⁸ Open Democracy, *Art of Darkness* (November 2020) <https://s3.documentcloud.org/documents/20415987/art-of-darkness-opendemocracy.pdf>

the cited figure of only 65 per cent of departments meeting the threshold in 2019, was already notably low.

7. These widespread delays and refusal of requests limit the effectiveness of the act. Open Democracy's research into Freedom of Information described these delays as equivalent to 'stonewalling' and argue that when releases are delayed, it decreases the potency of the information that is eventually disclosed. Since the Justice Committee⁹ and the Burns review¹⁰ made recommendations to address these delays, the Cabinet Office have not implemented them. Both the lack of the timeliness and completeness of disclosure appears to be a deliberate attempt to obfuscate departments' responsibilities to comply with the letter and intent of the FOIA.
8. The public can appeal to the regulator for Freedom of Information, the Information Commissioner's Office (ICO), if they are unsatisfied with the outcome of their request. The ICO also has the power to investigate complaints and enforce compliance with the act. Some of the more powerful tools that the ICO has at its disposal are advisory practice recommendations and binding enforcement notices. However, the use of these mechanisms in relation to delays has been low- the commissioner has never used either power directly in relation to stonewalling.¹¹
9. Moreover, the appeals process is also very time consuming for requestors. Open Democracy estimate that successful ICO complainants "wait more than one year, on average, for information to be disclosed."¹² By the time the appeal is granted the information disclosed in the FOI may be less relevant.

Recommendation: The ICO should respond to stonewalling complaints by using enforcement notices to order authorities to respond to all overdue requests immediately.

Recommendation: In line with the recommendation in the Boardman Review on lobbying data, government departments should have to provide data in their annual reports about the timeliness of responses to FOIA requests. Accounting Officers should be required to explain to their responsible Select Committees any failure to respond to FOIA requests in a timely manner.

Recommendation: Future legislative change should introduce an administrative silence rule whereby a failure to respond to a request within the requisite time period is deemed to be a refusal and can be appealed in full to the ICO (enabling the ICO to rule on whether the requested information should be disclosed and not only on the fact that the response is late).

Hollowing out of the Information Commissioner's Office (ICO)

⁹ House of Commons Justice Committee, *Post Legislative scrutiny of the Freedom of Information Act 2000* (July 2012) <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf> [accessed 25 August 2021]

¹⁰ Cabinet Office, *Independent Commission on Freedom of Information Report* (March 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf [accessed 25 August 2021]

¹¹ Open Democracy, *Art of Darkness* (November 2020) <https://s3.documentcloud.org/documents/20415987/art-of-darkness-opendemocracy.pdf>

¹² *ibid*

10. The ICO's apparent reluctance to issue enforcement notices and stricter enforcement mechanisms may be attributable to its lack of resources. In 2015, the Cabinet Office became responsible for Freedom of Information policy. This coincided with a reduction in the budget of the ICO for FOI from £5.2 million in 2010-2011 to £3.7million in 2014-15 and has remained at roughly this lower level since.¹³ This reduction in budget is coupled with a 46 per cent increase in casework for the ICO.¹⁴ The dual reduction in budget and increase in caseload is bound to impede the ICO's ability to effectively enforce the act.
11. Furthermore, the ICO's FOI budget is vulnerable to political influence as the Department for Digital, Culture, Media and Sport (DCMS) is responsible for setting it, and so it is subject to ministerial approval and potential governmental willingness to fund such work.

Recommendation: The UK Government should properly resource the Information Commissioner's Office (ICO) enabling it to carry out its work effectively.

Recommendation: We invite the committee to consider whether an alternative governance structure - in which the ICO reports to and receives funding from Parliament - is more appropriate. This approach is taken elsewhere - by the National Audit Office, the Parliament and Health Service Ombudsman and the Scottish Information Commissioner - to insulate oversight bodies from political pressure.

The Cabinet Office's refusal to implement longstanding recommendations on extending FOI to public services delivered by private contractors

12. The effectiveness of the implementation of the Act is undermined by its narrow scope and its exclusion of private contractors providing public services.
13. Since the FOIA was enacted private contractors have been increasingly delivering public services, with public procurement accounting for £292 billion of all public expenditure in 2019.¹⁵ Yet there is a loophole in the FOIA which means private companies, who supply vital public goods such as hospitals and who are funded by the taxpayers, are not subject to FOI law.
14. The Act states that:

*“ information is held by a public authority if... b) it is held by another person on behalf of the authority”.*¹⁶

15. A common sense interpretation would conclude that where a private company provides a service on behalf of an authority those services are subject to Freedom of Information requirements via requests to the authority. However, in practice this is not how the law is operating, instead Government have relied on companies to voluntarily include contractual provisions allowing access to information. Yet, research suggests that there is scant evidence that private suppliers are including such transparency

¹³ ibid

¹⁴ ibid

¹⁵ Cabinet Office, Transforming public procurement, CP353, December 2020, page 12

¹⁶ Freedom in Information Act Section 3, (2) (b) <https://www.legislation.gov.uk/ukpga/2000/36/section/3>

clauses or they are vague about what constitutes ‘held on behalf of’ in the event of a request.¹⁷

16. This has previously been highlighted: the commission set-up to review the FOIA, the Independent Commission on Freedom of Information, recommended that when a public service is delivered through a contract, information related to the contract “should be treated as being held on behalf of the contracting public authority”.¹⁸
17. Additionally, the Information Commissioner, in 2019 called this loophole a ‘transparency gap’ and urged that contractors be made subject to FOIA. ¹⁹ She reiterated this again in 2021 after the Government spent billions of pounds on contracts to private suppliers during the Covid-19 pandemic. She stated that we must restore “the public’s right to know irrespective of whether the service is delivered by public, private or third sector organisations”.²⁰
18. The fact that information held by private suppliers cannot be accessed using a freedom of information request is a significant accountability gap that must be closed.

Recommendation: FOIA should be extended to cover private bodies undertaking public contracts.

Creation of bodies outside the scope of FOIA

19. Of particular concern in the implementation of the Freedom of Information Act is in the emergence of bodies who wholly or partly escape being subject to the law. The Health Service Safety Investigations Body²¹ only allows for access to information in limited circumstances and the Advanced Research and Invention Agency (ARIA) will not be subject to FOIA at all.²² The Government’s argument is that this will free ARIA from any administrative burden and make it more agile. However, the American agency which ARIA is modelled on, the Defence Advanced Research Projects Agency (DARPA) *is* subject to the US Freedom of Information Act and whilst the budget for ARIA is less than its US counterpart, ARIA’s budget of £800million over four years appears sizeable enough to absorb the costs of FOI requests.
20. We also believe that the narrative that transparency obligations, such as handling FOIA requests, are a burden is concerning and misguided. When agencies are intentionally excluded from transparency and accountability mechanisms this poses a

¹⁷ ICO, *Outsourcing Oversight* (2019) <https://ico.org.uk/about-the-ico/what-we-do/outsourcing-oversight/> pg.36-37

¹⁸ Independent Commission on Freedom of Information, *Report*, page 52, (March 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf

¹⁹ICO, *Outsourcing Oversight* (2019) <https://ico.org.uk/about-the-ico/what-we-do/outsourcing-oversight/>

²⁰ Public Administration and Constitutional Affairs Committee, *After Carillion: Public sector outsourcing and contracting* (July 2018), Seventh Report of Session 2017–19 , pg. 40-41

<https://publications.parliament.uk/pa/cm201719/cmselect/cmpublicadm/748/748.pdf>

²¹ <https://www.cfoi.org.uk/2019/10/briefing-on-secrecy-in-the-health-service-safety-investigations-bill/> [accessed 31 August 2021]

²² <https://www.thetimes.co.uk/article/secrecy-for-high-risk-tech-research-agency-aria-h72lql80k> [accessed 31 August 2021]

significant corruption risk. Conditions are being created which make corrupt practices such as bribery and cronyism more likely but there is no way of being able to discover it, nor is there any threat that decisions would have to be publicly justified.

Recommendation: ARIA should be brought within the scope of FOIA.

The role and operation of the Cabinet Office Freedom of Information Clearing House

21. We are concerned by the Cabinet Office's current operation of the Clearing House, its questionable legal basis in the FOIA, the potential politicisation of FOI and the lack of transparency it is fostering.

Clearing House's legal basis and mandate

22. Initial explanations for the existence of the Clearing House stipulated that it was needed in order to coordinate and monitor 'round robin' requests, these are requests which are sent to multiple departments but are from the same requestor with substantially similar questions.²³ Michael Gove recently stated that:

*"there is a public benefit in ensuring that there is a consistent approach in replying to multiple requests; it makes sure that exemptions are applied in a consistent and legal way..."*²⁴

23. Yet, the FOIA itself has provisions for creating a consistent approach across departments. For example, the Act explicitly outlines to departments when information must be disclosed or is exempt in sections 21-44.²⁵ The Act does not however state the need for a 'Clearing House', so it has no basis in law.

Potential politicisation of Freedom of Information

24. The Cabinet Office have released additional reasons for the existence and functions of the Clearing House besides just to coordinate 'round robin' responses.²⁶ Out of the reasons stated for why requests should be referred to the Cabinet Office, three refer to policy issues and one is when there is a potential for media interest. This brings into question the purpose of the Clearing House as it appears that it has an overtly political role.
25. Moreover, two additional criteria for referral to the Cabinet Office are striking. One is for '...ICO cases where the original case was referred' and the second is for 'ICO Decision Notices from cases not previously referred where Ministers decide to appeal or where the ICO order disclosure of sensitive information'. These two reasons are alarming as they imply that the Clearing House can contribute to internal reviews and

²³ <https://s3.documentcloud.org/documents/20415987/art-of-darkness-opendemocracy.pdf> [accessed 25 August 2021]

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970833/CD_L_letter_to_the_Guardian.pdf [accessed 25 August 2021]

²⁵ <https://www.legislation.gov.uk/ukpga/2000/36/contents> [accessed 25 August 2021]

²⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970672/Cabinet_Office_FOI_Referral_Criteria_FINAL_.pdf [accessed 25 August 2021]

the appeals process. The ICO, as the regulator for FOI should have the ultimate oversight over FOI.

Undermining the applicant blind principle

26. Lastly, according to how Michael Gove explains the processes for dealing with the referred requests to Clearing House, practices appear to undermine the FOI principle of requests being applicant blind. He states that:

*“ The Cabinet Office circulates to departments a list of those requests made to more than one department that have repeat characteristics... .This list does use the name of the requestor to help identify the request; each department will have their own reference numbers, so the name is used to practically help with the multiple requests being grouped into a table”.*²⁷

27. By using the name of the requestor, even if the Government have stated that it has no material outcome in how the request is dealt with, this means that requests are not applicant blind. The Cabinet Office could find another way to code or uniquely identify requests that would avoid this. Even more alarming is that reports from Open Democracy’s research into the Clearing House reveal that, along with the requestors name, their line of work has also been disclosed in the past.²⁸
28. Additionally, as Open Democracy highlight, by sharing requestors names across departments the Cabinet Office may be in breach of General Data Protection Regulation (GDPR) requirements, as the requestor would not have consented to their name being shared.²⁹

Recommendation: We invite the Committee to explore if the Clearing House is in line with the intent of the FOIA and whether or not it is compliant with Data Protection law.

Recommendation: The Cabinet Office should explore alternative ways of identifying requests across public authorities that do not use the requestors name nor disclose their occupation.

Culture of Transparency in Government

29. The Government’s handling of Freedom of Information requests needs to be seen in the broader context of how transparency data is handled. Evidence suggests that the Clearing House is a symptom of a broader issue of Government backsliding on transparency obligations beyond just the implementation of Freedom of Information.
30. In our research into identifying corruption risks in UK public procurement, we highlighted that the Government didn’t meet its own guidance to publish contract award details within 90 days.³⁰ The National Audit Office has noted that out of 1,664

²⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970672/Cabinet_Office_FOI_Referral_Criteria_FINAL_.pdf [accessed 25 August 2021]

²⁸ <https://www.opendemocracy.net/en/freedom-of-information/uk-government-running-orwellian-unit-to-block-release-of-sensitive-information/> [accessed 25 August 2021]

²⁹ Open Democracy, *Art of Darkness* (November 2020) pg. 15

COVID-19 contracts above £25,000 awarded between 1 March and 30 June 2020, only one in four were published within the 90 day deadline.³¹ Whilst this was obviously a difficult period, the suspension of competitive tendering made transparency in procurement even more important. It is also important note that other countries, that faced the same urgent need for PPE procurement did not experience similar delays.

31. Lastly, through our own analysis and through maintaining the Open Access transparency tool,³² we have discovered that departments are publishing their ministerial meetings data later and later. The Government took, on average, 98 days to publish this data in the first quarter of 2019. In every quarter in 2020, Government has published the data later than 120 days.
32. The quality of the ministerial data that departments publish could also be improved. While departmental disclosures do include the ‘purpose’ of each meeting with ministers, this is often unhelpfully vague. For example, in 2020, we count at least 540 meetings where the purpose was recorded as ‘the ‘impact of Covid 19’ or ‘response to Covid-19’. This ambiguity does little to clarify what was discussed.

Recommendation: the proposals in the Boardman Review on ministerial meetings data, including frequency of returns and definition of meetings, should be implemented at the earliest possible opportunity.

ABOUT TRANSPARENCY INTERNATIONAL UK

Transparency International (TI) is the world’s leading non-governmental anti-corruption organisation. With more than 100 chapters worldwide, TI has extensive global expertise and understanding of corruption.

Transparency International UK (TI-UK) is the UK chapter of TI. We raise awareness about corruption; advocate legal and regulatory reform at national and international levels; design practical tools for institutions, individuals and companies wishing to combat corruption; and act as a leading centre of anti-corruption expertise in the UK.

We work in the UK and overseas, challenging corruption within politics, public institutions, and the private sector, and campaign to prevent the UK acting as a safe haven for corrupt capital. On behalf of the global Transparency International movement, we work to reduce corruption in the high risk areas of Defence & Security and Pharmaceuticals & Healthcare.

We are independent, non-political, and base our advocacy on robust research.

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³⁰Transparency International UK, *Track and Trace*, (April 2021)
<https://www.transparency.org.uk/sites/default/files/pdf/publications/Track%20and%20Trace%20-%20Transparency%20International%20UK.pdf>

³¹ NAO, *Investigation into government procurement during the COVID-19 pandemic* (November 2020) p.11
<https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>

³² <https://openaccess.transparency.org.uk/> [accessed 10 September 2021]

