

## Written evidence from Mária Žuffová<sup>1</sup> (FOI 29)

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

#### 1. THE EVIDENCE

The evidence discusses the following:

- The role of the Freedom of Information Act (FOIA) in promoting accountability and its importance for journalists and researchers,
- General experience of journalists with FOIA and central government bodies' compliance with the legislation,
- Experience with the Cabinet Office and the role and operation of its FOI Clearing House.

This evidence comes from my research on FOIA, conducted at the University of Strathclyde, Glasgow, as a part of my doctoral studies<sup>2</sup>. It draws from the survey of journalists ( $N=164$ ) and interviews with civil activists and civil servants ( $N=7$ ). The anonymous survey was open for three months, from May to August 2019, distributed through Qualtrics. Personalised email invitations were sent to 1093 journalists who at the time focused on politics and investigative reporting. The semi-structured interviews were realised in person and online throughout 2017–2019. They lasted for about 40 min on average and were audio-recorded.

#### 2. THE ROLE OF FOIA IN PROMOTING ACCOUNTABILITY AND ITS IMPORTANCE FOR JOURNALISTS AND RESEARCHERS

Survey results from my research have shown that FOIA is an important source for journalists. Journalists submit FOI requests regularly and consider the ability to exercise their right of access to government information as vital for their work. Their (self-reported) FOIA use and many of their stories demonstrate FOIA's importance for government oversight. Through requests, journalists attempt to obtain information that helps them to expose when the government does not act in public interest and point at systemic injustices. FOIA is also indispensable for researchers<sup>3</sup>.

Out of 164 survey participants, 155 (94%) claimed that they submitted an FOI request at least once in their career. One hundred and thirty-eight (84%) agreed that FOI legislation is instrumental for their work. Although journalists use FOIA widely, the survey results have shown that a relatively small fraction of journalists submits a large proportion of requests. Most surveyed journalists (70%) submit less than 50 requests a year (half of them submit less than ten requests a year). Only 24 (17%) surveyed journalists are frequent users (submit over 100 original requests per year). Ninety-four (57%) survey participants stated that their primary source is information obtained through FOI requests and available public-sector data.

#### 3. GENERAL EXPERIENCE OF JOURNALISTS WITH FOIA AND CENTRAL GOVERNMENT COMPLIANCE WITH FOIA

The survey results and interviews pointed to four issues with the central government's FOIA implementation: long time limits, which are not always met; unresponsiveness

(administrative silence); wide application of the exemption on cost grounds; and differential treatment.

- Time limits and unresponsiveness (administrative silence)

Journalists argued that the time for complying with requests is too long to suit the fast-paced work of newsrooms.

My own experience with submitting FOI requests to ministerial departments was that obtaining the requested information often takes substantially longer than the legally prescribed 20 working days. Out of 21 ministerial departments, 17 met the 20 working-day statutory time limit to respond to the request. Four - Department for Business, Energy and Industrial Strategy (BEIS), Department for Education (DfE), Ministry of Defence (MoD), and UK Export Finance (UKEF) did not reply promptly, as required by law. The UKEF responded eight working days after the deadline had passed, BEIS with ten working days and DfE with 38 working days delay. The MoD acknowledged the delay and indicated it would respond within the same week, but the response has never arrived. Also, nearly half of the departments responded on the very last day of the statutory time limit<sup>4</sup>.

The central government bodies that were mentioned in the survey responses as not adhering to time limits and being unresponsive were the Department for Exiting the EU (DExEU) and MoD. While the government statistics do not seem to be available for DExEU, it is available for MoD and confirms the views of surveyed journalists. From April to June 2021, MoD was late to respond to FOI requests in 14% of all requests<sup>5</sup>.

It is important to consider that requesting clarification resets the clock and adds additional days to the initial wait. Also, as the openDemocracy report<sup>6</sup> emphasised, in case of a refusal to disclose the requested information, the appeal process to revert refusal can take up to eight months. Moreover, the report stressed that unresponsiveness (administrative silence) is especially problematic, as it leaves requesters, who technically do not have the decision to appeal, in legal limbo.

- Wide application of the exemption on cost grounds

While public authorities have several legitimate reasons to refuse requests, the statistics on the government's FOI performance indicates a trend towards opacity, with the refusal rate having almost doubled in the past 15 years<sup>7</sup>. The first most frequent justification for withholding information the survey respondents encountered was made on cost grounds. The second most frequently cited reason for refusals was time burden. Section 12 of the FOIA states<sup>8</sup> that public authorities are not obliged to comply with a request for information if it estimates the cost of complying would exceed the appropriate limit, which is set at £600 for the central government. This is the estimated cost of one person spending 3.5 working days determining whether the department holds the requested information. The guidance provided by the UK's Information Commissioner also concludes that if "it would cost too much or take too much staff time to deal with the request", public authorities can reject such request<sup>9</sup>.

The problem with refusals on costs grounds is that they create information asymmetry in favour of public authorities, as requesters cannot verify whether the justification provided is genuine.

- Differential treatment

Survey respondents complained that their FOI requests “are being treated differently than those of any ordinary member of the public”. The problem of differential treatment was brought up in the interviews as well. A civil society representative argued that whereas most requests are dealt with by the regular FOI team, sensitive requests get to senior civil servants in the departmental hierarchy. Because they deal only with requests that might represent a reputational risk to the department, they “see threats, not advantages of disclosure”<sup>10</sup>. These practices have also been reported in other countries<sup>11</sup>.

#### **4. EXPERIENCE WITH THE CABINET OFFICE AND THE ROLE AND OPERATION OF ITS FOI CLEARING HOUSE**

Survey respondents and interviews discussed their experience with FOIA broadly. However, one journalist claimed explicitly that “the Cabinet Office in particular routinely fails to meet deadlines on FOIA requests”.

The openDemocracy report<sup>12</sup> suggested that the Clearing House keeps a list of journalists and activists who are frequent requesters, which should help them detect and obfuscate FOI requests that could represent a reputational risk. The experience of the Times data journalist George Greenwood<sup>13</sup> offered evidence of differential treatment of journalists<sup>14</sup>. In response to his subject access request to the Cabinet Office, he learnt that the FOI and Clearing House teams held information on him. References to him as ‘ever-active’ and his requests ‘as sensitive’ suggest that journalists are being targeted and their requests treated differently. This treatment of FOI requests goes against the general principle of FOIA of being the applicant blind administrative practice.

In response to my own request<sup>15</sup>, the Cabinet Office proactively mentioned the Clearing House and indicated that it indeed coordinates how certain requests should be responded to. Below is their full answer:

“You may also find it helpful to know that the Clearing House function was established in 2004 and has operated in different forms since the FOI Act came into force in January 2005 as an advice centre to coordinate complex requests across Whitehall. There is no stand-alone Clearing House team, but coordination functions are carried out by a number of staff members who have a range of wider responsibilities. The Cabinet Office provides advice to Departments, to ensure cases are handled consistently, and sensitive material handled appropriately.”

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#### **Notes**

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<sup>2</sup> See Žuffová, M. (2021). Fit for Purpose? Exploring the Role of Freedom of Information Laws and Their Application for Watchdog Journalism. The International Journal of Press/Politics. <https://doi.org/10.1177/19401612211006702>.

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- <sup>3</sup> For example, see research by Hanna Bows on accessing data on marginalised groups who may be difficult to recruit in research: Bows, H. (2017). Researching Sexual Violence against Older People: Reflecting on the use of Freedom of Information Requests in a Feminist Study. *Feminist Review*, 115(1), 30–45. <https://doi.org/10.1057/s41305-017-0029-z> or research exploring the implementation of Prevent Duty in the UK Higher Education Institutions: Whiting, A., Campbell, B., Spiller, K., & Awan, I. (2021). The Prevent Duty in UK higher education: Insights from freedom of information requests. *The British Journal of Politics and International Relations*, 23(3), 513–532. <https://doi.org/10.1177/1369148120968520>.
- <sup>4</sup> See Žuffová, M. (2021). Fit for Purpose? Exploring the Role of Freedom of Information Laws and Their Application for Watchdog Journalism. *The International Journal of Press/Politics*. <https://doi.org/10.1177/19401612211006702>.
- <sup>5</sup> The Cabinet Office, National Statistics: Freedom of Information Statistics – April to June 2021, <http://bit.ly/3hRvEgV>.
- <sup>6</sup> See Amin, L. (2020). *Art of Darkness: How the Government Is Undermining Freedom of Information*. London, United Kingdom. <https://www.documentcloud.org/documents/20415987-art-of-darkness-opendemocracy>.
- <sup>7</sup> Institute for Government, We Need to Know Why so Many FOI Requests Are Being Refused, June 22, 2018, <https://bit.ly/3ieDUGk>.
- <sup>8</sup> Legislation.gov.uk, Freedom of Information Act 2000, Section 12, <https://www.legislation.gov.uk/ukpga/2000/36/section/12>
- <sup>9</sup> Information Commissioner’s Office, When Can We Refuse a Request for Information? Guide to Freedom of Information for Organisations, August 14, 2017, <https://bit.ly/2S6XbOY>.
- <sup>10</sup> See Žuffová, M. (2021). Fit for Purpose? Exploring the Role of Freedom of Information Laws and Their Application for Watchdog Journalism. *The International Journal of Press/Politics*. <https://doi.org/10.1177/19401612211006702>.
- <sup>11</sup> For example, see Michener, G., Velasco, R.B., Contreras, E., & Rodrigues, K.F. (2020). Googling the Requester: Identity - Questing and Discrimination in Public Service Provision. *Governance* 33(2), 249–267. <https://doi.org/10.1111/gove.12416> and Roberts, A.S. (2005). Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada. *Public Administration* 83(1), 1–23 and Kwoka, M. (2018). The Other FOIA Requesters. In *Troubling Transparency: The History and Future of Freedom of Information*, eds. Pozen, D.E. and Schudson, M. New York, NY: Columbia University Press, 73–90.
- <sup>12</sup> See Amin, L. (2020). *Art of Darkness: How the Government Is Undermining Freedom of Information*. London, United Kingdom. <https://www.documentcloud.org/documents/20415987-art-of-darkness-opendemocracy>.
- <sup>13</sup> <https://twitter.com/GeorgeGreenwood/status/1386586421436293125>.
- <sup>14</sup> A transparent FOI system is vital for good government, George Greenwood, *The Times*, April 26, 2021, <https://www.thetimes.co.uk/article/a-transparent-foi-system-is-vital-for-good-government-drk2p8zgh>.
- <sup>15</sup> An email response from the Cabinet Office’s FOI team, received on January 5, 2021.