The Chartered Institute of Journalists' submission to the

Independent Commission on Freedom of Information on its review of the FoI Act 2000

The Chartered Institute of Journalists (CIoJ) is the world's oldest professional association of journalists and operates under a Charter granted in 1890 by HM Queen Victoria.

We represent staff and freelance journalists across all sectors of the media including local and national newspapers, periodicals, broadcasting and electronic publishing.

The CIoJ welcomes the opportunity to submit views on the Freedom of Information Act, however we are disappointed at the overarching direction that this review seems to take. The consultation document appears to have been written slanted towards offering more protection to public authorities and those who should otherwise be obligated to provide openness and transparency.

In our view the commission should be looking at ways in which to encourage greater openness and transparency in public sector organisations.

1. **What protection should there be for internal deliberations of public bodies**

   In our view the current provisions for protection are adequate.

2. **What protection should there be for information which relates to the process of collective Cabinet discussion and agreement**

   In our view the current provisions for protection are adequate.

3. **What protection should there be for information which involves candid assessment of risks**

   In our view the current provisions for protection are adequate.

4. Should the executive have a veto (subject to judicial review) over the release of information

The consultation document seems to argue that the Supreme Court ruling in relation to the release of correspondence between HRH Prince Charles and government departments was a game changer for the executive veto. However, it also points out that there remains 'considerable uncertainty' about the actual implications of the ruling.

This Institute argues that given the complex nature of the ruling, and the multi-layered appeals that this particular case went through, there can be no call for greater powers when it comes to the executive veto.

Indeed, allowing this one case to shape an enhanced protection of veto would have a resultant 'chilling affect' on the power of the media to access important information on behalf of the public.

Instead, the Institute would argue for the following reforms to the absolute exceptions

Absolute exceptions apply to

- Information supplied by, or relating to, bodies dealing with security matters (s23)
- Information relating to Court records (s32)
- Parliamentary privilege (s34)
- Information provided in confidence (s41) and
- Information prohibited from disclosure by any other piece of legislation or enactment (s44)

Exemptions that are absolute only in part include:

- Information that would prejudice the effective conduct of public affairs (s36), and
- Personal information (s40)

The Institute believes that after 50 years these absolute exceptions operate only instrumentally in terms of administrative convenience. They can operate unjustly particularly in bona fide investigations into personal and family history, academic and media history research.

The Institute strongly urges the Commission to reform the legislation so that after 50 years, a public interest test is applicable. The argument is based on the practice by security bodies such as the Security Service, GCHQ and the Foreign and Commonwealth Office in respect of Secret Intelligence Service matters, to release files to the National Archives on historical matters, but then apply the absolute exception when FOI requests inevitably arise as a result of the release of those documents. UK state security bodies also regularly give access to their historical files to selected academics for the research and publication of institutional histories. This is particularly the case with MI5 in 2009 and MI6 in 2010.

The Institute believes that the UK Supreme Court ruling in Kennedy (Appellant) v The Charity Commission (Respondent) 2014 demonstrates that absolute exceptions are vulnerable to legal challenge under English and Welsh common law as well as ECHR jurisprudence and

Human Rights law. The Institute strongly advises the Commission to adopt the public interest test for these exceptions after a passage of 50 years in order to make the legislation compatible with essential common law and human rights principles. The Institute believes that after 50 years there can be hardly any matters relating to security bodies, for example, that require concealment from public interest enquiry. It is a grave injustice that the existing FOI infrastructure of application, appeal and investigation should be barred from evaluating release in the public interest.

5. What is the appropriate enforcement and appeal system

The Institute argues that the existing enforcement and appeal system is operating fairly and effectively and offering a process for access to justice for those appealing a decision by public authorities to reject an FOI application.

Internal review and investigation on the merits of a decision by the Office of the Information Commissioner has clarity and process for evaluation.

The Information Tribunal system at first tier and with its upper level offers an effective balance for more informal involvement of lay appellants and traditional legal process where there is representation of public authorities by counsel.

The Tribunal process provides a forum for a greater depth of adversarial inquiry on important issues arising. It also extends the evaluative space and time for public authorities, including the ICO, to reconsider their position when extended evidence and submissions are tabled for oral consideration and analysis in tribunal hearings.

The Institute recommends that there is an amendment to Rule 10 of the THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(GENERAL REGULATORY CHAMBER) RULES 2009
S.I. 2009 NO. 1976 (L. 20)

> Orders for costs(b)
> 10.—(1) [Subject to paragraph (1A)], the Tribunal may make an order in respect of costs (or, in
> Scotland, expenses) only—
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
> (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings;

The Institute is concerned that this rule is a significant disincentive to an individual journalist acting in the public interest in pursuit of information concealed by a public body. It is our recommendation that the rule includes a provision for agreement by all the parties at the beginning of a tribunal hearing that there will be no application for costs where the bringing of the proceedings is considered 'reasonable.'

The Institute has discussed the question of the ten year delay between the time of the original FOI application and decision of the Supreme Court in R (on the application of Evans)

and another (Respondents) v Attorney General (Appellant) 2015- the Guardian and Prince Charles letters case.

We believe this delay has been excessive and is contrary to the spirit of the legislation. Justice delayed to this extent is justice denied; particularly in the field of journalism.

We would recommend some acceleration of the route of appeal in Freedom of Information disputes on merits and points of law. This could be achieved within the Tribunal system as well as subsequent to transfer to the court system. There would be some justification in the current Information Tribunal system identifying appeals from the ICO that raise issues of potential precedent and seriousness. These should be heard at first instance by the Upper Tribunal thereby taking out one layer of appeal.

The Guardian case was complicated by the intervention of the Attorney General and subsequent process of judicial review of his exceptional use of the veto under section 53 of the legislation.

Ordinarily The Upper Tribunal is an independent court, which is both an expert tribunal and a superior court of record, effectively with the same status as the High Court of Justice.

Consequently the next step in any appeals process should operate to the Court of Appeal Civil Division and then to the UK Supreme Court. We would suggest a shortening of the appellate route when challenges to section 53 certificates are made so that a Divisional Court ruling made in the Guardian case proceeds on appeal directly to the Supreme Court.

6. And is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know

The Institute argues that there is no evidence at all of the existing FOI system operating as a significant cost and bureaucratic burden. The number of FOI applications and appeals is falling. The existing system appears to be serving the interests of democracy by balancing the pressure for transparency in decision making as well as protecting the necessary integrity, privacy and confidentiality required for responsible governance.

Any argument by public bodies that FOI requests are putting them under unacceptable cost and operational stress, is invalidated by recognizing that had they made the information available and accessible in the first place in terms of their everyday media and public communications policy, the so-called 'burden' would not exist.

The real cost and burden argument is that public bodies can reduce expenditure by putting into the public domain through digital platforms information and data usually requested in the public interest by media and private citizens.

Journalists are the eyes and ears of the public, with a duty to scrutinise those in power and hold them to account. There should be no cost implication in providing this essential role in a democracy.