

BBC RESPONSE TO THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS' CONSULTATION ON THE DRAFT FREEDOM OF INFORMATION AND DATA PROTECTION (APPROPRIATE LIMITS AND FEES) REGULATIONS 2007

1. Introduction

1.1 The BBC is in a virtually unique position under the Freedom of Information Act, as a media organisation whose journalists make large numbers of FOI requests and as a public authority under the Act (in relation to some information) which receives many FOI requests. We are therefore aware of both perspectives on these issues.

1.2 We seek to adopt policies of openness and transparency. We welcome FOI as a tool which facilitates our relationship of openness with the public. We also welcome the fact that it helps our programme-makers to put material into the public domain where this is in the public interest.

1.3 As an authority that both receives and makes FOI requests we believe that the current Fees regulations strike the correct balance between providing access to information and delivering our public services.

1.4 We therefore do not wish to see changes to the FOI system which run counter to its spirit and would undermine its achievements and effectiveness. We believe that the government's current proposals would do this and are strongly opposed to them.

1.5 We welcome the fact that the DCA has initiated a formal consultation exercise. However we are disappointed with its narrow focus. We believe that the DCA should also be seeking views on the principle of what it is being proposed, not merely on the details of how to implement it.

1.6 We make some comments on the detailed questions asked. However, this is in the context of our fundamental opposition to the implementation of anything along the lines of the proposed new regulations.

1.7 We do not accept the costings analysis provided by Frontier Economics, which we contend has numerous flaws. However, in this submission we concentrate on the merits and demerits of how the government is now proposing to administrate FOI.

2. Examination, consultation and consideration time

2.1 We are opposed to the proposal to allow examination, consideration and consultation time to count towards the cost limit. If implemented this proposal would curtail those FOI requests which are most important and of widest public interest. This is because it is generally these requests that are subject

to the greatest amount of consideration and consultation in relation to any applicable exemptions. The proposed change is unlikely to affect the mundane, easily answered, routine requests. But requests on significant topics requiring extensive consultation with numerous officials and ministers, especially, for example, on the matter of the application of the public interest test on qualified exemptions, could easily exceed the proposed cost limit if time spent on deliberation could also be taken into account.

2.2 There is a fundamental flaw with the proposed regulations in that it is impossible to accurately estimate the costs you would reasonably expect to incur in consideration of exemptions and, where applicable, perform the public interest test. To make a reasonable assessment of the use of exemptions the information must be read line by line.

2.3 The proposal would also give public authorities a perverse incentive to employ particularly lengthy consideration and consultation processes for sensitive requests, so as to maximise the chance of refusing them by exceeding the cost limit. In the case of some public authorities this could become a crucial loophole. Inefficient authorities with wasteful processes will be better able to avoid difficult disclosures than decisive and efficient ones. So the proposal would mean that the government could reward inefficiency in public authorities.

2.4 Furthermore the proposal, if implemented, is bound to provoke more time-consuming and expensive internal reviews and complaints to the Information Commissioner arguing that the fees regulations have been incorrectly applied. This will reduce any cost savings that are hoped for.

Question 1. Are the Regulations prescriptive enough to ensure consistent calculation of the appropriate limit across public authorities or should they contain more detail? For example, taking into account the differing formats and quantity of information requested, should a standard reference (i.e. a 'ready reckoner') for how long a page should take to read be included in the Regulations or guidance?

2.5 While we are opposed to the inclusion of examination time in the cost limit calculation, we believe that if this is to happen then there should indeed be a standard speed stipulated for reading times. This is necessary to curtail inconsistency, prevent abuse of the system and the creation of additional loopholes. Any appropriate reckoner, however, must account for the variety of forms of information being sought eg databases, presentations, emails, tables, plans etc.

Question 2. Does the inclusion of thresholds in the regulations provide sufficient flexibility, taking into account the differing complexity of requests received?

Question 3. Are the thresholds the right ones to make sure the balance is struck between allowing public authorities to count these activities but not refuse requests on one of these grounds alone?

2.6 We would prefer the regulations to include thresholds and ceilings rather than not do so.

2.7 This is because if the proposals do go ahead we would wish to see their damaging effects mitigated, and thresholds and ceilings would go a small way in this direction.

2.8 For the same reason of mitigating the resulting harm, we would prefer to see the thresholds higher and the ceilings lower.

2.9 However the damage reduction would only be small. In practice, although this is certainly preferable to not doing so, little will be achieved by stipulating separate cost ceilings for consideration and consultation. Sensitive and difficult requests are likely to involve considerable amounts of both consideration and consultation on whether and how exemptions apply, and, therefore, to exceed the cost limit.

2.10 It is also important to note that while it is better to have thresholds and ceilings than not do so, the increasing complexity of the cost calculations will surely lead to additional internal reviews and appeals to the Information Commissioner. In other words, as the government seeks to ameliorate the damaging impact of the proposals on openness by increasing their complexity, it is reducing the potential cost savings. In our view this is further evidence that the entire approach is wrong-headed and should be abandoned.

3. Aggregation

Question 4. Are the regulations as drafted the best way of extending the aggregation provision?

3.1 The aggregation proposal – to allow the aggregation of all requests made by any legal person to one public authority within sixty working days – would have bizarre and unacceptable consequences.

3.2 As the proposal stands, It would mean that if one BBC journalist puts one or more requests to a public authority which come close to the cost limit (and implementation of the first proposal increases the chance that just one request would do so), then quite possibly no other BBC journalist would be able to put an FOI request to that authority about anything at all for the next three months. Other major media organisations would be affected in a similar way. It is important to bear in mind that the Act applies to all written requests for information from public authorities, whether or not they are intended to be made under the Act. The aggregation limits could, in theory, be 'used up' by the BBC simply through day to day email correspondence with the press

offices of public authorities on news stories where neither party had in mind the applicability of the Act.

3.3 Paragraph 29 of the Regulatory Impact Assessment notes that the proposal risks having 'the effect of imposing rigid quotas' on frequent requesters, 'particularly organisations'. This is indeed what would happen. Despite the impression given in the RIA, the proposed criteria for determining reasonableness do not mention the need to avoid imposing rigid quotas on organisations (such as major media corporations) that make frequent requests. These criteria will thus do little to prevent this risk materialising.

3.4 It is certainly better to state the aggregation must be 'reasonable' than not to impose this condition, but this is only a very minor step towards mitigating the damaging effects of this proposal. It will still leave public authorities enormous scope to aggregate and thus reject FOI requests which they don't like, while not bothering to aggregate the ones they have no difficulty with. Our experience suggests that it is likely to be those requests regarded as sensitive and difficult that will suffer.

If the Government decides that it will include an aggregation provision, we think this should only apply to applications from individuals, irrespective of whether they are writing on behalf of a company or corporation. Without such a qualification, the aggravation provisions will in effective remove the real benefits of the Act from large news organisations.

3.5 Our answer to question 4 is therefore 'No'.

Question 5. Do the factors that need to be taken into account when assessing if it is reasonable need to be explicitly stated in the regulations or can this be dealt with in the guidance?

Question 6. Are these the right factors?

3.6 In the event that this deeply damaging proposal to allow aggregation does go ahead, and guidance is issued on when it is 'reasonable' to aggregate non-related requests we assert that those mentioned in the draft consultation are not the right factors nor are they tightly enough defined. As currently defined in the Consultation Paper at paragraph 39 they leave great scope for abuse by public authorities seeking to refuse sensitive requests.

3.7 In any event the criteria for 'reasonable' aggregation should take into account how widely the disclosed information may be distributed by the requester and thus the level of public benefit that follows from the disclosure. If the point of FOI is to promote access to information which should be available to the public, then its public benefits are greatest when that information is distributed most widely. It is therefore less reasonable to aggregate and reject requests from requesters who are likely to make the disclosed information widely and easily available to the general public (and thus maximise the public interest benefit from disclosure) than to aggregate

requests from requesters who may keep the disclosed information to themselves or seek to sell it to others at a substantial price.

3.8 As a public authority in relation to certain information under the Act the BBC will suffer resource implications due to the aggregation proposal and the additional requirements to investigate the identity of requesters and also to ascertain their “purpose” for requesting information. Until now the Act has been requester and purpose-blind. It is likely that these additional requirements will have an impact on resources such that any cost savings will be reduced.

3.9 For the avoidance of doubt any drafting should make it clear that “aggregation” only includes requests for information that fall within the ambit of the Act.

3.10 We again make the point that any cost savings would also be reduced by an increase in internal reviews and appeals to the Commissioner.

3.11 It is the BBC’s position as a public authority under the Act (in relation to certain information) that we would prefer to utilise these resources responding to requests for information that are valid in accordance with the spirit of the Act and the form of the current Fees regulations, rather than having to fulfil potentially onerous administrative requirements under the proposed Fees Regulations.

4. Conclusion

4.1 The Regulatory Impact Assessment implies that those who would mainly suffer from the proposals are frequent FOI requesters. However in the case of the BBC we believe this is a fundamental misunderstanding. The people who would suffer are in fact our audiences who would be deprived of valuable information that we could no longer provide to them – information which would help hold public authorities to account and which would help facilitate public discussion of and informed participation in decision-making.

4.2 These proposals would dramatically curtail the ability of BBC journalists and others to put into the public domain material which merits disclosure in the public interest. In this way the proposed changes would actually obstruct the aim of increasing transparency and openness in public life that lies behind the government's introduction of FOI.

4.3 We believe that FOI has strengthened the BBC's ability to achieve the objective of delivering greater accountability and transparency to licence fee payers. While our experience of handling requests has been challenging it has also been rewarding. From our perspective as an authority receiving requests we see absolutely no need for the measures that are being proposed.

4.4 We therefore hope the government will think again and withdraw these proposals.

4.5 We intend to make this response public.