Independent Commission on Freedom of Information
Call for Evidence

Evidence submitted by

Northern Ireland Open Government Network

20th November 2015

The Northern Ireland Open Government Network is an alliance of individual citizens and representatives of community and voluntary sector organisations. Our aim is to contribute to delivering a more open, transparent and accountable government that will empower citizens to shape decisions that impact on their lives.

The purpose of the network is to actively engage a broad and diverse group of citizens and organisations in advocating more open government in Northern Ireland.

In accordance with the principles of the Open Government Partnership Declaration, the Network aims to contribute to:

- broadening participation in government
- increasing transparency and the availability of, and access to, data
- enhancing accountability
- improving policy making
- delivering better service provision and increasing confidence in government

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Introductory Comments

Reviews of policy and legislation are important in order to better understand and improve their impact for citizens. Therefore, the NI Open Government Network welcomes the opportunity to respond to the 'Call for Evidence' relating to the review of the Freedom of Information Act (2000). The Network strongly supports the initial objective of the 1997 Freedom of Information Act: "To encourage more open and accountable government by establishing a general statutory right of access to official records and information."

Under the Freedom of Information Act (2000), public authorities are obliged to publish information about their activities and members of the public are entitled to request information from, for example, government departments, local authorities, the National Health Service, state schools and police forces. Although there are some weaknesses with the 2005 Act, it is internationally recognised as a model that helps the citizen to access and use information.

'The Right to Information' is a cornerstone of the Open Government Partnership, to which the UK is a founding signatory. Prime Minister David Cameron has championed open government in the UK, pledging to make the UK government "the most open and transparent in the world." Any attempt to weaken the Act undermines the principles of open government and the commitments which the UK has endorsed through the Open Government Partnership.

We share the UK Open Government Network's concerns regarding the Freedom of Information Commission and Tribunal Fees, expressed in an open letter to Matthew Hancock MP, Minister for the Cabinet Office:

"We regard the Act as a fundamental pillar of the UK's openness arrangements. So too did the coalition government which stated that the Act had been 'successful in achieving its core aims of increased openness, transparency and accountability'. We do not believe that the Act's important rights should be restricted and consider that attempts to do so would be likely to undermine the Open Government Partnership (OGP) process itself."

The views of the NI network are now outlined under a series of thematic headings.

Open Government Network Northern Ireland

Terms of Reference

We are disappointed about how the consultation is framed and by its limited terms of reference. In the call for evidence overview document, the independent commission focuses on the negative impact of the FOIA for government, without recognising or reflecting on its benefits.

The call for evidence states:

"The Commission will review the Freedom of Information Act 2000 to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of the Act adequately recognises the need for a "safe space" for policy development and implementation and frank advice. The Commission may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information."

The terms of reference indicate that the Commission intends to focus on the case for restricting freedom of information and will not consider ways of enhancing the right of access, increasing the number of organisations subject to the Act or removing unnecessary obstacles to disclosure. The Commission is essentially asking to what extent the right of free access to information should be curtailed.

The Commission appears to be working on the assumption that transparency is burdensome – administratively inconvenient, politically unnecessary and democratically superfluous. Accordingly, the terms of reference frame the debate in transactional terms – it is about time and money wasted through dealing with FOI requests, rather than about the more important relationship between transparency and democracy.

FoI is a driver of good public authority practice. The Act has enabled government to change how it interacted with the citizen and allows the citizens to understand and engage more with democracy. The FoI Act should be strengthened in a way that makes government more transparent. There is no defence, for example, for failing to extend FoI to private companies contracted to take on public services, as the Public Accounts Committee suggested.

The Composition of the Commission Panel

We have concerns about the composition of the Panel and strongly believe that the government should have avoided appointing members who have already reached and expressed firm views on the issues around FoI.

We are concerned that the Panel members on the Commission, weighed down by preconceptions, are unlikely to approach their task with an appropriate level of objectivity. They seem less concerned with safeguarding the freedom of information than with imposing new restrictions on its flow; more preoccupied with enabling government to avoid awkward questions than enabling citizens to reveal inconvenient truths.

Loaded Language

We have concerns about the vague, undefined and loaded use of language in the call for evidence. Wording like ‘safe space’, ‘frank advice’ and ‘the burden of the Act on public authorities’ are loaded terms that, without any evidence, create the sense that the FOI Act curtails the work of Government.

The first term of reference concerns the balancing of ‘sensitive information’, but a coherent definition of ‘sensitive information’ is missing from the Commission’s call for evidence. In fact, the word sensitive is only mentioned once in the entirety of the Freedom of Information Act; and when it is mentioned under schedule 6, it clearly refers to personal information which is otherwise covered by the Data Protection Act.

The House of Commons Justice Committee

We believe that the Proposals under consideration are unnecessary and regressive.

In 2012, the cross party House of Commons Justice Committee carried out an extensive investigation into the operations of the Act. It reported:

“The Freedom of Information Act has been a significant enhancement of our democracy. Overall our witnesses agreed that the Act was working well. The right to access information has improved openness, transparency and accountability.”

The Justice Committee review took seven months, considered 140 pieces of evidence and heard oral evidence from 37 witnesses. The FoI Commission is due to report by the end of November and has a composition which reflects the interests of government with an extremely limited remit.

It is highly perverse for this useful and much needed legislation to be placed under threat by a review that is merely looking at proposals to weaken the Act. The Committee's comprehensive report addresses all the concerns which, according to the Government, its new review has been established to consider. Why then the sudden pressing need for another one?

Proposals such as strengthening the government veto, removing some types of information from FOI altogether and charging for requests are regressive and unnecessary. The Act already contains robust safeguards for sensitive information and it has revealed far more wasteful spending by public authorities than it has cost to administer. The FOI Act already offers discretion as to what can and cannot be accessed. Much of the data the public deserves to see remains undisclosed. FOI has never been a free-for-all; our right to free access to information should be extended, not watered down.

Protection for information relating to the internal deliberations of public bodies

Question 1 from the Commission asks:

*"What protection should there be for **information relating to the internal deliberations of public bodies**? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?"*

We believe that notions like 'protection of internal deliberations' are highly inappropriate in the context of publicly elected representatives making decisions that impact our lives.

Public scrutiny is awkward. For decades public institutions have operated freely behind closed doors to prevent perceived nosy citizens from interfering, criticising and asking awkward questions. Institutions and their employees should operate in a manner that reflects their duty to the citizen.

The Freedom of Information Act was designed to: *"transform the culture of Government from one of secrecy to one of openness; raise confidence in the processes of government, and enhance the quality of decision making by Government."* However, the agenda underpinning this review runs contrary to this cultural transformation.

If we limit information about internal discussions of public bodies, then:

a) Critical mistakes by public authorities could remain undisclosed for decades
b) Public authorities might feel free to ignore inconvenient evidence in reaching decisions
c) Public authorities might feel free to take decisions that satisfy commercial lobby groups

Democracy and transparency go hand in hand, and so the suggestion that a monetary burden may outweigh a democratic need is detrimental to our democratic society. Access to information is essential to the spirit and practice of open government. It supports good governance, effective and efficient public administration, compliance with laws and regulations, efforts to combat corruption and greater government transparency, and participation in decision-making.

The Open Government Network supports reform of FOI, not to diminish democracy, but to facilitate maximum disclosure. Any organisation that delivers services supported by public funds should be required to answer FOI requests. Public services are increasingly being delivered by private contractors which means that rights of the public are inconsistent as it is difficult to distinguish between information that is held on the authority's behalf, and private information.

We propose that either a disclosure obligation should be introduced, requiring any information held by contractors or subcontractors relating to the contract to be considered as being held on the authority's behalf, or by using budget trails so that public spending can be traced effectively and decisions can be based on complete information. As the open-source community insists, open access to information will produce more knowledge and greater processes.

Safe Deliberative Space for Ministerial Discussions

One of the aims of the review is to ensure that the Freedom of Information Act, "adequately recognises the need for a 'safe space' for policy development and implementation and frank advice." Through the FoI process the Information Commissioner and the tribunal have the power to question whether disclosure genuinely undermines such a, "safe space. Besides, an exemption already exists and any tightening of this exemption could mean civil servants would no longer be accountable to the public for the advice they offer to government.

At present section 35 of the Act allows the withholding of policy development work, private office communications and letters between ministers. Section 36 allows ministers to withhold other information as well which would undermine safe space for discussion.

When dealing with the concept of **'Deliberative Space**' the Commission states:

"It is difficult for organisations to have frank, internal deliberations if those internal deliberations are to be quickly made public."

It goes on to quote the Justice Committee:

"Good government requires: Ministers to be provided with full, frank advice from officials about the possible impact of proposed policy, even—or especially—where that advice acknowledges risks; Ministers and officials to be able to discuss and test those proposed policies in a comprehensive and honest way; and the records of those discussions and the decisions which flow from them to be accurate and sufficiently full...it is generally accepted that a 'safe space' is needed within which policy can be formulated and recorded with a degree of confidentiality."
(Justice Select Committee, Post-Legislative Scrutiny of the FoI Act, July 2012)

But the Commission fails to note that the Justice Committee also said:

"The Constitution Unit's research on FOI is the first major piece of research of its kind and is a valuable contribution to the debate around FOI. In its consideration of the chilling effect, the Unit broadly concluded that the effect of FOI appeared negligible to marginal."

The Justice Committee also said:

"The evidence shows time and time again that the Information Commissioner and the Information Tribunal have supported the principle that there should be a safe space for the development of policy. Cabinet minutes are not routinely outed. The only ones you get to hear about are the ones where the Information Commissioner or the Information Tribunal have ruled in favour of publication. Nobody is interested in the vast majority of cases, when we look at the balance of interests and say, "No; we think that the principle of collective Cabinet responsibility trumps any other argument."

Committee Chairman Sir Alan Beith insisted that:

"The Act was never intended to prevent, limit, or stop the recording of policy discussions in Cabinet or at the highest levels of Government, and we believe that its existing provisions, properly used, are sufficient to maintain the 'safe space' for such discussions."

While we recognise the need for a 'safe space' for policy making and for ministerial collective responsibility, we do not feel that this report has been open and honest in its presentation of arguments for and against a deliberative space.

The Commission and the Government must provide stronger evidence for the need to strengthen its protection for ‘safe space’.

Section 35 of the Act already provides an exemption for formulation of government policy; Section 36 already provides for, “prejudice to effective conduct of public affairs,” particularly collective responsibility.

The use of the words ‘safe space’ suggests that information needs protection from public scrutiny, but public involvement for policy development and implementation is actually beneficial to effective decision making and allows for a fresh-eye approach, leading to innovative solutions to otherwise stagnant situations.

The Act should not be viewed by the Commission as a hindrance to public authorities, or a way for journalists to invent new and scandalous headlines, but as a means to a more informed decision making process that may avoid later, heavier costs by weeding out mistakes early on.

The Justice Select Committee said recently that, “good government requires: Ministers to be provided with full, frank advice,” but this does not explain why there is a need for a safe space. In every community, decisions should be made at the level at which they are impacting. Advice can, and should, be given openly. Citizen engagement can only be achieved with access to information relevant to all stages of government policy development and implementation, including identification of need, delivery and evaluation.

Protection for information related to Cabinet discussions and collective agreement

In Question 2 the Commission asks:

“*What protection should there be for **information which relates to the process of collective Cabinet discussion and agreement?** Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?”*

But it admits that such protection already exists:

“In the UK, the public interest in maintaining the convention of ministerial collective responsibility is recognised in the Act through the protection afforded for the process of collective agreement through sections 35 and 36.”

The suggestion is that the FoI Act makes it too hard for government advisors to speak freely, but there are exemptions which ensure the formulation of government policy is not harmed by FOI. There is also the ability to redact the names and roles of those offering advice. So, is there really a problem protecting collective cabinet discussion and agreement?

Section 35 of the Act already provides an exemption for formulation of government policy and Section 36 for 'Prejudice to effective conduct of public affairs', particularly collective responsibility.

In the second quarter of 2015, these were the ninth and eleventh most used exemptions by government departments in response to FOI requests. Cabinet members can also exercise a ministerial veto. The Commission's call for evidence notes government concern at a changed legal interpretation of the veto, but the veto has only been used seven times since 2005.

The Justice Select Committee examined this issue in 2012, finding it was difficult to assess whether the Act had had the alleged 'chilling effect' on government policy. Some in policymaking had suggested it was a problem but research by the Constitution Unit found only a 'marginal effect'.

Given the value of 'increased openness' brought about by the Act, the Justice Select Committee concluded it was, *"cautious about restricting the rights conferred in the Act in the absence of more substantial evidence,"* – in other words, it would need compelling evidence to recommend changes and there was none.

In its response, the previous Coalition Government agreed: it felt that, "the legal framework of the FOIA, through both the exemptions and the availability of the veto, offers sufficient protection for Cabinet records and safe space.

An Executive or Cabinet Veto over the release of information
Question 4 asks:

"*Should the executive have **a veto** (subject to judicial review) **over the release of information?** If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?"*

In outlining this issue, the Commission's highly selective editing of the findings of the Select Committee reveals bias and creates misunderstanding:

"…*we believe the power to exercise the ministerial veto is a necessary backstop to protect highly sensitive material…"* (para 179, JSC post-legislative scrutiny, July 2012).

The full quote shows that the Select Committee recommends that the Government revise its policy:

"… It would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned."

While we believe the power to exercise the Executive Veto may be a necessary backstop to protect highly sensitive material, the use of the word '*exceptional*' when applying section 53 is confusing in this context. If the veto is to be used to maintain protection for cabinet discussions or other high-level policy discussions rather than to deal with genuinely exceptional circumstances, then it would be better for the Statement of Policy on the use of the ministerial veto to be revised to provide clarity for all concerned.

We have considered other solutions to this problem but, given that the Act has provided one of the most open regimes in the world for access to information at the top of Government, we believe that the current veto arrangement is an appropriate mechanism to protect policy development at the highest levels.

The FOI Act itself and the Information Commissioner and Tribunal system in judging FOI Act requests already protect ongoing government discussions and have found in favour of the government numerous times. Whilst the ministerial veto has only been used on seven occasions since 2005.

What is most concerning are the current exemptions under Part 2 of the Act; (s. 33-37 in particular). Whilst we understand the relevance of protecting information relating to security, defence and criminal activity etc., we fail to see why agendas such as the formulation of government policy (s.35), or communications with the Crown (s.37) should be held away from the public eye. This is a complete undermining of the democratic society that we would like to see the UK upholding.

There must be a public interest test that is tested by an independent third party, rather than the government. This has been highlighted by our partners in the UK Civil Society Network:

"As ruled by the Supreme Court, it is not reasonable for a government minister to be able to override a judicial decision."

In short, as Green Party Justice Spokesperson, Charley Pattison said:

"Transparent and accountable decision-making is essential to a successful democracy. Freedom of Information requests have often been the strongest weapon used against corruption in government. The FoI Act already contains adequate protections for sensitive information; any further restrictions will most likely be to protect politicians rather than the public."

Reducing the burden of FoI on public authorities

Question 6 in the Commission's call for evidence documents asks:

"Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are ***controls*** *needed* ***to reduce the burden of FoI on public authorities****? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?"*

Clearly, what the Commission Panel has in mind here is restricting access to information through charges and tighter rules around the time spent finding information. The burden would be much lighter if councils and government departments kept better records, were more open with information in the first place and worked harder to make FOI a smoother process.

As the Justice Committee clearly stated, some of the cost burden associated with FoI is self-imposed:

"Evidence from our witnesses suggests that reducing the cost of freedom of information can be achieved if the way public authorities deal with requests is well-thought through. This requires leadership and focus by senior members of public organisations. Complaints about the cost of freedom of information will ring hollow when made by public authorities which have failed to invest the time and effort needed to create an efficient freedom of information scheme."

Moreover, in some cases the release of information through FOI requests saves public money, in some cases huge amounts of money. If and when government improves access to information by default, FOI requests will become less necessary. Until then, the cost of FoI requests may be an issue, but the cost is most prohibitive to those organisations which are most distrusted: people make a lot of enquiries of them.

We should ask why it is that a monitoring mechanism like FOI is soaring in popularity and why the public feel compelled to search for answers on this platform. A creeping, and not undeserved, mistrust in government is contributing to the FOI's popularity.

Charges for access to information would:

a) deter large numbers of requests (for example, when a 15 euro fee was introduced in Ireland in 2003, this "resulted in the number of requests falling to 25% of its previous level).

b) prevent individuals and journalists from making legitimate requests for information on matters of public interest- everyday newspapers run stories exposing waste, incompetence and cover-ups that would never have come to light but for the FOIA. These stories result in policies being changed for the better and action being taken to improve people's lives.

c) reduce the scrutiny on public authorities – the cost of secrecy may be much greater than the cost of transparency and more dire if critical mistakes are not revealed early on.

d) make it easier for public authorities to say they are doing one thing when they are really doing the opposite.

Any suggestion of charging for FOI requests to ease the burden on public authorities would completely undermine the integrity and purpose of the FOI Act and turn it into a tool for the wealthy and powerful. It would create a farcical situation in which we pay to get information about how the government practices corruption and deceit. Large corporations may be more than happy to pay a few hundred Euros for research or data that may increase their profit margins by millions, but the vulnerable and the poor, cannot. To charge, would simply increase the gap between those who make FOI requests in the name of profit, and those who make them to highlight injustice and improve government services: the very reasons the Act was implemented in the first place.

FOIA impact in Northern Ireland

Although the focus of the commission is UK Government level it is important to highlight some of the impacts of FoI in Northern Ireland.

Despite the notable failures in FoI response times by numerous government Departments in Northern Ireland, the ability of citizens to freely access information has been vitally important to revealing issues of public importance and contributing to policy and legislative changes.

Examples include:

How integrated are our schools?

Using FOIA, The Detail, an investigative news and analysis website, established that almost half of Northern Ireland's schoolchildren are being taught in schools where 95% or more of the pupils are of the same religion.
http://www.thedetail.tv/articles/how-integrated-are-schools-where-you-live

In March 2015, The Detail used the FOIA to highlight that there have been over 6,000 paramilitary 'punishment' attacks on men, women and children across Northern Ireland since the start of the Troubles, they used the data to map all paramilitary attacks in their article 'Above The Law: paramilitary 'punishment' attacks in Northern Ireland'
http://www.thedetail.tv/articles/above-the-law-paramilitary-punishment-attacks-in-northern-ireland

In August 2015, The Detail revealed the extent of road collisions.
They requested a detailed breakdown of all fatal and serious road collisions which took place during 2013 and 2014. The data they received from the PSNI includes the date, time and location for each incident, road type, speed limit on the road and light, weather and road conditions. They also received the age and gender of all of the casualties involved in fatal and serious collisions over the two year period. Two years of death and serious injury on Northern Ireland's roads.
http://www.thedetail.tv/articles/two-years-of-death-and-serious-injury-on-northern-ireland-s-roads

Public access to information contributed to revealing one of the largest environmental crime sites ever witnessed in Europe. It brought to public attention the widespread criminality in the waste management sector in NI and the systemic failures of environmental regulation in NI. The illegal landfill site, located on the rural Mabuoy Road, only 1.5km from Londonderry, NI's second largest settlement, was shown to contain over half a million tonnes of putrefying illegal waste releasing a toxic soup and dangerous gases into the environment. It resulted in an independent report which estimated that known illegal waste sites identified over the past ten years in NI are likely to leave the UK tax payer with an estimated £250 million clean-up cost. The Department's Environmental Crime Unit is now examining another 26 priority sites of suspected illegal landfilling spread across Northern Ireland.

Concluding comments

Without transparency, accountability is impossible. Therefore, public information should be open and available to the public.

"It seems that the Commission has been tasked with removing the assumption that the 'public has the right to know', and replacing it with 'the public has a right to know, so long as we want them to know, and it's not too much of a hassle for us to tell them'" (David Higgerson).

But the public and civil society have become used to greater openness. And this attempt to take, "no privacy for you, no scrutiny for us," to a whole new level, will come across as highly hypocritical in the current climate.

The process and principles of openness – public deliberation, dialogue, debate and disagreement – may be inconvenient. But they're critical to democracy and essential to ensuring that services are being planned and delivered in the best interests of all citizens.