

# **Intellect Submission to Ministry of Justice Consultation**

## **Freedom of Information Act 2000: Designation of additional public authorities**

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## 1. Introduction

This submission has been prepared by Intellect in response to the consultation on the possible extension of the application of the Freedom of Information Act 2000 (“the Act”).

Intellect is the UK trade association for the IT, telecoms and electronics industries. Its members account for over 80% of these markets and include blue-chip multinationals as well as early stage technology companies. These industries together generate around 10% of UK GDP and 15% of UK trade.

The Intellect Freedom of Information Act Working Group is responsible for producing guidance for suppliers on the Freedom of Information Act and its implication for suppliers doing business with the public sector. It is also responsible for liaising with relevant government bodies regarding how the provisions of the Act and its implementation can be improved.

Our concern is that the extension of applicability of FoIA increases the risk of disclosure and will put at risk disclosure of commercially sensitive or confidential information which is not directly concerned with the delivery of public services and therefore not necessary to meet the objectives of FoIA.

We have explored this in more detail in the attached response to your questions.

## 2. Answers to Specific Questions

### **Q.1 Do you support extending the coverage of the FOI Act to organisations that carry out functions of a public nature and to contractors who provide services to a public authority whose provision is a function of that authority?**

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As a general comment Intellect members support the objectives of the Act but believe that extending the Act is not necessary. Existing coverage of the Act covers Government information held by or on behalf of public authorities. The expression “on behalf of” will encompass organisations performing the functions of an authority this will include contractors and other organisations performing functions of an authority.

If the Act were to be extended we believe each designation should be considered separately and have regard to the nature of the public function. Any attempt to generalise could be difficult given the need to interpret what is meant by “functions of a public nature” and “services that are “function of that Authority”. Definitional issues around what constitutes a contracted ‘service whose provision is a function of that authority’ would make consistent application across the range of public sector contracting arrangements extremely difficult.

We envisage that safeguards will be necessary where the public function is to supervise or regulate private sector entities that are not themselves providing public functions. For example, an organisation which regulates a private sector activity will necessarily gather and retain or have under its control a great deal of information (including commercial and confidential information) about the private sector entities it regulates and which is either:

- (i) incidental to the discharge of the supervisory function or
- (ii) necessary for the exercise of that supervisory function but not in itself related to the discharge of the public function itself.

The widely drawn nature of the Act and the narrowness of the exemptions could mean that such information becomes subject to disclosure.

While that authority may legitimately be requested to disclose information in its possession, the required disclosure should be statutorily limited only to information relevant to its own activities in the discharge of its public function. The obligation to disclose should not extend to

information it possesses about the entities being regulated which was gathered in the course of the exercise of its function (including commercially sensitive and or confidential information).

Unless safeguards are provided, the Act could unintentionally extend its reach into private sector matters unrelated to public service delivery. (A practical example of this, were the ICEAW to be included in scope, would be the plethora of financial and commercially sensitive information gathered by the Institute Chartered Accounts for England and Wales (ICAEW) in the course of its monitoring of multidisciplinary accounting firms whose regulated activities are a small fraction of their total business and who in many markets are competing with private sector entities that are not so regulated).

This outcome would be detrimental to the effectiveness of the regulatory regime which frequently depends on an open and cooperative approach to exchanging information for example people in key regulated industries such as the Financial Services sector may be deterred from reporting wrong-doing if they fear that there is a risk that their identity will be disclosed.

As to what safeguard might be effective, a mechanism which had a similar effect to that of the statutory bar in section 348 of FSMA would be needed to prevent the inappropriate disclosure of information passed to a regulator in the course of it discharging its supervisory functions.

We do not agree that the FoIA should be applied to all (private sector) contractors discharging a public function on behalf of a public authority.

While we can see the case in some circumstances, for example where the public funding involved is of itself significant (by significant we mean greater than e.g. £5million) or (and subject to the potential burden on small organisations) where the activity is a large part of the contractor's business it may be most efficient to designate the contractor concerned. However there are a number of practical issues to overcome.

Although the public authority may have contracted out the provision of the function, the authority retains responsibility for its provision and is itself subject to the Act (although its role (and arguably the 'public function') shifts from being one of direct provision to oversight). Whilst there is a continued need for direct accountability to the public with regard to the public function, the primary agent for holding the contractor accountable is the public authority itself and the onus must be on that authority to put itself in a position where it can comply with its obligations. A public authority could argue that any requests for such information should be forwarded to and dealt with by the private company to whom the performance of the relevant function has been outsourced. It is difficult to see in this scenario see how the public interest in increasing public accountability could best be achieved.

If the objective is to make public sector contracting more accountable and transparent, then there should be a structured and targeted approach to doing so, focusing on the relationship between the public authority and the contractor, rather than applying rules to private sector entities that are more appropriate for the public sector. In particular, it is not clear how well placed a private sector contractor would be to make an objective assessment of the 'public interest' in accordance with the Act.

The conflict between a company's duty to its shareholders and a public authority's duty to the public via the democratic institutions of the state embodies the difference between private companies and public authorities. Any private company that is designated under FoIA may face difficulties in reconciling a conflict of interest between their shareholders and the public. How does a designated private company discharge its commercial duty to its shareholders while not failing to comply with its obligations under FoIA, in the knowledge that compliance may require steps to be taken which are not in the shareholders' best interests. Within public authorities there is a public service ethos allied to a consciousness of cost. Private sector organisations by contrast are primarily driven by the profit motive, the commercial imperative and have an overriding duty prescribed in law to their shareholders. There is a serious possibility that these commercial realities and prescribed statutory duties to shareholders could hinder the ability of any private company to comply with designation under FoIA.

We understand that the Department for Business Enterprise and Regulatory Reform (BERR) is against additional regulation. BERR is currently following an explicit de-regulatory agenda to relieve businesses, voluntary organisations and certain public authorities from unnecessary regulations. "The Better Regulation Executive" now sits within BERR and publicly claims: "The Better Regulation Executive has been tasked by the Prime Minister with cutting red tape so that businesses can be more productive and public services more efficient, by legislating only where necessary and deregulating and simplifying existing legislation wherever possible"<sup>1</sup>

Further, we envisage considerable practical challenges with extending the Act to contractors, both for the private sector and public sector. At the current stage of proposals, it is difficult to assess the types of service that it is contemplated should be covered by the Act. Given that there is a considerable grey area between the examples cited in the paper and a wide range of services and large number of contractors could be included. As a result, it is likely to be complex and burdensome to administer. We comment further on this in our answer to question 7.

### **Cost**

The cost of implementation (training, establishing processes, deploying resources, consulting third parties, establishing adequate record systems, distinguishing between information subject to the Act and that not) will be disproportionate to the assumed benefit.

Potentially multidisciplinary organisations, one aspect of whose business is regulated could be at a commercial disadvantage compared with its competitors, no part of whose business is regulated. Companies who are designated as public authorities under the Act may be at commercial disadvantage compared to other companies offering similar services in the same market, when competing for contracts to provide services to the public sector. Designated companies may be obliged to disclose into the public domain information which may be commercially prejudicial. Designation under the Act may therefore seriously hamper their ability to compete. Equally the public interest would be damaged in that reduced competition amongst private companies to provide services to the public sector under contract may result in public authorities not obtaining the best value for money services. The price of services may rise and the quality of service provision decline as certain service providers pull out of certain markets because they have been designated.

The retrospective nature of the Act would not be acceptable to the private sector. The burden would be exacerbated on very long term contracts where there may be no opportunity to reprice for the increased risk and the Change of Law clause (if there is one) does not protect the contractor for introduction of the proposed changes. The automatic application of the EIR to all FoIA public authorities would significantly extend the burden. The extent to which the public sector re-use regulations would apply under the proposals would need to be clarified.

It is not acceptable that information that would be exempt under a disclosure in confidence from a contractor to a public authority under the existing regime would not be applicable if the contractor were to be designated as a public authority and an application was made directly to the contractor in the proposed regime.

### **Q.2 Of the five proposed options, which do you consider the best option? Or would some other option, or combination of options, be preferable? Please explain your reasoning.**

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We consider Option 1 to be the best option, as existing coverage is adequate for access to Government information. Those non-public authorities carrying out a public function (but not on behalf of a public authority) could adopt a voluntary code under the sponsorship of an appropriate public authority most closely related to their public function. Legislation under the Charities Acts and the Companies Acts would be better vehicles for focussing on the requirements to publish specified information in the public interest rather than the Act.

We favour option 4 as regards entities that have responsibility for public functions in their own right and support the designation of a limited number of organisations directly carrying out public functions as public authorities, (based on a case by case assessment as above).

As regards entities that contract with a public authority to provide services in the discharge of a public authority's public function, as we have said we believe that the disclosure obligation should remain with the public authority who will need to negotiate and agree appropriate disclosure provisions in its contract with the contractor.

The contractor needs to properly understand what risks of disclosure of its confidential and/or commercial information stem from the contract prior to agreeing to enter into the contract in order to assess the balance of risk and reward. In that way, the contractor has the option of declining to bid if it views the disclosure obligations or risks as too great. The alternative is to expect a contractor to contract without knowledge of the potential commercial cost or competitive damage that might flow from subsequent disclosure requests. In our judgement, the absence of a pre-contractual mechanism whereby this risk can be assessed may lead to a segmentation of the market between (i) entities a large part of whose business is engaged in this kind of activity and (ii) those who withdraw from the public sector market. At best this will reduce the range of suppliers available and thus the competition on any individual public sector tender.

The approach by the Information Tribunal has created uncertainty for companies wishing to keep commercially sensitive information confidential. As the Information Tribunal has taken a narrow approach to commercial prejudice a private company designated under the Act will face an internal conflict when applying the public interest test required by the s43 commercial prejudice exemption. How can a private company required by statute to carry out its duties to its shareholders and other stakeholders be expected to release commercially prejudicial information about itself into the public domain?

We anticipate that there would be difficulties with Option 3 in the early stages. There is a real risk that the public sector would adopt an overly cautious approach and require disclosure of information that went beyond the requirements of the Act, or they might apply extensive disclosure obligations to a wider range of services than was intended. Conditions and exemptions could create conflict between contractor and public authority, where there are different interpretations of the exemptions, and, as with option 2, (see below), create difficulties in relation to conflicting duties of confidentiality and disclosure. Consistent application of terms would be difficult to achieve, given the wide range of public sector bodies involved and the differing nature of public services covered. Eventually, however, we envisage that the 'market' expectation of disclosure obligation will stabilise, the true risk of disclosure will become clearer through practical experience and public authorities and contractors alike will be able to take informed decisions.

In passing and with regard to option 2, in addition to the issues raised in the paper, voluntary disclosure of information creates difficulties for contractors in respect of duties of confidentiality. Where the contractor holds information about the contracted service, there is almost certainly an obligation of confidentiality owed in respect of that information to the public sector client. It would not be appropriate for the contractor to decide whether to disclose that information. That decision should rest with the client.

Option 5 risks creating lingering uncertainty about the future application of the Act.

**Q.3 Should some form of public funding be essential in order for an organisation to be considered for inclusion in a section 5 order, or should this be just one of a number of relevant factors to be considered?**

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Yes. If an organisation's activities are not deemed to be sufficiently pertinent to the public interest to attract public funding, it is unreasonable to extend the Act's disclosure regime to that organisation.

However, firstly, the existence of public funding should not, of itself, be determinative. The level of funding should be significant and the organisation concerned should be large enough to withstand the burden – and often considerable expense - of compliance.

**Q.4 Are there any organisations or categories of organisations that do not receive public funding but that you believe should be covered by the Act? Please explain why.**

As we have said, if an organisation's activities are not of sufficient import to the public interest to merit funding from the public purse, it is not reasonable to extend the Act's disclosure regime to that organisation.

Surely the issue is whether they hold Government information or not? The intention of the Act was to make government information accessible so that the government should be held to account, not other organisations.

**Q.5 Do you agree that the balance between the public interest and the potential burden of FOI is an appropriate consideration when deciding whether to cover an organisation.**

Yes. The burden of compliance with the Act placed upon organisations that discharge public functions is in itself a matter of public interest, as it increases the cost of providing, and diverts resources away from provision of, those functions. Whether or not this is desirable needs to be considered on a case by case basis.

This will be of particular concern to charitable organisations who will have to incur infrastructure and training costs that will divert funds away from people in need.

The burden should be considered both in terms of the size and resources of the organisation but also the relative significance of public function activities to the organisation concerned. Clearly, a small business comprising say, less than 50 people will find any new compliance burden difficult to manage and are unlikely to have the financial resources to buy in the external skills (e.g. solicitors) to manage it.

In addition, we believe that if the Government extends the disclosure regime to private sector organisations as contractor to the public authority concerned, then regard should be had to the significance of public sector activities to the business of the organisation concerned. In order to retain the widest possible choice of suppliers, the barriers to entry to that market by a new supplier should be as low as possible. If it were the case that its first successful tender for a small contract which brings with it revenues which are negligible in the context of the organisation as a whole also brought with it the risk of public disclosure of commercially sensitive and confidential information about the whole of its business (e.g. pricing and profitability) that organisation would have a difficult decision to take.

**Q.6 To what extent do you think that the factors listed, or any other factors, should be taken into account in determining whether organisations performing public functions should be brought within the ambit of the Act?**

We agree that the factors listed are all relevant considerations in determining the coverage of the Act. We believe they are listed in the order of declining significance, save that we would move "Any effect on competition" much further up the list.

We believe there are two additional considerations.

1. With respect to including accountability to a regulator as a relevant factor, we would add that there are many different stakeholders who hold an organisation to account, not just a regulator. For example, a professional body is accountable to and has a governance structure comprise mainly of its members. The full scope of sources of accountability should be taken into account in determining whether it is appropriate to subject an organisation to the Act.

2. Consideration should also be given to the extent to which the organisation holds commercially sensitive, confidential or other information from and about organisations not covered by the Act and should address how this might inadvertently extend the reach of the Act to information beyond its intended remit.

Where a service is provided on a cost-plus basis there is public interest in the disposal of public funds. When a service is provided at a unit price in a competitive environment there is no justification for probing beyond the payment criteria.

Whether the function impacts the public as individual citizens should be a key factor. There are other routes available to protect corporate interests.

Inconsistent coverage (e.g. between schools or counties) will distort provision and unfairly penalise some providers.

**Q.7 Do you agree that the coverage of FOI should extend to contractors who provide services under contract with a public authority whose provision is a function of that authority? If you disagree, please give your reasons.**

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We appreciate that the proposals are at a high level stage at present, but we think that there are significant problems with extending the coverage of the Act to contractors who provide services to a public authority.

1. We have already described our concerns about the effect or competition for public sector tenders.
2. We also envisage considerable practical difficulties in designating contractors as public authorities. Since Section 5 orders must specify the type of service provided by a contractor that is covered by the Act, each time a contractor is awarded a contract for a new type of service, a consultation process must be commenced and in due course, a section 5 order issued. These multiple Section 5 orders could prove to be a significant burden for the public sector and risk causing delays to the procurement of many services. In addition, it is not clear how consistency would be achieved across the public sector in determining precisely which services will be considered to be contracted out public functions.

Applying the Act to contractors in this way would inevitably raise the costs of procurement and contracted public service provision, given that contractors will need to establish and maintain new systems for dealing with information requests and incur legal costs when dealing with contentious issues.

If the supplier works in many industries they may need to implement systems on a temporary basis. Although the cost of implementing such systems could be included in the price in practice this will rarely be acceptable to a customer and will not enable a supplier to be competitive.

3. An important point is the extent that designation would be retrospective; i.e. apply henceforth to contracts that have been either
  - i) already concluded and / or
  - ii) commenced and are still in operation.

Retrospective application would be particularly difficult for firms to deal with, having possible disclosure requirements in respect of information that firms and their clients never contemplated being in the public domain and thus not priced in at the time the contract was negotiated. This would be an unreasonable burden.

We note that the paper makes a distinction between services that the public authority provides as part of its functions and those services that enable it to carry out its day to day activities. We would like further clarity on how this distinction will be drawn - for example, does the provision

of a procurement service, where a contractor runs a statutorily required tender process on behalf of a public authority constitute a public function

The full costs of establishing and maintaining an archival and records service to support this function would have to be met – even if no (or one or two per year) requests arrive. Being able to be sure that information is no longer held anywhere in the organisation is far more demanding than anything needed to support operations. In addition, the operational costs of segregating records and correspondence into potentially discloseable and private collections (or versions) of documents will often be significant. The cost limits will need to apply to the full cost of employment of the particular individuals involved and all associated operational costs.

It will be necessary to redefine the form of an effective request and to substantially increase the permitted response time if liability falls directly on a commercial body.

Small and special purpose companies may be able to consider any incoming request for information under the Act but this is completely impractical in a large, diverse organisation which has some qualifying contracts. They will need to designate a specific contact point and require a relevant request to cite the Act as authority.

In a really small organisation the requirement to respond within 20 working days could effectively prevent some personnel from taking holiday breaks. In a large, diverse one it may take considerable time to ensure that information is not held. The permitted response time would need to be increased to 60 days.

The model contract clauses from OGC are seriously counter-productive because they create a contractual obligation to put far more information at risk than the Act requires (and there is no legal restraint on the scope of the information subsequently disclosed). Terms similar to DEFCON 531, which limits demands to information relevant to the particular contract which the authority must disclose, should be applied across the public sector.

**Q.8 Do you agree that information relating to an organisation's administration of a public service or function, for example, in the areas listed in paragraph 33, should be subject FOI? If not, please give your reasons.**

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No. For many contractors, only part of whose activities are designated under Section 5, it is unlikely that they presently distinguish management activities and information that relates to the service covered by the Act and to other parts of their business. Clearly, in the specific example of a board meeting, separate meetings could be established dealing with the designated activities. However, there are large numbers of management activities that do not lend themselves to such segregation even if it were economically efficient or desirable to do so.

The paper currently suggests that such information would fall under the Act. In our view, this would be a disproportionate extension of the act into areas of a contractor's business that the Act was never intended to reach and could unfairly disadvantage those contractors against competitors in the other markets in which they operate.

The section 43 exemptions under the Act for commercial interests give limited reassurance that such information would be protected, given the exacting tests applied to qualify for this exemption and in any event is subject to the public interest override. The private sector contractor therefore has no assurance that its commercially sensitive or confidential information will be protected.

We would also to understand if extending the Act to administrative information could result in entities affiliated to that providing the public function being designated under the Act, for example, a parent or subsidiary company of a contractor.

Disclosure of a critical mass of administrative information could result in the formation of cartels, despite the best intentions of the participants.

For organisations which have some qualifying activities and other commercial ones systematic full disclosure of employment terms and operating procedures which apply throughout

**Q.9 Which organisations, or types of organisations, do you believe should be considered for inclusion in any extension of FOI under s.5 of the Act, and why?**

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Only those public authorities fulfilling or responsible for exercising or overseeing public functions.

It is possible to conceive of the Act being extended to cover a body governed by public law (as used in the Public Contracts Directive 2004/18), where:

A 'body governed by public law' means any body:

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having legal personality; and

(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Representative bodies will rarely have the resources to address all the detailed implications for each of their members. Discussion here might shape the intentions but final discussion must be with each separate organisation

### 3. Conclusions

- What evidence exists to suggest that the existing regime is not working in relation to departments that engage government contractors?
- We would question the need for extending the scope of to cover suppliers on the basis of the nature of their contracts. We believe the existing legislation currently enables FOI requests of information that is held by a supplier on behalf of an Authority – section 3(2).
- The financial burden and privacy concerns raised by extending the scope of the Act, especially if those include regulatory bodies such as the FSA Law Society and ICAEW, could result in the UK being seen as an unattractive market in which to do business and damage the economy.
- Extending the scope of the Act must increase the number of claims that need to be processed by the Information Commissioners Office which will add to the existing backlog. Increasing the backlog will reduce the effectiveness and value that can be provided by the Commissioners office for example not being able to produce updated guidance resulting from key FOI decisions.
- Does the MoJ believe that a private company operating under commercial pressures is capable of properly applying the public interest test to the qualified exemptions under the FOIA?
- Has the MoJ considered what happens if a private company refuses to disclose information pursuant to an order to do so by the information commissioner? Does the MoJ intend to allow for judicial review of decisions made by private companies on the applicability of the Act exemptions? Has the MoJ considered amending the Companies Act 2006 to allow internal decisions made by private companies to become subject to judicial review.

- Increased costs for charitable organisations.
- Has the MoJ consulted with BERR on their de-regulatory agenda and what designation under FOIA might mean for the agenda being pursued by BERR?
- Has the MoJ considered the impact that extending the Act may have on the operation of the Competition Act? Does the MoJ accept that by designating certain companies as public authorities under FOIA there is a significant risk that the government will be facilitating the exchange of cost and price information, innocently or otherwise, between companies (who are engaged in bid rigging for example) in contravention of the prohibitions contained within the Competition Act?
- We do not believe the Act should be retrospective.
- Complexities of mutual Code of Practice coverage requiring private sector contractor to consult with public authority (reverse of existing Code) with confusion as to which organisation actually has compliance responsibility.
- With private sector contractors typically being major industry players, vexatious worldwide requests-for-information frustrating protection of commercially sensitive contractor information is likely to reduce innovation available for public sector services.
- Increased cost, together with difficulty for industry in partitioning public sector and private sector operations, is likely to reduce private sector capacity available for public sector services, resulting in polarisation between private sector organisations delivering to public sector and private sector.
- The consultation appears to relate to legislation for England & Wales. It is not clear whether any outcome from the consultation will be applied similarly in Scotland and Northern Ireland.

Intellect will be happy to discuss these issues in greater depth with the Ministry of Justice.

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