

Positive Action Group (PAG)

Submission to the Consultation on a Cost Limit for Freedom of Information Requests

A) Introduction

1. Positive Action Group (PAG) is pleased to be asked to be one of the Direct Consultees.
2. PAG is a political lobby group, not a political party. It is a not-for-profit Association the objectives being to promote an awareness and understanding of politics and citizenship. We encourage members of the public to participate in politics by taking part in discussions, making their views known, voting, standing for office and holding public office.
3. PAG regularly makes consultation submissions as well as contacting government departments with proposals out-with the formal process.
4. PAG has campaigned over a number of years for the introduction of a Freedom of Information Act in the Isle of Man.

B) Comments

1. We welcome the published timetable for phasing in the FOI Act 2015 to other public bodies by 1st January 2018 (1.1)
2. PAG also welcomes the rejection of charging applicants who make requests (3.1)
3. Before the publication of this consultation document the period after 1st February 2016 was not referred to as a pilot phase (1.3)
4. PAG agrees that a careful balance needs to be struck with effective, open, transparent government and value for the taxpayer (1.4). Equally as important is a recognition that any cost limits should be subject to an explicit public interest test.
5. To consider limiting cost limitations after only 6+ months is premature as:- a) the public bodies may not have fully integrated the operation of the law into working practices and b) the introduction may have released a pent-up demand, within certain people, for statutory access to public

information

6. The impact assessment is based on only 41 requests, mainly from what is described as '*other requesters*' (2.2). It would seem that information was timely provided to the satisfaction of both provider and requester in the majority of cases.

7. The suggestion for cost limitation appears to have arisen because one person made 12 'unfocussed' requests. To impose such a restriction at this early stage of the Act is reminiscent of a teacher giving detention to the whole class for the misdemeanours of one pupil !

8. The proposals focus on:- a) what should be the limit in terms of the number of hours of work, and b) what activities should count towards this limit?

9. As already stated PAG considers that cost limits should be subject to an explicit public interest test. The suggested alternative cost limit proposals take no account of the public interest in disclosure. They provide an absolute cost limit in which a request may be refused, once it is reasonably estimated that a prescribed number of hours would be exceeded.

For example, a request for information about a life-threatening disease actively spreading through the population of the Isle of Man could be refused on exactly the same basis as a request about a public authority's stationery requirements.

10. As well as hours worked in answering a request other activities contribute to a limit. At option a) 4.1.i these are collation time + redaction time. At option b) 4.1.i it is search time + time to comply with the request.

11. Under both option a and option b the maximum permitted time allowed for collating or searching for information is 12 hours. This is substantially more restrictive than both the UK and Scottish provisions. (See APPENDIX)

12. There is a confusing lack of clarity about the terms used in these two options. For example:

- '*collation*' time (option a) and '*search*' time (option b) presumably refer to different kinds of activities - but the terms are not explained and there is no indication at all of differences between them.

- What activities count towards "*complying with a request*" in option b? Are these limited to the steps necessary to put information into

the requester's preferred form (which is the implication of the list of options that follows - e.g. providing a copy in permanent form, providing a digest or summary or permitting the record to be inspected). If so why should as many as 28 hours work (£700 at £25/hour) be required for these activities? Or does the large time limit indicate that the permitted activities under option b include all the activities mention in paragraph 2.1 including the time needed to coordinate the request, search for and retrieve the information, assess information against the Act, consider whether exemptions apply, consult third parties, redact information and formulate a responses? Most of these activities cannot be taken into account at all under either the UK or Scottish FOI laws.

- It is not clear how the time needed for those activities could be reasonably estimated in advance of actually carrying them out. Moreover, they provide multiple opportunities for exaggerating the time needed to deal with the request (e.g. by arguing that lawyers or third parties would have to be consulted where this might not otherwise be felt necessary), thus deliberately engineering conditions so as to permit a request to be refused on cost grounds.
- If the 28 hours/£700 limit in option b covers the full list of activities referred to in 2.1, is 'search time' an element of both limbs of the option b test? Its not clear why such double counting would be justified.

13. Under both option a and option b the maximum permitted time allowed for collating or searching for information is 12 hours. This is substantially more restrictive than both the UK and Scottish provisions. It is worth examining the detail of cost limitation in the FOI Acts for these countries.

14. The consultation implies that the IOM lower cost limits are justified by the relatively small size of the jurisdiction. But where authorities are of comparable size, in terms of their staffing, an Isle of Man authority will be able to refuse a request that an identically sized UK or Scottish authority would have to comply with. Yet the consultation raises the question of a further reduction in the number hours needed to trigger a cost refusal for authorities with fewer than 20 full time staff. The existing cost limits are extremely low as they stand. Any further reduction in the cost limits should be out of the question. This aspect requires further detailed consideration especially in relation to the theoretical hourly rate of £25.00. No justification is provided for this figure. (see APPENDIX)

15. More consideration needs to be given to redaction time. Permitting it to provide a free-standing basis for refusing requests could encourage an authority to make unjustified exemption claims, aimed at increasing the volume of exempt information that has to be redacted perhaps to the point at which the request could be refused on cost grounds.

16. Aggregation:- At (4.1.ii) the proposal is that 2 or more similar requests made within 60 (working) days of each can be refused if the aggregate total exceeds the cost limit. In effect, this prevents a requester taking a single large request, which on its own would exceed the cost limit, and breaking it down into several smaller requests each within the cost limit.

The consultation states that this is in line with the UK position. But the proposed 12 hour search time cost limit is so far below the UK's as to invalidate this comparison in real terms. Aggregating two quite small requests to small authorities could lead to them being refused here though they would have to be answered in the UK. The cost limit should either be brought into line with the UK's or the 60 working days that would have to pass before another related request could be made should be reduced to a substantially shorter period.

Furthermore, Scotland does not permit any aggregation of requests at all. Each request is dealt with solely on the basis of whether its costs in isolation would exceed the cost limit. The vexatious provision within the Act would be available to protect authorities from those making excessive numbers of similar requests.

17. At 4.1.iii the proposal that authorities should be able to make a charge for photocopying, postage and similar disbursements (para 4.1.iii) is reasonable, so long as the charges do not exceed the actual costs, *excluding* staff time. Photocopying, for example, should not exceed a standard commercial rate.

18. Waiving requests (at 4.1.iv): It is essential that authorities should be able to waive fees which could be charged otherwise authorities would be obliged to seek to recover trivial photocopying/postage costs even where the cost to them of doing so would exceed the value of the recovered amount. They should be able to provide information where the cost limit has been exceeded. Where they do so, it should be clear that the information is still provided under the Act - not voluntarily - thus preserving the right to complain to the Information Commissioner about any unjustified withholding of information.

C) Conclusions

1. PAG recommends that cost limit considerations are held back until after the Act is fully implemented
2. We do not discount completely the possible need to allow a request to be refused where the amount of work needed to answer it exceeds a given number of hours. To come to a conclusion about this after a limited introductory period is premature.
3. In order to avoid confusion or misinterpretation stricter definition is required for certain terms used within this document
4. In the spirit of FOI any cost limit should be wholly justified according to explicit public interest considerations.

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APPENDIX

Cost limit considerations in other countries

UK

- a) Only allows search time to be considered.
Evaluating the public interest test or consulting third parties not taken into account.

- b) Up to 24 hour search time allocated by government departments and 18 hours by other public authorities. These include the smallest authorities subject to the UK Act e.g. GPs, town or parish councils.

- c) Only search time is considered.

- d) There is no limit on redaction time, unless request is classed as vexatious

SCOTLAND

There is a cost limit of £600.00 at a maximum hourly charge of £15.00, but if staff are paid less than this the actual hourly rate is used. This means that requests can only be refused on cost grounds if the time needed to locate, retrieve and provide the information is more than 40 hours.