Clearing House Evidence

Response to the Public Administration and Constitutional Affairs Committee Call for Evidence on the Cabinet Office Freedom of Information Clearing House

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About mySociety

mySociety is a not-for-profit social enterprise based in the UK and working internationally. We provide technology, research and data that give people the power to hold their institutions to account.

As one of the first civic technology organisations in the world, we are committed to undertaking rigorous research that tests our actions, assumptions and impacts, and using that knowledge to drive positive policy change.

A key pillar of our work is in improving transparency, and we develop open source Alaveteli software which is currently supporting citizens in over 25 jurisdictions to make FOI requests. In the UK, we run WhatDoTheyKnow.com, which enables citizens to easily access their right to information and which makes the responses to requests public, for the wider benefit. Having run for over a decade, the site is the largest publicly accessible repository of FOI requests and responses in the UK.

In April 2021, we published “Reforming Freedom of Information: Improvements to strengthen access to information in the UK”, a report explaining how different FOI jurisdictions in the UK can learn from the best practices of their counterparts. It can be read at: https://research.mysociety.org/publications/reforming-foi

Summary

The FOIA 2000 is a key tool in a developed and accountable democracy, and has become a core feature of the constitutional settlement. The Act has remained static, and chronic underfunding of its regulation means that non-compliance often goes unnoticed or unpunished. Public bodies that dislike disclosing information are able to show minimal compliance, investing efforts into avoiding release rather than looking for ways to disclose as much as legally possible.

Recent investigations into the internal working of the Cabinet Office and the Clearing House give clear focus to what obstruction of FOI can look like in practice, but also how difficult it is to secure redress within our current framework. Applying the findings from our recent report “Reforming Freedom of Information: Improvements to strengthen access to information in the UK”, this submission outlines how tactics used by the Cabinet Office fit into a wider pattern of evasion, and how Scottish FOI legislation provides a model for how these issues can be addressed.
Summary of arguments:

- In official statistics, the Cabinet Office stands out as having a lower than average percentage of requests for information fully granted, and a higher percentage of requests that were not returned within the 20 day statutory limit.
- The Cabinet Office has received a high number of decision notices from the ICO, with over 50% of complaints upheld or partially upheld in all but four years (2014-2017).
- The highest number of complaints are upheld in procedural areas, which, taken in combination with wider patterns and specific decisions, are reflective of tactics used to delay or obstruct the release of information. For instance, administrative silence/stonewalling can be a highly effective tactic to delay the longterm release of information.
- While a coordinating function can be legitimate, that the Clearing House is based in the Cabinet Office is a cause for concern. There is a key question of whether the Clearing House reduces the volume or quality of information disclosures through permissible or impermissible means.
- Evidence from the information tribunal concerning the release of information related to the Clearing House should be seen as informative as to the general attitude towards transparency: by default withholding everything, and using every tool to delay scrutiny of this decision.
- FOI requests should be ‘applicant’ and ‘purpose’ blind. The storage of unnecessary information about the applicant in the Clearing House system is an information hazard that raises reasonable suspicions that requests are not being treated as legally required.
- However, fixing the underlying problem requires more than changes in which information is gathered and stored. Impermissible methods (such as higher scrutiny for journalists) can be reframed as higher scrutiny for particular kinds of requests (that are likely to be requested by journalists). The root problem requires more effective ways of ensuring the correct information is made available promptly.
- In general, concerns about coordinating bodies undermining the functioning of the Act should be directed at closing loopholes they (and any public authority) can use to delay or obstruct the release of information.
- We recommend mirroring the approach used in Scottish Freedom of Information legislation to provide stronger clarity around time scales and administrative silence that can prevent delaying tactics.
- More generally, the system of regulation could be improved by moving supervision and funding of the Information Commissioner’s FOI functions from government ministerial oversight (where there is clear capacity to limit resources for FOI enforcement) to Parliament.
Recommendations

- The Clearing House, and/or any other FOI coordinating body, should be compelled to operate in a fully transparent manner, publishing its procedures, decisions and appeals data.
- The FOIA should be revised to improve clarity of process and to close procedural loopholes that currently frustrate disclosure and effective regulation.
- The FOIA should be revised to include a legal obligation upon public authorities and the regulator to collect and publish data on the administration of the Act.
- The regulation of the FOIA should be split from the current Information Commissioner’s Office, where its budget and importance is dwarfed by data protection work, and constituted as an individual entity focused solely on FOI.
- The oversight of the FOI regulator should be migrated from its current Ministerial portfolio, where it is vulnerable to political pressure and influence, and should instead become accountable to Parliament.
Q1: The Cabinet Office’s compliance with and implementation of the Freedom of Information Act 2000

Central Government statistics

There is no comprehensive set of statistics covering FOI across all public authorities covered by the Freedom of Information Act, but there is a set that covers a collection of central government departments, ministries and agencies. This is a quarterly spreadsheet release, originally published by the Ministry of Justice and continued at the Cabinet Office. mySociety publishes a public dashboard based on these statistics at: research.mysociety.org/sites/foi-monitor/cabinetfoi/.

Volume and success

Since 2010, the Cabinet Office has received an average of 1,670 Freedom of Information requests a year. In recent years this has increased, with over 2,200 requests received in 2020. The number of requests that were granted in full is lower than the average ministry or department (14% compared to 29% in 2020). Previous analysis from the Institute for Government has highlighted the Cabinet Office as having a high rate of withholding information:

Some departments are more prone to withholding information. Typically, the Cabinet Office, Foreign and Commonwealth Office (FCO) […], MoJ and HM Revenue and Customs (HMRC) are among the departments that grant the fewest Freedom of Information requests in full.

This low rate may reflect the fact that these departments hold more exempt information than others, however, the Cabinet Office also has a higher rate of procedural issues such as late
Cabinet Office: requests received and resolved

Requests

- Granted in full
- Requests received

Data Source: Cabinet Office FOI Statistics

Cabinet Office: Percentage granted in full

As % of resolvable requests

- Cabinet Office
- Ministries and departments

Data Source: Cabinet Office FOI Statistics
Late responses

For the last few years, the Cabinet Office has had a higher proportion of responses sent beyond the 20 day limit than the average department or ministry.

For the majority of the time since 2010, the proportion of late responses has been typical of a central government department or ministry. This changed after 2018. In 2019, 17% of responses took over 20 days, and in 2020 this was 25% of responses. In both cases this was around 10% higher than the average for all ministries and departments. The majority (71%) of these were “permitted” extensions to conduct a public interest test. However, there is no explicit time set for this test, and so the statistics do not record precisely how delayed responses were as a result. Decision Notices related to the Cabinet Office’s use of the public interest test (explored below) show how this can extend months past the ICO’s view that this should be a short 10 day extension. As such, for comparisons between authorities, this 20 day comparison remains the clearest at demonstrating compliance with the statutory time requirements.

Cabinet Office: Percentage 20 day deadline missed

As % of resolvable requests

[Graph showing percentage of 20 day deadline missed over years]

Data Source: Cabinet Office FOI Statistics

Internal reviews

Over all years recorded, 22% of internal review requests to the Cabinet Office resulted in either a full or partial reverse of the original decision. While for most years, the Cabinet Office has had a higher rate of internal review than other central government ministries or departments, for the last few years this has been at the average rate.
ICO decision notices

The ICO investigates complaints from the public about authorities' decisions and procedures in processing requests for information. Often complaints are resolved informally, but when they are not the ICO can issue a decision notice. A decision notice may cover multiple complaints under different parts of access to information law. A complaint may be upheld in full (the ICO agrees with the complainant), in part (some aspects of the complaint are upheld, while others are not), or not upheld (finding the authority has acted appropriately).

Between 2005 and 2020, the Cabinet Office has been the subject of 540 decision notices by the ICO. With the exception of 2014-2017, every year the majority of complaints made have been upheld or partially upheld. In relative terms, from 2015 through 2020 the Cabinet Office had the third highest number of decision notices with complaints upheld or partially upheld (145) compared to 169 for the Ministry of Justice and 248 for the Home Office. There is a large gap between these three bodies and that in the fourth position in this period (the Foreign and Commonwealth Office, with 72 decision notices).
The area of the law that is being examined highlights that Cabinet Office decision notices do have class-based exemptions that may arise more frequently at the Cabinet Office than at other public bodies (such as those involving royal communication, or security/national security issues). However the largest group of complaints focus on procedural issues. The three most common categories are where the Cabinet Office has not responded in the statutory time limit; where there
has been dispute about whether the information in question is held; or a more general complaint concerning proper refusal procedures.

**Cabinet Office ICO complaints by section (all time)**

These procedural complaints were generally decided in favour of the complainant. Almost all complaints involving the Cabinet Office around s.10 (time limit) or s.17 (refusal procedure) are decided against the authority, because this is a mechanism to compel a proper response when it has not been forthcoming. Similarly, in the majority of cases, disputes are resolved in the complainant’s favour when the dispute concerns whether information is held (58% upheld/partially upheld) or if the information is already publicly accessible (57%).

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Data source: Analysis of DNs published on ico.org.uk. One DN may contain multiple complaints. Categories with less than 10 excluded.
Procedural complaints

Time Limit Procedure

The Time Limit Procedure is a method by which if an authority has failed to provide a valid (or any) response to a Freedom of Information request within the statutory period, the ICO can issue a decision notice requiring a “substantive response” be issued.

openDemocracy refers to the practice of not issuing a response, or administrative silence, as “stonewalling”. This can be an effective way to delay answering FOI requests as there are few consequences. As openDemocracy calculated, “In 2016–20, it took an average of 106 calendar days for complaints about stonewalled requests to reach the ICO. The ICO then took an average of 82 calendar days to process the complaint and issue a decision” (p. 28). For instance, in IC-75450-N5P1, there was a request made to the Cabinet Office on 26 September 2020; the request was acknowledged on 2 November; there was no response, and the complainant appealed to the Commissioner on 5 December; the decision notice was issued on 18 January 2021, giving 35 days to issue a valid response (22 February). Even a successful appeal to the ICO effectively resets the clock back to the start.

This is discussed in more detail in the response to Q2, but in the equivalent situation in Scottish (and Irish) Freedom of Information law, not replying within the statutory time limit is considered to be a refusal, which can then be appealed through the normal method. This means that requests cannot be delayed in the same way, and repeated lack of response can lead to the regulator...
judging whether the information should be released directly (by reviewing whether the refusal was valid), rather than just mandating a response.

**Refusal procedure/public interest test**

Decision notices covering Section 17 are generally actionable complaints concerning a long delay in conducting a public interest test. In other cases, the Information Commissioner may include a procedural criticism while considering another issue, but not require action.

Public authorities are allowed a “reasonable” extension of the statutory reply limit when the use of an exemption is subject to a public interest test. However, there is no definition of “reasonable” in the legislation ([the ICO’s view](https://www.ico.org.uk/guidance/foi-guidance/reasonable-grounds)) is that this should not be more than 20 additional days. In [IC-111879-B9Y4](https://www.ico.org.uk/guidance/foi-guidance/reasonable-grounds), the Cabinet Office wrote to the requester several times to say they held relevant information, but needed extra time allowed to complete a public interest test. The request was sent on 15 January 2021, and the complainant contacted the respondent on 14 June 2021, who asked the Cabinet Office for a response within 10 days. This not being forthcoming, a decision notice was issued requiring the information either be released or a refusal notice issued within 35 days. This is a delay tactic related to stonewalling, in that instigating a public interest test removes the process from the statutory time table and allows further delay. It also distorts how compliance statistics should be interpreted (as explored above), because if the decision to undertake a public interest test was valid, there is no further tracking required of how long the request takes to complete.

**Information held / advice and assistance**

A complaint under FOI s.1 (Info held/not held) typically occurs when there is a dispute about what is being asked for: the requester asks for Information A, the authority interprets this as a request for Information B, and then says it does not have it. In [a recent DN](https://www.ico.org.uk/guidance/foi-guidance/reasonable-grounds) (IC-47340-Y0M6) concerning the Cabinet Office’s interpretation of a request, the Information Commissioner found that “the request clearly described the recorded information that was sought by the complainant. It is her view that there is only one objective reading, which is the interpretation set out by the complainant”. The DN ordered a new response to the request “based on the correct objective reading”. There is room for disagreement in good faith about information that is asked for, but interpreting a request in a broader way than is intended can be used strategically to engage cost limits that can enable a refusal, or facilitate a delay in making a substantial response.

This is related to complaints upheld by the Commissioner under section 16 (advice and assistance). In cases where the request is ambiguous, the Commissioner’s “view is that section 16 obliges public authorities to provide practical suggestions on how the scope of the request could be reduced so that information of interest to the requester might be provided” ([FS50559082](https://www.ico.org.uk/guidance/foi-guidance/reasonable-grounds)). This means that rather than reading an ambiguous request widely, and refusing on cost grounds, the authority should
re-engage with the requester to suggest ways of narrowing the scope. In IC-52977-Y1P8, the Commissioner required the Cabinet Office to ask for clarification of a request that it had interpreted broadly and refused on cost grounds.

**Relevance to Clearing House**

There is nothing inherently wrong with an escalation or coordination process across different ministries and departments. It *is* a concern if that function is housed in a department that has a pattern of practices that (either deliberately or coincidentally) avoid or delay compliance with Freedom of Information laws. The data above demonstrates that the Cabinet Office’s attitude to FOI has a disproportionate influence on FOI responsiveness by central government overall. Where anti-FOI or anti-disclosure attitudes exist in the Cabinet Office, it is likely that the disclosure regime across central government as a whole will be tilted towards refusals.
Q2: Role and operation of Clearing House

The role and operation of the Cabinet Office Freedom of Information Clearing House, including:

a. Its handling of the cases that come to it;

b. Its role in advising on and coordination of the handling of Freedom of Information cases across Government.

History and available information about the Clearing House

The Clearing House system was originally situated in the Department of Constitutional Affairs, and was created in 2005 to provide support and guidance to central government departments dealing with FOI requests. The remit includes:

- Coordination on round-robin requests, where the same information is requested from multiple departments
- A point of escalation for “sensitive” requests that fall within the broad remit of the Cabinet Office
- Cross-government coordination on ongoing litigation and appeals to the Information Commissioner

In the initial period, when the FOIA 2000 was first introduced, this last function explicitly had a remit to establish information law through litigation, e.g. strategically having/not having legal conflicts about disclosure of information that would establish case law and set precedent for how the system would work in practice. Over the first few years of operation, there was a transition described in 2010 as a move from a “directive” to “pastoral” role where departments answer more requests autonomously, and referring to statistics showing a year on year decline in requests referred to Clearing House.¹ The Clearing House was later relocated to the Ministry of Justice and was more recently moved to the Cabinet Office.

Just as the Clearing House and FOI in the UK have always coexisted, concern about the activity of the Clearing House is a long-running issue. By September 2015, an article in The Times was concerned about the new Whitehall “Central Clearing House”. As the then (and present) director of the Campaign of Freedom of Information described: “[The Clearing House] plays a dual role. It is partly promoting awareness of the Act but in some areas they are trying to keep everybody in line and prevent disclosure.” In 2006 evidence given by the Department for Constitutional Affairs, the department defended the Clearing House function:

¹ https://www.palgrave.com/gp/book/9780230250345
There have been reports in the media that the Clearing House blocks information requests. The Clearing House does not do so; its function is to ensure that there is proper and consistent application of the Act across central government. Sometimes this will entail protecting information which is genuinely exempt and sometimes it will entail making sure that information which is not exempt is disclosed.

The problem then and now is the distinction between a body that illegitimately blocks access to information, and a body that, through effective organisation and coordination, leads to more requests for information being legitimately denied. From the point of view of someone who wants information, there is little practical distinction between the two, but the second is defensible as an official activity. Even accepting a theoretically valid basis for the Clearing House, there is a clear suspicion that a body set up to withhold information within the rules is also well positioned to test the boundaries of those rules, or to step well outside them.

The long history of the Clearing House has been used as a rhetorical device by the Cabinet Office to say that talk of a secret “Orwellian” unit undermining FOI is exaggerated. For instance, The Cabinet Office’s February 2021 response to OpenDemocracy draws attention to a 2010 book with an “entire section” (which in reality, is about one page) on the Clearing House as an example of how well established and known the Clearing House was. What this description actually reveals is the lack of public domain materials about the role or the operation of the Clearing House function since 2010.

Investigations from openDemocracy have either directly revealed, or prompted disclosure of how the current Clearing House works. This includes a March 2021 page on GOV.uk that details the current remit and referral criteria, and justification for the Cabinet Office Clearing House role. Its role, as described by government, is more focused on coordination and standardisation. The language of ‘support’ is no longer used, and clear emphasis is given to the nature of requests and their sensitivity. openDemocracy’s investigation also resulted in testimony from current staff during an Information Tribunal that the relationship between the Clearing House and departments is still strictly speaking advisory, but the power relationship is that they have to explain why the advice is not followed back to the Cabinet Office. In coverage of a dispute between the Treasury and the Cabinet Office/Clearing House on releasing information related to the infected blood scandal, it is clear that the Clearing House has the effective (if not strictly unquestionable) power to prevent or delay the release of that information. While on paper it has few actual powers, the modern function extends beyond advice to scrutiny and control.

There is also very little information available concerning the volume of material referred to the modern Clearing House. There are figures available for the number of requests referred in the first few years of its operation - declining from 3.2k in 2005 to 1.2k in 2007. There is significantly less information about volume more recently. In an answer to a Parliamentary question, Chloe Smith MP responded that:
The Cabinet Office does not routinely capture data on the number of requests which are referred to the Clearing House. However, in 2020, Clearing House gave advice on 516 aggregated ‘round robins’ (requests made to more than one department and that have repeat characteristics); a small proportion of over 30,000 requests received by government departments in the same time period.

This is relatively meaningless, given there is no clear information on how the number of round robin requests relates to the other possible 18 criteria for referral. Given that a referral is a bureaucratic process with a form this reflects, at best, a lack of curiosity about the scope of the operation. While there are a number of different justifications of the Clearing House role, there is not a clear internal picture of its administrative load or its effect on government. Any Clearing House function should set a high bar for transparency of process to avoid the appearance of impropriety.

Different kinds of coordination

Many justifications of the Clearing House involve the innocent and legitimate role that a coordinating body could play. A coordinating body can have three potential kinds of impact:

1. Coordinating function that promotes access to information
2. Coordinating function that promotes government secrecy (within the rules)
3. Coordinating function that promotes noncompliance with FOI

While the third scenario is the most worrying, it is also the most difficult to examine, as many effects can be effectively disguised as legitimate actions. Equally, the second is difficult to quantify, given the lack of obligation to collect adequate data on the administration of requests.

Coordinating function that promotes access to information

There are legitimate coordinating actions a government body may play to promote government transparency. For instance, a central body reviewing a round robin request may result in advice to release information. This might otherwise lead to more disparate individual responses, leading to more requests for review to a small number of bodies to get the correct response. While it seems unlikely that value to requesters has ever been the primary purpose, this was part of some early descriptions of the unit:

The Clearing House’s role in such cases is to ensure a coordinated approach is adopted in order to avoid inconsistency between different departments, which would leave government open to criticism and be unhelpful to requesters.

This highlights that there is nothing inherently wrong with a coordination role that works across central government. Coordinating functions in service to promoting disclosure are also likely to
encourage organisational migration towards a more proactive publication regime, in order to maximise access to information and reduce the burden of responding to individual requests.

Coordinating function that promotes government secrecy (within the rules)

There are legitimate coordinating actions a government body may take to promote government secrecy. The Freedom of Information Act creates many exemptions where the interests of wider society or the state were judged to be best met by withholding information. A coordinating body fulfilling this function would try to ensure that ‘sensitive’ information which should be withheld under an exemption is not released by a public authority unaware of the potential use of the exemption. This kind of action is within “the rules of the game”, and if reviewed by the Information Commissioner, the policies recommended by the coordinating body would be upheld by them. Coordinating bodies that consistently push up against the limits of secrecy will approach requests and try to identify reasons not to disclose information, rather than ways in which to disclose as much as possible. This regime is likely to disclose less information than one which aims to maximise the volume of information disclosed.

Coordination function that promotes noncompliance with FOI

There are illegitimate coordinating actions a coordinating body may take to promote government secrecy, where processes and advice are contrary to the legal rights to information that citizens have. This may include courses of action that are contrary to legal requirements. For instance, the Scottish Government for a time had a clear and written policy where FOI requests from journalists and political researchers were subject to a higher level of scrutiny than other requesters.

This kind of activity might also occupy a grey area where expert knowledge of the limits of regulation encourages practices that violate the spirit but not the letter of the law. For instance, an expert coordinating function may informally be able to spread awareness of the lack of statutory timetable for long internal review or public interests tests. It might encourage exemption substitution, where a more expansive refusal is attempted first to either delay the response if there is an appeal, or deny the information altogether if the requester does not appeal. For instance, discussing a request to the Treasury of the release of documents related to the infected blood scandal, a Cabinet Official suggested rejecting the request using a particular exemption “for now”, and saying that this could be revisited if it “goes to ICO”. This kind of expert group could encourage less knowledgeable public authorities to use every tool at their disposal to stop the release of information.
Addressing the core problem

In one sense, the question about the Clearing House is primarily whether it promotes government secrecy inside or outside the rules. However, the reality of a substantial grey area between the two makes the question less practically important. In practice, many tactics to obstruct the release of information can already be disguised inside the legal framework, or could be without much practical change. In an even wider sense, it should not matter if a public authority replies incorrectly to a request on its own initiative or on the advice of the Clearing House: either scenario should be effectively and quickly resolvable through the oversight and appeal systems.

For instance, a key journalistic concern about the Clearing House is whether they operate a system that applies a higher process of scrutiny to requests by journalists. This would violate the spirit of Freedom of Information requests being applicant and purpose blind. This is an important question in judging compliance with FOI law, but a narrow focus on this question could lead to technical changes that have little practical significance for journalists or Freedom of Information.

It is possible for a process to be technically applicant-blind while creating substantial obstacles for specific classes of applicants (like journalists). Similarly, too great a focus on the Clearing House misses the wider point that, inside an effective regulatory framework, it does not matter if a public authority obstructs a Freedom of Information request on its own initiative or on the advice of the Cabinet Office, the same working redress mechanism would apply in both cases.

The issue with the Clearing House is not its existence, but that it can mobilise a range of delaying and obstructive tactics that can be deployed strategically and at scale to avoid releasing information. This course of action is made possible due to the under-resourcing of the ICO as an effective regulatory body, and failures within FOI law to require data collection on the administration of FOI requests. The next section explains this problem in more detail, but in general we recommend that addressing the issue of evasion tactics at source would be the most effective action to curb possible abuses by the Cabinet Office/Clearing House.

**Authorities should not gather information about requesters, but preventing this does not remove barriers to information**

FOI requests should be ‘applicant’ and ‘purpose’ blind in that the same request received from different sources should be considered identically (with a limited exemption around identity for vexatious requests). Decision-making about refusing to disclose information should be based solely on the information provided.
There are practical problems impeding the ideal of perfect compliance with applicant blindness. There is often unavoidable information leakage about the identity and purpose of the applicant. Because FOI requests are required to have the applicant's name, basic information about the applicant is known to the recipient. The recipient may already be aware of who the requester is (for instance, a local or specialist journalist), and this may create an impression of the purpose of the request even if not explicitly stated.

In principle, knowledge of the purpose may legitimately trigger an entirely separate process dealing with repercussions of disclosure as long as this does not influence the actual decision making around the request or impair the legal rights of the requester (for instance, by introducing additional delays). It can be argued that informing a press office that they are releasing information to a journalist is not necessarily a violation of an applicant blind approach, if the actual information was released in the same way it would be to any other requester.

This logic quickly becomes more complicated. For instance, the London Borough of Lambeth's FOI guidance recommended actively Googling the requester to assess motive and “the likely impact to the council (e.g. political, media, legal, commercial, personal data)”. If you accept the argument that an FOI request can be handled according to the applicant-blind principle when the recipient happens to be aware that the requester is a journalist, then you should accept they are capable of this even if they actively investigate the identity of the requester. The argument that the process is applicant-blind even with knowledge of the applicant is less defendable the more information is available or actively gathered.

Knowledge of the requester is an information hazard, which is impossible to completely remove, but should be minimised because it poses a risk to legal compliance with the FOI process. The more an authority knows, stores or actively seeks out information about the requester, the more there is an entirely justified suspicion a request is not being processed by the applicant-blind principle. As such, official FOI processes should discourage the accumulation or sharing of knowledge about the requester.

It is clear from the redacted version of the Clearing House Round Robin List obtained by OpenDemocracy that in 2018 the Clearing House was habitually collecting and sharing the names of people behind “Round Robin” requests that were sent to multiple departments. A previous form of the Round Robin list sometimes included “the profession or employer” of the requester and was scaled down after a previous incidence of concern from the ICO. The presence of this information on the sheet raises concerns that it was in some way important to how the request was being processed. As the OpenDemocracy report put it, “there is no obvious need or reason to routinely share requesters' names other than to identify the source of the request and subject it to extra-legal procedures”(p.15). While the Cabinet Office says that it is handled in an applicant blind way,
holding this information raises reasonable questions about the depth of commitment to this principle.

![Table of FOI and EIR Round Robin list]

Figure 1 - FOI and EIR Round Robin list, as reproduced in OpenDemocracy Art of Darkness report.

This perception of possible wrongdoing has practical as well as reputational risks. In the Information Commissioner's application of a public interest test around the release of the round robin document, that the list included the names of applicants became a reason in favour of disclosure of the wider list, because disclosure would assist the public in assessing "whether the advice offered and the general handling of requests on the list is influenced by the identity of an applicant when it is not necessary to do so, such as in relation to the application of section 14 FOIA [vexatious request]". In other words, gathering and storing information on applicants systematically is a hazard to public authorities that makes disclosure of related meta-material more likely. The Chancellor of the Duchy of Lancaster may dismiss criticism of the Clearing House as a “ridiculous and tendentious exercise”, but its practices invite reasonable suspicion not just from journalists but from the Information Commissioner.

All this said, this specific practice should not be seen as the most substantive potential problem. While this is a suspicious sign that a simple form of discrimination might be taking place, the absence of applicant information does not prevent a more sophisticated (and compliant) form of screening from taking place.
Impermissible applicant screening can be reframed as permissible content screening

The specific concern around gathering applicant information is that this might either be fed into, or reflective of, a system where details of the applicant are used to shape the processing of a request. For an example of what this looks like in practice, the Scottish Government until recently had an explicit system where requests from journalists were subject to a higher level of scrutiny. The Scottish Government’s internal guidance said that:

Requests from journalists, MSPs, political researchers or other high profile requesters where the information requested may be used in the media or in Parliament – these should normally be looked at by special advisers and the relevant Cabinet Secretary or Minister.

A 2017 intervention by the Office of the Scottish Information Commission (OSIC) recommended the Scottish Government end this practice as it is incompatible with an applicant-blind approach. However, the OSIC recommendation also pointed out that “this would not prevent a clearance system based on the sensitivity of the information sought and/or the complexity of the case. While such a system may still capture many requests from those groups, it will be based on a consideration of the request and not of the person.” In other words, it would be possible to construct a system that achieved much the same purpose of applying a higher standard of scrutiny to “sensitive information” while being “applicant blind”. If a particular class of requesters (for instance, journalists) were especially likely to request sensitive information, they might not notice much practical difference between a permissible and impermissible screening system. As the OSIC’s follow-up report details, there continues to be a perception of special treatment by journalists after the explicit tier system has been halted, despite the removal of the time disparity for answers to media and non-media requests.

In terms of the Clearing House, the referral criteria released by the Cabinet Office are broad, but carefully constructed around the content of the request, rather than the requester themselves or the purpose of the request. Even catch-all criteria such as the “[e]xpectation there will be significant wider interest in the topic of the request at the time”, while catching requests made by journalists that are likely to lead to high profile stories, are framed in terms of the request rather than the applicant. A compliant policy can be crafted that is applicant-blind while retaining the substantive problem: that requests made by journalists are effectively subject to additional scrutiny, delays and reduced information.

It may turn out that the Clearing House is non-compliant in some respects, but it also seems likely that this could be addressed without actually improving the information environment. If there is evidence that the Clearing House bureaucracy directly processes requests from journalists differently, this could be resolved in a way that maintains the current roadblocks to accessing information from public authorities. In the OSIC’s report on the Scottish Government, they point
out that even while applicant-blind, “sensitive” complaints subject to additional clearance can lead to similar issues of “delays, reduction in entitlement and use of tenuous reasons [to refuse disclosure]”. A direct focus on these tools of the obstructive authority not only directly addresses actions of the Clearing House, but has a wider impact on the whole system.

**Directly addressing delay and obstruction tactics**

One way of looking at the Clearing House is to investigate whether its actions fall into “permissible” defences of government secrecy (mobilising resources and knowledge to make the most of allowed exemptions), or whether they lead to more active non-compliance and denial of information rights. The problem with this framing is that many tactics used by public authorities to obstruct FOI rights are violations of the spirit, but not the letter, of the law.

In mySociety’s recent report ‘Reforming FOI’, we highlight a number of concepts present in Scottish FOI legislation that help address these delaying tactics. The Information Tribunal decision (FS50841228) which required the release of Clearing House documents demonstrates how the Cabinet Office was able to drag out the length of the request. Methods of delaying making a response to a request are technically applicant-blind, but are a particularly effective technique against journalists, where delays may make a story less newsworthy or impactful.

**Put time limits on a statutory basis**

One area where the Scottish legislation is much clearer is around time limits. OpenDemocracy have labelled the practice of not replying to a request at all “stonewalling”. This is a loophole where not replying to a request puts the requester in limbo, having no refusal to appeal or ultimately contest with the ICO. The ICO can compel a substantial response (and has done so 40 times against the Cabinet Office in the 2015-2020 period), but the time limit given by the ICO is usually in excess of the original 20 day window, meaning that this tactic can create a substantial waiting time even before a refusal is received.

The more explicit legislative description of the review process in Scottish FOI legislation means that a lack of reply is interpreted in the same way as the Irish concept of a ‘deemed refusal’. This is where a request not replied to inside the statutory limit is regarded as refused, allowing requesters who are being actively obstructed to move onto the next step of the appeal process, rather than being sent back to the start.

In the Information Commissioner’s Decision Notice (FS50841228) against the Cabinet Office decision to withhold information in this case, she says that there was ”no justifiable reason in the Commissioner’s view for the public authority to have taken nearly 8 months to carry out the internal review”. That there is no justifiable reason can be true, while also being perfectly lawful.
In Scottish legislation, there is a legislative requirement that internal review takes no more than 20 days, while in the UK-wide system, this time limit is merely included as best practice in FOI Code of Practice. The lack of a hard deadline means that the obstructive public authority can, as the Cabinet Office did in this case, substantially delay the progression of a response. Similarly, the Cabinet Office is the third most frequent user of the s.22 exemption, which allows information not to be released if it is intended for future publication. However, there is no time limit on when this future publication might be. In Scotland there is an explicit requirement that the information be published within the following 12 weeks.

Given clear evidence that the suggested time limits in the Code of Practice are not followed, elevating these and the idea of deemed refusal to a statutory basis would remove a tool used to delay access to information. This undercuts the negative effects that any particular coordinating body can have.

**Move oversight of the regulator from government to Parliament**

The Clearing House function is an expression of a desire for government secrecy, but this attitude is not confined to the relatively small number of people who work within the Clearing House. There are strong institutional forces in favour of secrecy and closed government. The goal of the Freedom of Information Act was to move the balance in the other direction, in favour of greater disclosure and transparency of how the government functions.

In a misguided effort to shield the regulator from political control, the Information Commissioner was set up to be funded by a government department rather than Parliament. The problem that this has created is that the budget of the Information Commissioner for Freedom of Information is directly under the control of a government department which the Information Commissioner technically regulates. While independent in action within the budget, this creates a clear dynamic where the oversight of the Freedom of Information system can be financially or managerially throttled by the government of the day.

In Scotland (as well as other jurisdictions like Canada), the Information Commissioner is set up in the Officer of Parliament model, both reporting to and funded by Parliament rather than the government.

Per head, Scotland has 32p spent on regulating FOI, while over the rest of the UK the figure is 6p. Over time, the ICO’s budget for FOI has been progressively reduced, while the OSIC’s budget has remained relatively stable. Over time, the casework the ICO receives has increased, requiring it to process more case work with a declining or static budget.
We argue, in agreement with previous conclusions from the 2004 Select Committee on Constitutional Affairs and a 2014 Public Affairs Committee, that as a constitutional watchdog with a clear role of scrutiny of Government, oversight of the Information Commissioner would be more appropriate within the Parliamentary ecosystem. Freedom from ministerial oversight may empower the FOI regulator to hold government more effectively to account, without concern for how this may affect future budgeting or management decisions.

A more effective and better supported regulator would be better placed to deal with abuses of the system across the public sector, and minimise the extent that any coordinating body could exploit weak points in the regulation of Freedom of Information. An FOI regulator freed from the tasks of regulation around Data Protection and privacy would also be able to focus entirely on FOI-related issues, of which there are many.

Currently, FOI represents only 8% of the ICO budget, with 92% devoted to Data Protection work. As such, the Information Commissioner’s time is heavily weighted towards Data Protection, leaving scant resources to work on FOI. A regulator focused only on FOI and reporting to Parliament could revolutionise FOI in the UK and better address issues such as those raised by the Clearing House quickly and effectively.