

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's submission to the Justice Select Committee's Inquiry: Post- legislative scrutiny of the Freedom of Information Act

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

1. Liberty welcomes the opportunity to submit evidence to assist the Justice Committee's post-legislative scrutiny of the Freedom of Information Act (**FOIA**), informed by the Ministry of Justice's Memorandum published in December 2011.¹ The FOIA was designed to encourage public trust in authorities and to create a culture of open and transparent Government. The Act gave, for the first time, a general statutory right of access to official records and information. As noted in the Memorandum, the Act was, and continues to be, an extremely important initiative which shores up the pillars of good democracy: transparency and accountability.

2. As a human rights campaigning organisation, Liberty has – for nearly 80 years – sought to ensure that Government makes decisions which are just, fair and which do not infringe on fundamental rights and freedoms. The FOIA has been a key step forward in assisting our work. Without information about how and why decisions are made by public authorities it can be difficult to challenge bad practice on a systemic level. The FOI Act is not perfect, and there are significant weaknesses and gaps in the information it covers resulting primarily from the broad exemption categories in Part 2 of the Act. Yet even with these weaknesses the FOIA has become a beacon of public accountability.

Operation of the FOI Act

3. The FOIA provides a general right to be informed if a public authority² holds requested information, and, if so, the ability to access it.³ This right is subject to practical considerations - for example, repeated or vexatious requests need not be fulfilled,⁴ and information will be considered exempt where the cost of compliance will exceed the 'appropriate limit'.⁵ Some categories of information are exempt – as outlined below. Part 3 of the Act sets out the role of the Information Commissioner's Office; Part 4 sets out how the Act is enforced; and Part 5 sets out the appeals mechanism where requests are refused.

¹ Ministry of Justice *Memorandum to the Justice Select Committee* (December 2011), available at <http://www.justice.gov.uk/publications/policy/moj/post-legislative-scrutiny-foi.htm>.

² A list of public authorities subject to the Act are listed in Schedule 1 to the Act, which can be amended by statutory instrument: sections 3 to 5 FOIA.

³ Section 1(1) FOIA.

⁴ Section 14 FOIA.

⁵ Section 12 FOIA.

4. Part 2 of the Act sets out information which will be exempt from the general right of access contained in Part 1. Information in a Part 2 category will either be absolutely exempt from disclosure, or the authority may claim that the public interest in maintaining the exclusion of the duty to confirm or deny whether the information is held, or to release it if it is held, outweighs the public interest in disclosure.⁶ The exemption categories in Part 2 are broad. Section 23 provides that information held by a public authority is exempt information if it was directly or indirectly supplied to the public or authority by, or relates to, a listed body dealing with security matters. These bodies range from the Security Service to a number of related statutory tribunals.⁷ Information will also be exempt from disclosure obligations under Part 2: in order to safeguard national security,⁸ if it prejudices the UK's defence forces⁹ or Britain's international relations;¹⁰ if it relates to any relations with any UK administration;¹¹ or in order to protect the UK's economic interests.¹² Section 30 of the Act exempts information held by a public authority *"if it has at any time been held by the authority for the purposes of"* investigating criminal offences. Section 31 lists a wide number of areas where information is exempt if it would prejudice, or be likely to prejudice, law enforcement as well as certain civil proceedings or inquiries etc.

The importance of the FOIA

5. A key aspect of Liberty's campaigning work involves test case litigation. As a small organisation, we tend to take on cases which have broader ramifications for public policy and practice. The use of information disclosed under FOIA procedures has been essential to some of our most successful legal challenges. In some cases, being unable to access information can have a detrimental impact on achieving the best result for our client, as well as limiting the opportunity to achieve positive systemic change. Below we document some key cases where we have used information provided by public authorities under the FOIA to challenge breaches of human rights; put an end to discriminatory policy and advocate for some of the most vulnerable members of our community.

⁶ Section 2 FOIA.

⁷ See section 23(3) of the *Freedom of Information Act 2000*.

⁸ Section 24 FOI Act.

⁹ Section 26 FOI Act.

¹⁰ Section 27 FOI Act.

¹¹ Clause 28.

¹² Clause 29.

Case study 1: challenging detention without suspicion at our borders

Under Schedule 7 of the *Terrorism Act 2000* a constable, immigration officer or customs officer at a port or border can question anyone entering or leaving to determine whether the person is involved in some way in terrorism, “*whether or not he has grounds for suspecting*” that a person has had such involvement.¹³ In order to exercise this power an officer can detain the person and question them for up to nine hours,¹⁴ search their person or any of their belongings and retain any of those belongings for up to seven days.¹⁵ It is an offence if the person fails to answer questions or obstructs the exercise of the functions under the Act.¹⁶ If detained in a police station the police can also take that person’s fingerprints and DNA, which under current law can be retained indefinitely.¹⁷

Liberty is concerned that the operation of Schedule 7 is in breach of the *Human Rights Act 1998* and impacts in a discriminatory way. Our concerns are supported by statistical evidence - people from ethnic minorities are reportedly 42 more times likely than White people to be stopped using the Schedule 7 power.¹⁸ Qualitative research has also indicated the negative impact of the use of these over-broad counter-terror powers.¹⁹ Many in minority communities believe they are repeatedly targeted solely because of their ethnicity and/or religion. The police have also recognised that their relationship with their communities is being destabilised on account of the operation of these powers.²⁰

Liberty is currently representing a young British man stopped and questioned at Heathrow airport under Schedule 7. We are seeking a review of the power in the European Court of Human Rights (ECtHR), challenging the compatibility of the power with Articles 5 and 8 of the European Convention on Human Rights (ECHR).²¹ Key evidence to support our legal action has been obtained through the fulfilment of FOI requests. As the Home Office has only recently begun publishing statistics on the use of Schedule 7,²² FOI requests by us and

¹³ Para 2(4) of Schedule 7 *Terrorism Act 2000*.

¹⁴ Para 6(4) of Schedule 7.

¹⁵ Para’s 2 to 8 and para 11 of Schedule 7.

¹⁶ Para 18 of Schedule 7.

¹⁷ Para 10 of Schedule 8 *Terrorism Act 2000*.

¹⁸ See <http://www.guardian.co.uk/uk/2011/may/23/counter-terror-stop-search-minorities>.

¹⁹ See Choudhury, T and Fenwick, H (Durham University) *The impact of counter-terrorism measures in Muslim communities; Equality and Human Rights Commission Research Report 72*, *ibid*.

²⁰ *Ibid*, at page 22, 27.

²¹ Article 5 of the ECHR, as incorporated into UK law by the Human Rights Act 1998, protects the right to liberty and security; Article 8 protects the right to respect for private and family life.

²² Disaggregated data on how many stops were made under the Schedule and their ethnic origin only started being released by the Home Office in 2010. It is unclear from the data available what searches took place, how many arrests and convictions arose as a result of being stopped under Schedule 7, etc. See p 21 in Choudhury, T and Fenwick, H (Durham University) *The impact of counter-terrorism measures in Muslim communities; Equality and Human Rights Commission Research Report 72* (Spring 2011), available at http://www.euro-islam.info/wp-content/uploads/pdfs/counter-terrorism_research_report_72.pdf.

others have enabled us to obtain a lot of information about how the power has been used before statistics began to be published, including statistics on the ethnicity of those detained.

Case study 2: challenging discriminatory stop and search

Section 60 of the Criminal Justice and Public Order Act 1994 is a broad power which allows for a police officer to stop and search individuals, without any suspicion, in anticipation of, or after, violence in a specified area. The power can be exercised after authorisation is given, on the basis of an easily reached subjective threshold. Once an authorisation has been given any police officer can stop and search any pedestrian for an offensive weapon or dangerous instrument, or stop and search any vehicle and its driver and passenger for the same. In conducting such a stop and search, the officer need not have any grounds for suspecting that they are carrying an offensive weapon or article. Anyone who refuses to be stopped and searched commits a criminal offence and is subject to up to one month's imprisonment or a fine or both. Reports of the use of section 60 have indicated widespread rolling use across many different areas.

While there may be a place for stop and search without suspicion on a tightly limited basis, these kinds of powers have been found to be hugely problematic in communities where those from minority groups have been repeatedly stopped, with significant ramifications for the relationship between them and the police. The continued alienation of young people and people of particular ethnicity or appearance is a clear source of social tension. Liberty has already successfully challenged stop and search without suspicion powers under section 44 of the *Terrorism Act 2000*.²³ The power was declared to be unlawful and in breach of Article 8 of the Convention by the ECtHR; the Court concluded the powers had been widely deployed against young Black and Asian men and used against peaceful protesters.

Section 60 suffers from many of the same hallmarks by which section 44 fell foul of Article 8 of the ECHR - recent data shows that under section 60, Black people are 26 times more likely to be stopped than White people.²⁴ We are currently acting as intervener in the case of an allegedly unlawful section 60 search, *Roberts v Metropolitan Police Service*. We have obtained information from all police forces in England and Wales about the number of authorisations made under section 60 and the reasons for them. None of this information was previously available, so not only will it inform our submissions to the court, it will improve transparency in policing. The response from one force revealed that the power had been used

²³ *Gillan and Quinton v UK* (App no 4158/05) (12th January 2010).

²⁴ See <http://www.guardian.co.uk/uk/2010/oct/17/stop-and-search-race-figures>. Based on analysis of the Ministry of Justice's *Statistics on Race and the Criminal Justice System*, Supplementary tables 3.05a 0809 (June 2010) with population data taken from *Statistics on Race and the Criminal Justice System* published in 2008 and 2006/07. See <http://www.stop-watch.org/uploads/STOPWATCH-PACE.pdf>.

in a way which we consider to be unlawful under the *Equality Act 2010* and we are now pursuing this.

Case study 3: challenging discriminatory Government counter-terrorism policy

We recently acted for an academic who had made FOI requests to a number of police forces requesting statistics on the “Channel” project, an aspect of the counter-terror Prevent programme whereby children were identified as potential extremists.

The academic’s requests were refused on grounds of national security and the prevention and detection of crime. Following an appeal to the First Tier Tribunal, the police agreed to disclose the information which revealed that 67% of those referred to the project were Muslim and 55 were under 12 years old. The Prevent programme has recently been reviewed by the Home Office.²⁵

Case study 4: exposing dangerous practices in deportation

Recent deaths and serious injury caused to individuals being deported by private security guards (contracted by the UKBA) are of serious concern. In early October 2010 Jimmy Mubenga, an Angolan refugee being deported by private security firm GS4, collapsed and died while a British plane prepared for takeoff after being heavily restrained by the security officers accompanying him.²⁶ His death shone a light on what appears to be a systemic problem within this part of our immigration system; a recent report from the Home Affairs Select Committee concluded there is an urgent need for the Home Office to put a stop to restraint techniques which risk the lives of people within their care.²⁷

As a result of these cases Liberty requested from the Home Office a copy of the full Use of Force policy, which it refused to disclose. We have since been granted permission for a judicial review of that refusal, as well as a review of the lawfulness of these cruel techniques against vulnerable detainees which place them at high risk of being subjected to unlawful use of force in breach of Article 3 of the ECHR. We have made a number of FOI requests which are vital to inform our case and the court’s judgment. Accordingly we have requested the Use of Force guidance made available from UKBA to private security companies; the number of

²⁵ See Liberty’s response to the Home Office consultation on the Prevent strand of the UK counter-terrorism strategy (December 2010), available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/response-to-home-office-consultation-on-prevent-january-2011.pdf>.

²⁶ See “Security guards accused over death of man being deported to Angola” The Guardian, 14 October 2010, at <http://www.guardian.co.uk/uk/2010/oct/14/security-guardsaccusedjimmy-mubenga-death>

²⁷ See the Committee’s 18th Report of Session Rules governing enforced removals from the UK (17th January 2012), available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/563/56302.htm>.

complaints lodged against private security firms (G4S, Serco etc) and in-country staff; and whether there is a fine or other penalty for a failure to remove a person from the UK.

Case study 5: challenging degrading treatment for detained immigrants

Liberty has increasingly become concerned about the treatment of individuals held in immigration detention. The obstacles faced by this group in our society can often be insurmountable, caused by lack of language and knowledge about what rights they have while in detention, fear and an inability to access impartial advice. Liberty has taken on the case of a failed asylum seeker who, while being held in immigration detention, required hospital treatment. For the nine days of his treatment in hospital, and on further occasions for outpatient treatment, our client was handcuffed to a security officer - including while sleeping, showering and using the toilet. We are challenging, by way of judicial review, both the Government's policy and the private contractor's policy on handcuffing of immigration detainees during medical treatment. In support of our claim we have used FOI requests to obtain information about the number of people in immigration detention who need treatment outside the detention centre itself, and the number of those who were assessed as needing to be handcuffed.

Challenges to the FOI Act's successful operation

6. The laudable aims of the FOI Act to promote openness, transparency and accountability across the public sector are somewhat undermined by certain provisions in the Act and how it can operate in practice. Delay in responding to our requests and having to chase public authorities to fulfil their duties can be an issue, as can reluctance to release information, as outlined in some of the case studies above. Requesters are also often in a difficult position to challenge certain decisions made in response to a FOIA request. If we suspect some information may be missing from what has been made available it is difficult to pursue this suspicion without more detailed insider knowledge of the records being kept, or which should be being kept. Similarly being told that the requested information is exempt by reasons of costs under section 12(1) of the Act can be very difficult to challenge as it is near impossible to guess how much paperwork a public authority will have to go through in order to provide the information requested. Instead of invoking cost and time to resist FOIA requests, more detailed responses explaining why the material requested isn't readily available, or why it is too costly to produce, would assist requesters in modifying and tailoring requests.

7. The aim of the FOIA is also seriously undermined by the number of broad exemption categories contained in Part 2, as outlined above. In all our work on the

Act Liberty has consistently called for an end to blanket exemption and stronger tests for disclosure refusal. Section 31, for example, lists a wide number of areas where information will be considered exempt if it would prejudice, or be likely to prejudice, law enforcement as well as certain civil proceedings or inquiries etc. 'Prejudice' is an incredibly weak threshold. Our concern is exacerbated given transparency is particularly important in this context; indeed one of the recommendations of the Inquiry into the death of Stephen Lawrence was that any FOI legislation "should apply to all areas of policing, both operational and administrative, subject only to the 'substantial harm' test for withholding disclosure".²⁸ As Sir William McPherson stated in his Report

*Essentially we consider that the principle which should govern the Police Services, and indeed the criminal justice system, is that they should be accountable under all relevant legislative provisions unless a clear and specific case can be demonstrated that such accountability would be harmful to the public interest... we consider it an important matter of principle that the Police Services should be open to the full provisions of a Freedom of Information Act. We see no logical grounds for a class exemption for the police in any area.*²⁹

Similarly, section 35 exempts all information held by a Government department if it relates to the formulation of Government policy, ministerial communications, advice by Law Officers or the operations of any Ministerial private office. This potentially excludes a vast amount of information of use not only to members of the public but also to Parliamentarians making determinations about proposed legislation – as recently argued in relation to the departmental risk register for the Health and Social Welfare Bill.

8. While Liberty certainly appreciates that certain information will need to be withheld – for reasons, for example, of public safety – we believe that broad blanket exemption from disclosure which is absolute or based on a very weak test of 'prejudice' goes against the essence of the Act. The current wording of the Part 2 provisions leaves an individual seeking access to the information covered having to rely on the discretion of the authority that controls the information in order to gain access – a situation FOI legislation was expressly intended to change. We believe

²⁸ See recommendation 9 of "The Stephen Lawrence Inquiry - Report of An Inquiry by Sir William Macpherson of Cluny, Advised by Tom Cook, The Right Reverend Dr John Sentamu, Dr Richard Stone" Cm 4262-I.

²⁹ Ibid.

that Part 2 of the Act would be vastly improved if it was amended to provide for a presumption that information will be released unless it would cause “substantial harm” to the public interest, in which case it could be redacted or withheld.³⁰

9. Finally, a significant obstacle that Liberty has encountered is the refusal by private companies who have been contracted by public authorities to undertake public services to release information because they do not consider themselves subject to FOIA. The current trend to contract out Government functions – including its core functions – means that this is increasingly going to become an issue. It will mean not only that important information is not made publicly available, but accountability will be significantly reduced. It ought to be made clear – by amending the Act – that private companies carrying out public functions are bound by the FOIA and must both keep proper records and make those records available to the public under the Act both proactively and where it is requested.

Conclusion

10. The Ministry of Justice’s Memorandum importantly recognises that freedom of information “*remains a vital element of the transparency agenda and has been instrumental in the release of a great deal of information which might otherwise have remained closed*”.³¹ As demonstrated above, the FOIA has become a vital cog in the work that Liberty does. The Act and its implementation however still suffer significant weaknesses. Our main concern is that the aim and purpose of the Act is often thwarted by the broad exemptions and increasing risk of obscuring public decision-making by contracting out public services. Clarifying that the Act applies to private companies who carry out public services; narrowing and eliminating broad and absolute exemptions; and lowering the threshold for disclosures would all be welcome reforms.

Sophie Farthing

³⁰ See Liberty’s Committee stage briefing on the Protection of Freedoms Bill in the House of Lords (January 2012), which set out detailed proposed amendments along these lines to the FOIA, available at <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-committee-stage-briefing-supplementary-prot-of-freedoms-bill-hol-j.pdf>.

³¹ See the MoJ Memorandum, *ibid*, at para 219.