

SCRUTINY REPORT

OVERVIEW & SCRUTINY BOARD

DATE OF MEETING

Freedom of Information - Call for Evidence

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Summary

1. After ten years of the Freedom of Information Act's operation, an Independent Commission has been formed to review the Act. The Commission is inviting evidence from a range of interested parties including local authorities. If the Council wishes to provide evidence it should be submitted by the 20 November 2015.
2. The key aims of the Act are to give the public a right to access information and to make the government and local authorities more open, transparent and accountable. This report provides OSB with an overview of the number and types of request received in Middlesbrough and some of the challenges faced by the Authority as a result of the Act and the requirements placed upon the Council. Due to the tight timescales for submissions, further evidence is being sought from the Leadership Management Team which may highlight further issues particularly in relation to the impact on the local authority.

Introduction

3. The Freedom of Information Act 2000 ("the FOI Act"), commenced in January 2005, provides an enforceable right to access recorded information held by around 100,000 public sector organisations.
4. The Act's intended objectives were to: 'transform the culture of Government from one of secrecy to one of openness'; 'raise confidence in the processes of government, and enhance the quality of decision making by Government'; and to 'secure a balance between the right to information...and the need for any organisation, including Government, to be able to formulate its collective policies in private'.
5. After ten years of the Act's operation, an Independent Commission on Freedom of Information was established on the 17th July with the following terms of reference :

6. The Commission will review the Freedom of Information Act 2000 ('the Act') to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of the Act adequately recognises the need for a "safe space" for policy development and implementation and frank advice. The Commission may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information."
7. In order to fulfil its terms of reference, the Commission is inviting evidence from a range of interested parties including local authorities. There are six questions being posed by the Commission, however only two (see below) relate to issues experienced in Middlesbrough. If the Council wishes to provide a submission, then the evidence should be objective and factual about the impact or effect of freedom of information in relation to the two questions below.
8. **Question 1:** What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?
9. **Question 6:** Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?
10. All evidence will be read and considered by the Commission and used to help formulate the Commission's final analysis and recommendations.

Requests for information in Middlesbrough

11. The FOI Act and the Environmental Information Regulations 2004 (EIR) provide rights of access to information held by public authorities in England, Wales and Northern Ireland.
12. FOI legislation promotes openness and transparency by public authorities. By making information publicly available, public authorities are more accountable to the citizens they serve. Both sets of legislation provide an assumption or presumption in favour of disclosure of requested information - in other words, the 'default setting' when dealing with requests favours disclosure. However there are a number of exemptions (31) that may apply.
13. Whilst the provisions of the FOI Act and EIR are very similar,, there are a number of differences which the Council must reflect in its response to relevant requests.
14. Whilst the Commission is only reviewing the FOI Act, the same issues and concerns arise with the EIR and in Middlesbrough these are processed in the same way.
15. Many requestors do not identify the provisions under which they are asking for information and it is the responsibility of staff to identify what type of information request is being made and treat it accordingly in line with the appropriate legislation. However, as it is FOI which is widely quoted in the media and the press, it is this

regime that the public have become most aware of and so if they do quote any legislation, it tends to be FOI.

16. In order to ensure compliance with the legislation and to support staff in handling information requests the Council has adopted a centralised model for the receipt and processing of requests so that the most appropriate legislation can be applied consistently and timescales adhered to. The function sits within Democratic Services.

Call for Evidence - Impact of Requests for Information in Middlesbrough

17. There are two questions in the Commission's review that are more relevant to Middlesbrough Council and those are questions 1 & 6. An explanation of some of the issues experienced in Middlesbrough are as below:

18. **Question 1:** What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

19. Only s36 (Effective Conduct of public affairs) applies to local authorities.

20. Section 36(2) of the FOIA states that: *"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information*

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

21. The application of this exemption is currently limited. Before refusing a request on these grounds the informed opinion of the Council's Qualified Person (Assistant Director of Organisation and Governance or the Chief Executive) has to be given.

22. One example of where this exemption has been used in Middlesbrough related to a request for all documents and correspondence held by the Council relating to, or mentioning, an ongoing Children's Safeguarding review.

23. This request was refused as it is important that officers had a safe space to consider issues of sensitivity; that they did not feel inhibited by possible disclosure of any advice they give or views they exchange with regard to restructuring of the Council's services, management structures or other similarly sensitive issue and consider all options and opinions, including extreme ones, in order to make effective decisions. Also there were concerns that if communications were released then this may make officers more reticent in putting their frank and honest thoughts/views in writing which may have a detrimental effect on effective decision making within the Council.

24. Whilst this decision was supported by the timing of the request (during the conduct of the review) had the same request been submitted after the outcome of the review had been implemented, the exemption would be unlikely to still be relevant and the question is posed whether Officers advice would be likely to be impacted by the

threat of future disclosure. The public or campaigners may argue that public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.

25. It may be beneficial for the Council to set a time limit (say for a minimum of 1 year) before any consideration is given to whether such information should be released. This could cover for example;

- Leadership Management Reports
- Team meeting notes/minutes
- Service reviews and operational deliberations

26. This would allow a safe space for senior managers to deliberate issues, concerns, projects and proposals, some of which may progress and some that may not or may be sent back to the service for further work avoiding the need to disclose information that is still in development. Releasing information could also give the public the wrong impression that an action would take place when it has been rejected or superseded.

27. It is difficult to ascertain how you could apply a standard rule on timescales for the sensitivity to a process as it would be very much dependent on the topic and nature of the information being requested and each request would need to be considered on its own merits.

28. It is not evident why it is necessary for the Council's 'Qualified Person' to give an opinion and what added benefit this has. In general, when applying this exemption a senior manager has already identified the reason for refusal, and an experienced FOI officer or the Members & Statutory Services Manager has advised on the legislation and the application of the exemption. The public interest is also already considered and the complainant still has the right of appeal. This additional step does cause some delays in responding to requests.

Middlesbrough Requests and Requesters

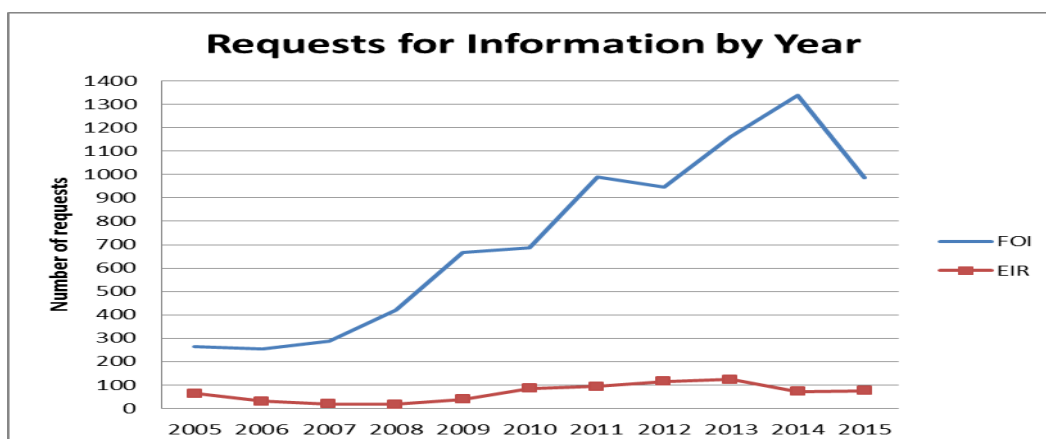
29. **Question 6:** Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FOI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

30. Middlesbrough Council changed its IT system for managing/recording requests in March 2015 and whilst some basic statistics were not retained it is not possible to interrogate some statistics fully for previous years which would give year-on-year comparisons for all the sections below, which would have shown some trends of impact on certain service areas.

Number of requests

31. The number of Information requests being submitted has climbed steadily since the introduction of FOI/EIR. In addition they have also become more complex with requesters 'asking for detailed breakdowns, cross directorate information or for answers in a particular way, such as in tables' or using on line survey forms.

32. Rising request levels could be being driven by increased awareness of FOI and media stories in the national press (for example MPs' expenses) and local stories. Requests can also come in waves around a particular issue.



*2015 as at 15 October

Who has made the requests?

33. Neither the FOI Act nor the EIR require the person asking for the information to say why the information is required, although the Act does require a name and address, however an email address is acceptable.

34. With the increasing use of email the identity and motivation of requestors becomes increasingly difficult to define as details supplied are not always representative of the person actually making the request. The following table is therefore based on limited information and must therefore be treated with a degree of caution.

35. The table below shows per type of requester (where it has been possible to identify them) for the time period 9 March 2015 – 15 October 2015 (stats not available before this date).

Business	187
General public	368
Government (MP's)	7
Health	5
Local authorities	8
Media	110
Organisations (E.G Ramblers Association, Carers Trust)	35
Researcher	14
Solicitor	4
Student	2
Total	740

36. Experience also shows that where there may be an individual, business or political grievance, then requesters will utilise multiple access regimes to the Council such as Corporate and/or Ombudsman complaints, the Council's Accounts,, Access to Information, Data Protection and Subject Access requests.

37. The Council has a small number of requesters that place a substantial burden on the Council by utilising the various access regimes and move on from one topic to another which makes identifying the requests as vexatious very difficult. Consequently a change to the legislation which allows the requester rather than the request to be vexatious may aid councils in dealing with persistent requestors.
38. Whilst it is recognised that these requestors do place additional burdens on local authority staff there may be a misconception that the burden is solely down to the FOI regime as they often use many access regimes.
39. The Council received 18 requests for an internal review in 2014 and to-date 10 in 2015.

Number of requests per service area

40. It is also important to note that a number of requests have been multi - faceted and have involved multiple service areas, so the number of requests for 2015 (967) per service area may not equate to the number of requests received by the Council (e.g. one request may be assigned to four service areas).

Service Area	2015	FOI	EIR	TOTAL
Economic Development & Communities		227	44	271
Environment, Property & Commercial Services:		49	28	77
Finance and Investment		102	3	105
Mouchel		97	1	98
Organisation & Governance		227	7	304
Wellbeing, Care & Learning:		182	0	182
Total (15/10/15)		884	83	1037

Subject of requests

41. The range of subject matters requested is vast as many requests from the public are often niche and of private interest to the person, however the most requested topics are:
- Safeguarding and schools
 - IT systems and their procurement
 - Housing and Homelessness
 - Financial information
 - Business Rates
 - Human Resources and Staff

Impact of FOI on the Council

42. Before FOI there was a range of legislation that enabled access to local government information either through documents, attendance at meetings or through specific areas and records. Many of these still exist and are also being utilised by requestors/public.

43. Measuring the impact of FOI and its ability to improve not only transparency and accountability, but improve decision-making, increase public participation in and understanding of decision-making whilst increase public trust is difficult. An Authority has no right to ask why the information has been requested and feedback is very rarely given as to whether the information provided met their needs.
44. Whether the resources expended on information requests are justifiable is becoming increasingly harder to determine as the Council is going through a rapid period of change and transformation to deliver savings and efficiencies.
45. In order to mitigate some of the requests, the Information Governance Team do monitor requests to see if there are frequent requests for the same information and ask the services to proactively publish such information on a regular basis. This does not appear to stop the requests as many requesters submit round robins (emails to multiple Councils) without conducting any research themselves first i.e. establishing whether information is already available on our website. However, it does shorten the administrative process slightly.
46. It is also felt in Middlesbrough that there is very little evidence to show that the proactive publication of information through publication scheme or the numerous data sets that now have to be compiled and released by the authority have increased transparency or accountability. As you will see in the table below there are a reasonable amount of visits to the open data section of the website, however greater interrogation of these figures would be required to ascertain who is using the site and whether the visitors to the site found the information useful or relevant as the number of requests for information received by the authority has not reduced. Therefore we still have to question whether the time and resources dedicated to this is an effective use of resources.

Open data landing page	787
Payments over £500	633
Senior staff salaries	1708
Spend on procurement cards	144
Annual report & statement of accounts – 5073	624
Audit of accounts	210
Data protection	393
Freedom of Information	815
Statistics	1662
Strategies, performance, plans & policies	1307
Children’s service funding statements	103
Local Authority land and building assets	183
Procurement information transparency code	132
Tender and contracts	270
Total	8971

47. Anecdotal - The Information Governance Team often receive comments from staff that the combination of cuts and rising number of information request have left nominated officers within service areas feeling stretched and unable to cope with the timescales and many feel they are now at capacity. Some staff have also stated that they feel that they have become researchers for students; the media fishing for stories and businesses seeking contact names and details trying to sell their goods. They feel that timescales for responding (20 working days) and that the number of years that some requesters expect officers to collate information for is unrealistic as systems change over time as do staff knowledge and resources to be able to research and compile the information.

48. Requests failing to meet the 20 working day

- 2014 72 of 1398 requests
- 2015 38 of 967 requests

Whilst this shows a reduction in failures to meet the target date more analysis is required to determine if services are taking more of the 20 allowable days to complete the response than in previous years.

Cost

49. It is difficult to quantify the actual cost for FOI to the authority and to be able to compare this on a like for like basis with other authorities. There are many individual factors such as; how the authority manages requests for information, what staff are employed, how many requests are received and the nature and complexity of the request; local events and media attention etc.

50. In Middlesbrough the Information Governance Team has responsibility for managing the development of FOI policy, training and processes i.e. assigning requests to nominated officers within the service area ensuring compliance with statutory timescales for responding to requests. They also provide expert advice to requestors and service areas on the legislation and carry out research on recent Information Commissioner or tribunal decisions which impact on any refusal. The Members & Statutory Services Manager deals with any complaints/ appeals and liaises with the Information Commissioner where requesters remain unhappy with the outcome.

51. In the team there is 2.2 FTE whose main roles are to support FOI/EIR processes and a Records Manager which although not dedicated to supporting FOI, does aid the Council in meeting the s46 Records Management Codes of Practice requirements.

52. There are also 8 nominated offers within the service areas that coordinate their services requests and gather the information. The costs for these staff have never been apportioned and FOI duties are tagged onto existing roles and responsibilities.

53. It is also difficult to assess how much on average a request takes to answer as under the FO and Data Protection (Appropriate Limit and Fees) only the time that an officer takes in finding and retrieving the information can be taken into account.

54. Under the legislation, requests which amount to less than 18 hours (£450 - £25 per hr) officer time spent in gathering and collating information are not chargeable and when responding to these requests a public authority may only charge for photocopying and postage. However, many requests are submitted and responded to by email so this is not relevant.

55. Nominated officer's record the amount of time (see below) that has been spent on a request, this time only reflects that which we are allowed take into account rather than the true cost or impact on the Council staff resources.

56. The Authority determines whether the appropriate fees limit is reached, using a basis of £25 per hour as per the Act. In 2014 there was an estimated recorded figure of 3,483 officer resource hours spent on dealing with information requests, In 2015 (1 January – 15 October) record's so far show 2769 hours spent. Using £25 as a basis to estimate the cost, this equates to

- 2014 £87,075
- 2015 £69,225

57. Information Governance FOI specific staffing cost of £62,000 per annum plus a Records Manager (£35,000)

58. The Authority cannot take into account any time;

- inputting and coordinating requests
- time discussing a request with managers etc.,
- considering whether an exemption applies and researching recent decisions
- liaising with any third parties to ascertain if they have objections
- considering and responding any complaints or appeals and Information Commissioner communications
- seeking the opinion of the Qualified Person
- giving advice to the public and officers

FOI Campaigners

59. The media plays a key role in FOI as user and defender. The media is also the primary means through which the public gains awareness of the Act and knowledge of information disclosed by it.

60. Locally The Gazette and 140 other media bodies, campaign groups and others have written to the Prime Minister expressing 'serious concern' at the government's approach to the FFOI Act and the fact that there is no indication that it is expected to consider how the right of access might actually need to be improved.

61. In order to seek a media perspective and to share their experience, the Evening Gazette have been asked to contribute to the Board's deliberations. Chris Styles, the newspaper's editor has confirmed that he will not be able to attend the meeting but has submitted the following response:

The Gazette is among a large group of newspapers from across the country which has lobbied the Government to oppose any attempt to weaken the Freedom of Information Act.

We regard the act as a vital mechanism of accountability which has transformed the public's rights to information and substantially improved the scrutiny of public authorities. We would deplore any attempt to weaken it.

It is vital for the reputation of public bodies that they are - and are seen to be - open and accountable. In my experience, the majority of bodies are happy to do this, though not all. Restricting the ability to ask questions about how taxpayers' money is being spent would diminish this reputation in my view.

Doing so would also send the wrong message to the electorate; a block on information would breed cynicism about the actions of councils and other public bodies.

I appreciate there is an issue about the time and resource which is required to service Freedom of Information requests. We do not seek to be cavalier over the amount of requests we submit. I have worked with Middlesbrough Council - and will continue to do so - to ensure that any requests are appropriate and cannot be dealt with in a more expedient fashion.

Conclusions

62. Key issues for Middlesbrough that the Board's might wish to consider

- There is little evidence to show that legislative processes such as the publication scheme and requirement to pro-actively publish data sets are a justifiable use of Council resources. Should more research be done by the Government on ascertaining if the public actually find this service beneficial?
- The sheer number of requests being received and the timescale for responding
- Cost to the Authority particularly given the major financial challenges it faces – charging a fee for requests may reduce the costs and the burden on the local authority
- Charging a fee for requests may deter some repeat requests and may encourage more people to do some of the research themselves (i.e. visit Council websites) before submitting a request however; this may also disenfranchise a large section of the community.
- More control / restrictions on repeat and round robin requesters and the application of the vexatious exemption.
- Greater local authority control on dealing with time spent on personal, business or political campaigners submitting unrelated requests frequently enough that it becomes inappropriately or disproportionately burdensome.

Recommendations

1. The Board's views are requested on the issues raised by this report as part of the process of it preparing a submission to the Independent Commission.
2. It be noted that further evidence from the Leadership Management Team might be submitted in addition to the views expressed by the Board, in order to give further evidential weight to the issues identified.

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