



UK OPEN
GOVERNMENT
CIVIL SOCIETY NETWORK



**Campaign for
Freedom of Information**

Extend Freedom of Information to all public contractors

A proposal for the UK's 2016-18 OGP National Action Plan

Contact

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Introduction

The development of the UK's third Open Government Partnership National Action Plan¹ and the publication of the Commission on Freedom of Information's findings² present a perfect opportunity to consider how the public's democratic right to information, and the transparency and accountability of government and public service providers, can be strengthened.

Here we, the Campaign for Freedom of Information (CFOI)³ and UK Open Government Network (OGN),⁴ outline a proposed commitment for the UK's 2016-18 OGP National Action Plan to extend Freedom of Information to public service contractors in a balanced and proportionate way.

As set out in the Open Government Manifesto,⁵ proactive transparency measures through open contracting standards and baselines can help to ensure that there is proper accountability for public funds. However, access to the information necessary to properly scrutinise the delivery of public services can only be ensured if contractors are also subject to Freedom of Information.

Where private companies and charities provide public goods, services or infrastructure, any information held by the contractor in connection with its delivery should be subject to the Freedom of Information Act and thereby open to scrutiny. A number of other countries' FOI laws already take such an approach, including those of Australia,⁶ New Zealand,⁷ Ireland,⁸ South Africa,⁹ Brazil, Estonia and Macedonia.¹⁰ A recent poll conducted by YouGov for 38 Degrees, found that 60% of the public supported the FOI Act's extension to companies in receipt of taxpayers money, compared with just 10% who were opposed.¹¹

Currently, important information about public contracts has been withheld under the FOI Act because this information is being held by public authority contractors and not by the authorities themselves. Examples include:

- The number of complaints from the public against court security officers provided by G4S and the number of officers charged with offences.

¹ <http://www.opengovernment.org.uk/engage/open-government-project/>

²

<https://www.gov.uk/government/publications/independent-commission-on-freedom-of-information-report>

³ <https://www.cfoi.org.uk/>

⁴ <http://www.opengovernment.org.uk/>

⁵ <http://www.opengovmanifesto.org.uk/>

⁶ Commonwealth of Australia, Freedom of Information Act 1982, section 6C

⁷ New Zealand, Official Information Act 1982, section 2(5)

⁸ Ireland, Freedom of Information Act 2014, section 11(9)

⁹ South Africa, Promotion of Access to Information Act 2000, section 4(b)

¹⁰ <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

¹¹ <https://home.38degrees.org.uk/2016/02/08/foi/>

- The number of prison staff at HMP Birmingham and the number of attacks at the prison. This is also held only by G4S.
- The ratio of prison officers to prisoners at HMP Altcourse, managed by G4S.
- Information about rehabilitation projects at HMP Bronzefield, run by Sodexo.
- The value of penalty fares issued on the London Overground and Docklands Light Railway by private sector inspectors.
- The costs of bringing TV licensing prosecutions, which is held by Capita and not known to the BBC.
- Whistleblowing policies applying to Virgin Care staff providing NHS services.
- The numbers of parking tickets issued, then cancelled on appeal, by Islington traffic wardens offered Argos points as incentives to issue tickets by NCP Ltd. How often a contractor managed council swimming pool in Southwark had been needlessly closed to the public after being booked by schools which did not use their slots.
- Arrangements made by a subcontractor to restore Leyton Marsh after its use as a temporary basketball court during the Olympics.¹²

The proposal below sets out a starting place for discussions. The first step of a commitment to extending freedom of information must be a broad based discussion and consultation to determine an approach that delivers maximum transparency at minimum cost.

Proposal

Extension of Freedom of Information must be done in a proportionate way that does not deter small and medium size organisations - companies or charities - from taking on public contracts. We therefore propose a dual approach to bringing public service contractors within Freedom of Information based on the size of the function that is being performed. This approach has previously been proposed by CFI and was endorsed by the Information Commissioner's Office in its report: 'Transparency in outsourcing: a roadmap'.¹³

Major contracts

Contractors that deliver major public goods, services or infrastructure should be brought directly under the Act in their own right in relation to those contracts. Such functions include, for example, running hospitals, prisons and transport networks. The ICO propose that this should apply to contracts 'over £5 million in value or continuing over 5 years or where the contractor solely derives its revenue from public sector contracts'.¹⁴

¹²

<https://www.cfoi.org.uk/2016/01/foi-should-apply-to-prisons-and-parking-tickets-even-if-contractors-hold-the-information-says-campaign/>

¹³ <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

¹⁴ <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

We propose that the FOI Act be amended to provide that major contractors are brought directly under the Act themselves in relation to their public sector contracts. FOI requests could then be made directly to those contractors.

Considering the size and critical nature of such contracts, it is right that the contractor should be directly responsible for responding to requests. This would be in line with the existing right to obtain environmental information from contractors providing environmental services for public authorities.¹⁵ A step in this direction has also been taken in Scotland, where contractors providing secure accommodation for children or running privately managed prisons will become directly subject to the Freedom of Information (Scotland) Act from September 2016.¹⁶

Small and medium size contracts

Other contractors should be subject to Freedom of Information through the contracting authority. Currently, the FOI right does apply to information which a contractor holds on behalf of an authority, but deciding what information is held on the authority's behalf is not easy and depends on each contract's precise terms, which vary from contract to contract. Often, important information is considered to be held for the contractor's own purposes, not the authority's, and is therefore inaccessible under FOI.

We propose that the FOI Act be amended to provide that any information regarding the way in which a public good, service or infrastructure is provided under contract is automatically considered to be held on the authority's behalf. All such information could then be obtained under the FOI Act via a request to the authority, subject to the Act's exemptions. This should apply to sub-contractors as well as contractors.

Such an approach would ensure that a disproportionate burden is not placed on small contractors, as the public authority would retain responsibility for complying with the right to information. It would however help to ensure that critical information is available for public scrutiny. The Information Commissioner supports this approach; the Independent Commission on FOI supports it in relation to larger contractors.

Conclusion

The Freedom of Information Act is a fundamental pillar of the UK's openness arrangements, providing an important legal backstop to work on proactive transparency and openness, and acting to regulate the balance of rights and responsibilities between citizens and government.

¹⁵ Environmental Information Regulations 2005, regulation 2(2)(d)

¹⁶ <http://www.legislation.gov.uk/ssi/2016/139/introduction/made>

We believe that strengthening the public's right to information in the ways outlined above would represent a potentially transformative commitment, of the kind the UK is committed to making under the Open Government Partnership, and would contribute towards the Government's commitment to becoming the most open and transparent government in the world.

We commit to work with ministers, civil servants, civil society and business through the OGP process to develop an effective approach to ensuring the transparency of government contracts.



UK OPEN GOVERNMENT CIVIL SOCIETY NETWORK

The Open Government Network (OGN) is a coalition of over 500 organisations and individuals across the UK, committed to making government work better for people through transparency, participation, and accountability.



Campaign for Freedom of Information

The Campaign for Freedom of Information is a non-profit organisation which is not affiliated to any political party. We campaign to improve and defend the Freedom of Information Act, advise the public on using it, encourage good practice by public authorities and provide FOI training.

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