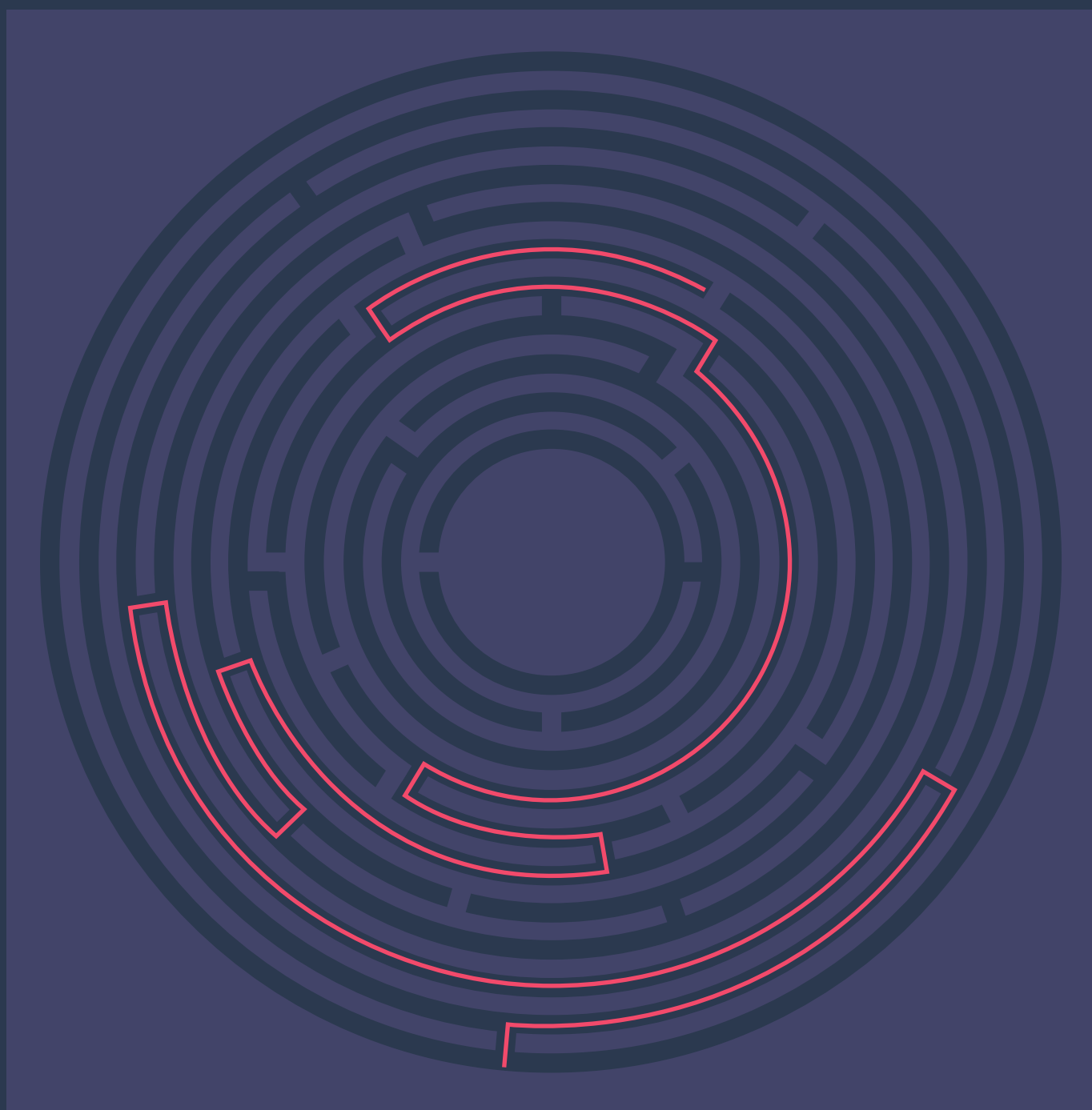


Art of Darkness

How the government is undermining
Freedom of Information

Lucas Amin



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openDemocracy is an independent global media platform covering world affairs, ideas and culture which seeks to challenge power and encourage democratic debate across the world.

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Executive summary

The Freedom of Information Act 2000 was a landmark piece of legislation that redefined the transparency and accountability of public bodies in the UK¹. Public interest disclosures under the Act are today a staple of news reporting - ranging from local stories about councillors' fraudulent expense claims² to significant revelations about the Brexit referendum³ and the Iraq War⁴.

Parliamentary inquiries have concluded that the Act "has been a significant enhancement of our democracy"⁵ and has "enhanced openness and transparency"⁶. But FOI has not proved popular with leaders in power. Tony Blair called himself a "nincompoop"⁷ for passing the legislation, while David Cameron complained that FOI "furs up"⁸ the arteries of government. (Boris Johnson is yet to offer an opinion.) This is a sure sign that the law is helping to keep government honest.

Compliance with FOI has been a mixed bag. Public bodies - particularly those at the heart of government - often respond improperly to requests because they fear the impact of disclosure. This can be effective because only a small minority of requests are appealed. Delaying an outcome by forcing a requester into the (slow-moving) appeals process can also take the political sting out of a disclosure.

Over the last few years, many users of the Act - journalists, campaigners, academics, engaged citizens and others - have noticed a marked change. Compliance is worsening, waiting times are increasing, and some public bodies don't bother to respond to requests at all. What is going on?

This report takes a step back to find out. It looks at FOI through the lens of two datasets. First, drawing on data collected by the Cabinet Office, it briefly reviews long-term trends in requests and internal reviews sent to central government.

openDemocracy then presents the first macro-level analysis of formal decisions issued by the Information Commissioner's Office (ICO) in response to complaints submitted by the public. Drawing on metadata from 6,168 public Decision Notices issued in the last five years - augmented by machine-reading technology - we offer fresh insights into how and why access to information is being undermined.

The report also pays special attention to the ICO, the regulator of information rights, and the Cabinet Office, which is responsible for FOI policy, but is also the worst performing Whitehall department on FOI. Finally, the study reflects on the case for extending FOI to public contractors, and on the government's response to the publication of the ICO's 2019 report 'Outsourcing Oversight?'

The FOI Act is twenty this year - the same age as the Nokia 3310. But while mobile phones have evolved rapidly in the information age, FOI is yet to receive a major update. It needs one. Swift action by both the ICO and government is now essential to preserve the democratic gains that the Act has delivered.

1 Scotland passed the Freedom of Information (Scotland) Act 2002, which has a great deal in common with the FOIA 2000.

2 <https://www.cps.gov.uk/mersey-cheshire/news/former-councillor-sentenced-fraudulent-expense-claims>

3 <https://www.opendemocracy.net/en/dark-money-investigations/new-email-release-shows-how-leave-campaigners-used-vast-loo/> ;

4 <https://www.reuters.com/article/britain-iraq-oil/uk-held-talks-with-oil-firms-before-iraq-invasion-paper-idUSLDE73100J20110419>

5 <https://publications.parliament.uk/pa/cm201213/cmselect/cmjust/96/96.pdf>

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf

7 https://www.bbc.co.uk/blogs/opensecrets/2010/09/why_tony_blair_thinks_he_was_a.html

8 <https://www.bbc.co.uk/news/uk-politics-35550967>

Key findings

1 There is a long-term trend toward greater secrecy in central government

Central government granted fewer and rejected more FOI requests in 2019 than ever before, according to official statistics collected by the Cabinet Office. The percentage of requests granted in full has declined every year since 2010 - from a high of 62% in 2010 to 44% in 2019. The percentage of requests withheld in full has steadily increased from 21% in 2010 to 35% in 2019.

Last year, central government departments upheld their original decision in full in 83% of internal reviews - the first stage of the appeal process - which was the highest proportion in the past decade. The trend towards greater secrecy in central government is unmistakable.

This trend has been led by the largest and most powerful Whitehall departments. In the last five years, the Cabinet Office, Treasury, Foreign Office and Home Office have all withheld more requests than they granted.

2 Public bodies made elementary mistakes in half of ICO complaints last year

According to new analysis by openDemocracy, 48% of ICO Decision Notices fully or partially upheld complaints made by the public in 2019-20. This figure, the largest it has been in the last five years, was driven by a surge in fully or partially upheld procedural complaints.

In procedural cases, the ICO examines only the basics of the way a request was handled. The ICO is now increasingly finding, for example, that authorities are failing to issue a response within twenty working days, failing to issue a valid refusal notice, and failing to conduct appropriate searches for information.

This growth in upheld complaints about basic procedural errors - 15 years after the Act's implementation - is a sign of poor health, suggesting that public bodies' fundamental understanding of or respect for the legislation has declined. The problem may be rooted in a lack of resources, inadequate training, changing attitudes to FOI - or a combination of all three.

3 A cynical tactic for avoiding FOI is spreading across the public sector

New analysis by openDemocracy also shows that some public bodies are cynically undermining requests for information by failing to respond to requests in any way. Offering no response whatsoever - a tactic described in this report as ‘stonewalling’ - puts requesters in legal limbo because without a substantive refusal they cannot fully enter the appeals process.

Requesters who get stonewalled can complain to the ICO, but only about the fact that they have not received a response. This process - from request to ICO decision - takes more than six months on average. Yet the public authority response, when it arrives after an ICO order, can still be a refusal. Requesters must then seek a substantive decision through the appeals process - via internal review and another ICO complaint - which together often take more than eight months to complete.

ICO Decision Notices about stonewalling have increased by 70% in the last five years. The Ministry of Justice, Home Office, Cabinet Office, NHS England and Metropolitan Police are repeat offenders. The practice has recently taken root in areas of local government too. The Royal Borough of Kensington and Chelsea made extensive use of stonewalling to shield itself from transparency following the Grenfell Tower fire.

4 The ICO is failing to enforce FOI

The ICO has enforcement powers to compel public bodies to address systemic compliance problems. But analysis by openDemocracy shows that the commissioner has never used these to directly address public bodies that stonewall requesters. The ICO has, in fact, only used its enforcement powers twice in the last decade. In the absence of adequate enforcement, our findings above - of greater secrecy, more basic mistakes and the growth of stonewalling - are not surprising.

What explains the ICO’s enforcement approach? Not enough money and too much politics. openDemocracy’s analysis shows that over the last ten years the ICO’s FOI budget has been cut by 41% in real terms while its complaint caseload has increased by 46%.

The ICO is sponsored by the Department for Digital, Culture, Media and Sport (DCMS), but on FOI the commissioner is accountable to the Cabinet Office. This governance arrangement undermines the independence and credibility of the ICO. The regulator of FOI - a law that promotes transparency and accountability from the bottom up - is overseen by the Whitehall department that delivers the agenda of the prime minister and his inner circle. The Cabinet Office is also the worst performing Whitehall department on key FOI metrics (detailed further in this study).

5 The Cabinet Office runs an ‘Orwellian’ unit that monitors the requests of journalist and campaigners

The Cabinet Office’s influence on FOI does not stop at the ICO. The Cabinet Office is also in charge of the Clearing House - a small unit that monitors inbound ‘sensitive’ requests across Whitehall and coordinates the responses of multiple departments. In 2005, The Times described the Clearing House as “Orwellian”⁹ but - true to form, perhaps - very little has been published about it since.

This report reveals the inner workings of the Clearing House for the first time. FOI and Subject Access Requests by openDemocracy reveal that the Clearing House shares with a range of Whitehall departments a daily update containing the names of journalists and campaigners, the requests they have submitted and advice on how referring departments should respond. The Clearing House has also reviewed drafts and signed off on departmental responses to FOI requests.

There is no basis in law or policy for the existence of the Clearing House and it is unclear to whom it is accountable. The concern is that the unit may be monitoring requests by the media to undermine journalists’ access to information.

6 The government is failing to close the transparency gap in outsourced services

The increase in government outsourcing in the 21st century has shrunk the scope of FOI, because the law doesn’t apply to private contractors delivering public services. Yet outsourcing scandals during the COVID-19 crisis have laid bare the urgent need for transparency and accountability of government contractors.

The need to close the ‘transparency gap’ has been recognised in reports by the ICO, the Committee on Standards in Public Life, the Public Accounts Committee, the Public Administration and Constitutional Affairs Committee and the Independent Commission on Freedom of Information - to name but a few. This culminated in the first major study of the issue, ‘Outsourcing Oversight?’, which was published by the ICO in 2019.

The government has since rejected calls for legislative reform, which it claims - somewhat dubiously - is due to concerns about the regulatory burden of FOI compliance on SMEs and voluntary organisations. Instead, the government has elected to enhance contracting transparency through proactive publication - but evidence suggests it is also failing to implement these measures.

⁹ The Times, 30 September 2005, quoted on p118 of R. Hazell, B. Worthy and M. Glover, ‘The Impact of the Freedom of Information Act on Central Government in the UK’, London: Palgrave Macmillan, 2010.

7 Delays throughout the FOI process remain a problem

The FOI Act states that requests should be answered “promptly and in any event not later than the twentieth working day following the date of receipt”. The intention of the legislation seems clear: to give requesters fast access to information - within a month at most. But too often this is not what happens.

Public bodies have several tools to frustrate expedient disclosure. Stonewalling, described above, is one of them. Another is the use of a loophole that allows authorities to extend the time frame for responding to a request when they need to consider the public interest in disclosure.

The appeals process is also beset with delays. Only 57% of internal reviews are completed within the recommended time frame of twenty days - with many taking much longer because there is no binding time limit for their completion. Meanwhile, waiting times at the ICO complaint stage are increasing.

In 2015-16, 66% of ICO Decision Notices were issued within 180 days - but by 2019-20 only 37% were concluded within this time. Analysis by openDemocracy shows that, when combining the time periods of different stages of the appeals process, successful ICO complainants wait more than one year, on average, for information to be disclosed¹⁰.

¹⁰ This applies to decisions that are not appealed to the Information Rights Tribunal by public authorities (the large majority of decisions).

Introduction to the Freedom of Information Act

The FOI Act gives the public the right to access information held by more than 100,000 public bodies. Caveats apply, however, and information can be withheld following a legitimate request under one or more of the Act's 24 exemptions. Access to your neighbour's tax returns, for example, or information that could be used to plan a terrorist attack is prohibited by exemptions. The Act balances the need to protect the workings of government and personal rights to privacy against the democratic benefits of transparency.

Most exemptions to disclosure cease to apply if the public interest in releasing information outweighs the public interest in withholding it. For example, a request about police stop and search practices may trigger the law enforcement exemption (section 31). But information may still be disclosed because there is a public interest in understanding potential police harassment and racial profiling, which outweighs the public interest in averting prejudice to law enforcement.

Determinations on whether an authority has correctly applied an exemption, and where the public interest lies, are usually worked out in the appeals process. When a request is refused, there are four stages of appeal. Requesters must first ask the public body to conduct an internal review of its original decision. Once they have been through this process, and the outcome is not satisfactory to them, they may complain to the Information Commissioner's Office (ICO). ICO decisions can then be challenged in the lower and upper tiers of the Information Rights Tribunal, and then in the Court of Appeal.

This report examines trends in the first three stages of FOI (requests, internal reviews, and complaints to the ICO). The decisions of the tribunal and courts are more than worthy of attention, but are outside the scope of this study.

FOI requests to central government

The UK government's responses to Freedom of Information requests reached an all-time low in 2019, according to official statistics collected by the Cabinet Office. Ten years ago, there were three requests granted in full for each one withheld in full. On the current trajectory, however, there will soon be one granted for each one withheld. Many government departments have already passed this point.

Fig 1a: Percentage of FOI requests granted in full, partially granted, and fully withheld in Departments of State

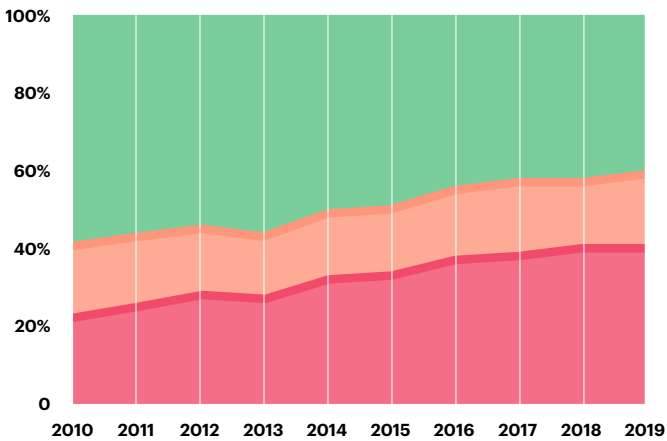
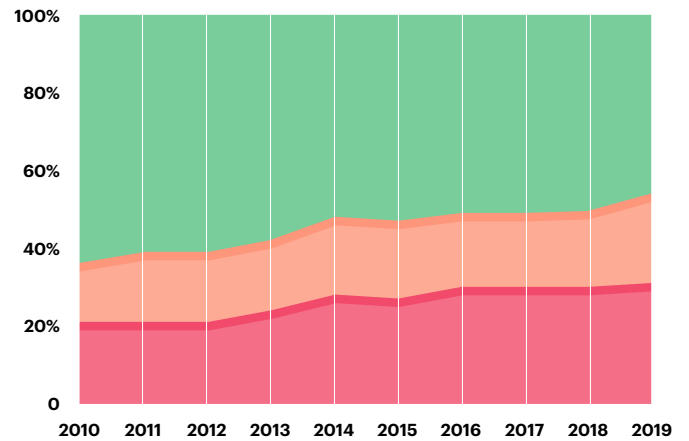
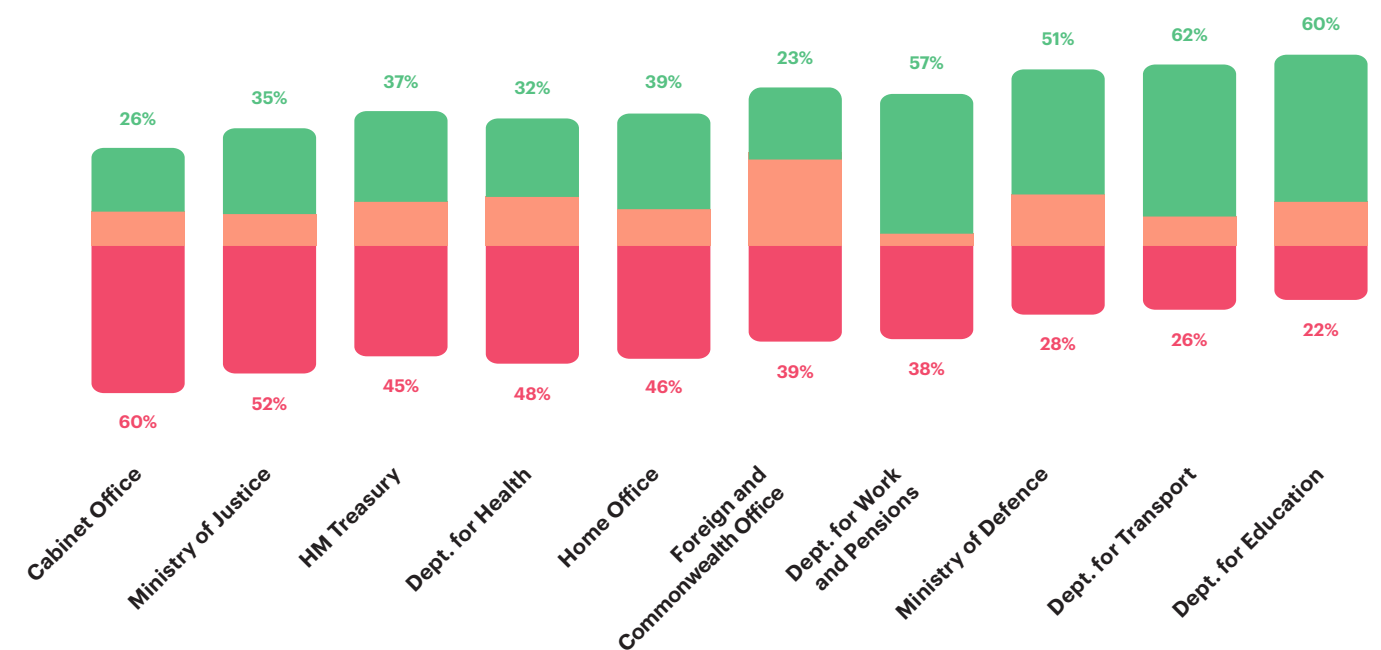


Fig 1b: Percentage of FOI requests granted in full, partially granted, and fully withheld in other monitored bodies



Six of the ten Whitehall departments that receive the most FOI requests have withheld more requests than they granted in the last five years. This includes the Cabinet Office, Treasury, Foreign Office and Home Office.

Fig 2: Percentage of granted, partially granted and withheld requests in 10 Whitehall departments that receive the most requests



■ Granted requests
■ Partially granted requests
■ Withheld requests

Source: Freedom of Information statistics: January 2010 to December 2019 dataset, Cabinet Office. <https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2019>

It is sometimes argued that a declining rate of openness under FOI is a natural consequence of greater transparency. As citizens learn more about the way government works, they devise more complex and sensitive requests for information. Yet, as the rest of this report demonstrates, access to information is being impeded on multiple levels, which undermines the argument that the decline in positive FOI responses is somehow a result of greater transparency.

Timeliness

Section 10 of the Act requires authorities to reply “promptly and in any event not later than the twentieth working day following the date of receipt”. However, Cabinet Office statistics show that 12% of all requests to central government over the past decade were not responded to within twenty days - because they were simply late (7%) or because authorities claimed an extension to consider the public interest in disclosure (5%). These percentages are proportionately small, but they represent more than 4,000 requests a year that are not responded to within the statutory time limit.

Public interest extensions

Public bodies may extend the twenty-working day response period when considering the application of an exemption with a public interest test. Yet, in something of an accounting trick, extended requests are still considered to be ‘on time’.

This loophole allows the government to delay its response to requests that it identifies as having a notable public interest - i.e. the ones in which disclosure may matter most - without recording them as late.

For example, on 18 February 2020, openDemocracy submitted a request to the Ministry of Defence (MoD) about meetings between its officials and Andrew Sabisky, a former advisor to Boris Johnson.

The request was sent shortly after Sabisky resigned from government - after his comments on eugenics, race and pregnancy attracted widespread criticism. Writing on Dominic Cummings’ blog, Sabisky had commented: “One way to get around the problems of unplanned pregnancies creating a permanent underclass would be to legally enforce universal uptake of long-term contraception at the onset of puberty. Vaccination laws give it a precedent, I would argue.”

The urgency in understanding exactly what Sabisky had been doing in his capacity as advisor to the prime minister is self-evident. The MoD, however, responded to the request on 1 September after extending the deadline to consider where the balance of the public interest lay. Having apparently considered the public interest for 196 calendar days, the MoD rejected the request on multiple grounds. Yet this delayed response would be recorded as ‘on time’ in the statistics.

The two major reviews of FOI conducted in the last decade (the 2016 Independent Commission on FOI and the 2012 Justice Committee inquiry) both recommended abolishing this loophole and replacing it with a one-time twenty-day extension¹¹. But no reforms have been tabled.

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217298/gov-resp-justice-comm-foi-act.pdf

Monitoring timeliness

Public bodies that fail to respond to 90% of requests ‘on time’ can be monitored by the ICO (this threshold was raised from 85% in March 2017.) Even though requests that are extended to consider the public interest are considered ‘on time’, many Whitehall departments still miss this target. The Department for Business, Energy and Industrial Strategy (BEIS), for example, has not responded to more than 83% of requests ‘on time’ since it was created in 2016.

But the public doesn’t know whether BEIS has been monitored by the ICO. Until 2017, the commissioner published the names of the public bodies it monitored for timely compliance - putting them on the ‘naughty step’. But in 2018 the ICO introduced a new monitoring policy and no longer routinely identifies authorities that are subject to monitoring.

The Campaign for Freedom of Information (CFOI) has questioned why exactly the ICO has ceased to publish this information. A copy of the monitoring policy, released under FOI, states that the ICO “will publish... details of organisations who we have worked with to improve their compliance” and “the results of this work and any next steps”¹². It is unclear why this aspect of the policy was quietly dropped.

In response to a recent FOI request by the BBC journalist Martin Rosenbaum, the ICO released the names of authorities with which the ICO has worked and whose performance has improved¹³ - but not those, like BEIS, who consistently underperform.

The broader limitations of ICO enforcement are addressed later in this report (on page 30).

¹² <https://www.cfoi.org.uk/2020/09/ico-refuses-to-identify-underperforming-authorities/#more-9070>

¹³ <https://twitter.com/rosenbaum6/status/1311969506735071232/photo/1>

Compliance in the wider public sector

FOI applies to more than 120,000 public bodies including councils, NHS Trusts, police forces and schools. It is not possible to review compliance in the wider public sector, unfortunately, because there is no collection of standardised statistics. The FOI Code of Practice recommends that authorities that employ at least 100 full-time equivalent staff publish their own compliance statistics¹⁴.

But publishing this data is not mandatory. It is also not published in a standardised format nor available from a single portal, which makes it impossible to collate useful information. The picture painted in this report is therefore not representative of the whole public sector - but many of the insights are nonetheless indicative of wider trends. (There have been laudable efforts to generate snapshots of compliance in local government by mySociety¹⁵ and the Campaign for Freedom of Information¹⁶.)

Internal reviews to central government

When an FOI request is refused, a requester can ask a public body to conduct an internal review of its decision. However, the internal review is not described anywhere in law and consequently there are no formal rules, tests or time limits for the procedure¹⁷.

Public authorities are required to create their own internal review policies. The FOI Code of Practice, a non-binding set of guidelines issued by the Cabinet Office, encourages public bodies to “provide a fair and thorough review of procedures and decisions taken in relation to the Act” by “someone other than the person who took the original decision”¹⁸ within twenty working days¹⁹.

Over the last ten years, 7% of FOI requests made to central government and other monitored bodies were internally reviewed. Four in five of these reviewed decisions were upheld in full, and less than one in ten decisions were fully overturned. These outcomes are not entirely surprising given that internal reviews are conducted in-house to standards set by the public body itself.

¹⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

¹⁵ <https://research.mysociety.org/html/local-gov-foi/#top>

¹⁶ <https://www.cfoi.org.uk/wp-content/uploads/2019/03/FOI-good-practice-a-survey-of-london-local-authorities.pdf>

¹⁷ Other than section 17(7) of the FOI Act, which states that if an authority has a complaints procedure it should give the requester details of it when issuing a refusal notice.

¹⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

¹⁹ The previous code (2005–18) required reviews to be conducted by an official of greater seniority but did not stipulate a time limit – stating only that target times should be reasonable. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722476/Secretary_of_State_for_Constitutional_Affairs_-_Code_of_Practice.pdf

Fig 3a: Internal review outcomes in departments of state

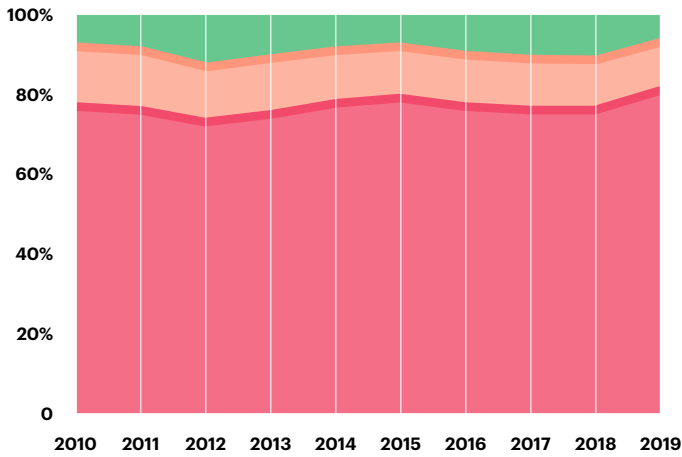
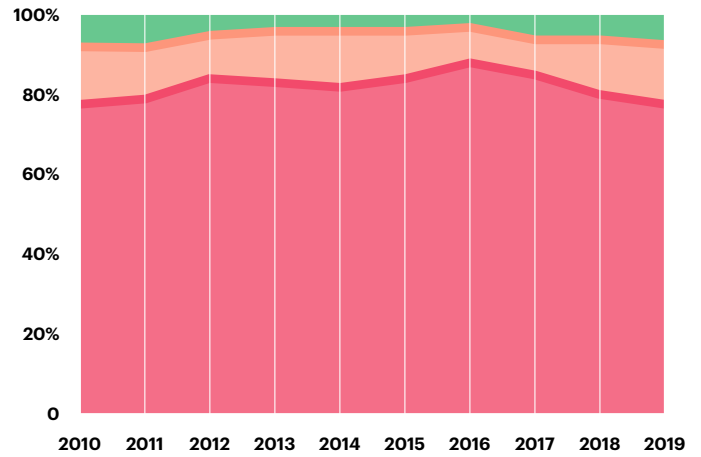


Fig 3b: Internal review outcomes in other monitored bodies



- IR overturned
- IR upheld in part
- IR upheld in full

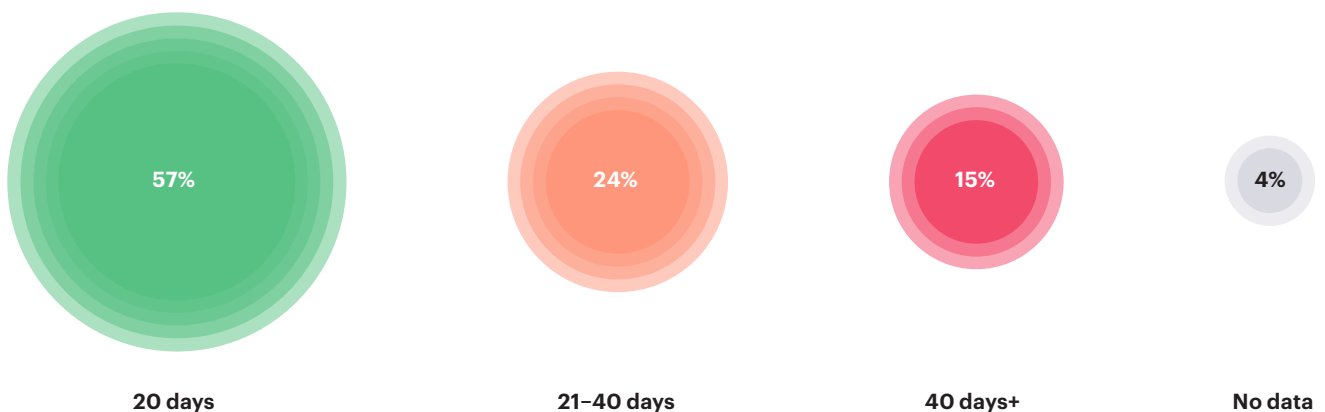
Source: Freedom of Information statistics: January 2010 to December 2019 dataset, Cabinet Office. <https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2019>

Internal reviews: timeliness

In the last ten years, there have been 20,803 internal reviews conducted by departments of state (17,279) and other central agencies (3,524). Of these, 57% were completed within twenty working days.

(Both the 2012 and 2016 government reviews of FOI have recommended introducing a statutory time limit of twenty days for completing internal reviews. But, as with public interest extensions, the government declined to implement these recommendations.)

Fig 4: Duration of internal reviews: 2010–2019



The Clearing House

FOI requests sent to multiple central government bodies - so-called 'round robins' - and requests that are deemed to be 'sensitive' are processed in a different way to regular requests. They are subject to monitoring and input by a unit in the Cabinet Office called the Clearing House. However, the FOI Act does not stipulate the need for a Clearing House and the unit has no public policy mandate.

So what exactly is the purpose of the Clearing House? And what makes a request 'sensitive'? There is evidence to suggest that the Clearing House's primary function is to monitor and obfuscate FOI requests submitted by journalists and campaigners that the Cabinet Office perceives as reputational risks.

In 2005, The Times described the Clearing House as "Orwellian"²⁰ but very little of substance has been reported about the unit since. This report reveals the inner workings of the Clearing House for the first time.

Under the system, Whitehall departments and a range of other bodies alert the Clearing House when they have received sensitive or round robin requests. The Clearing House then advises referring departments on how to respond and, in some cases, it signs off on drafts of responses before they are sent. The Clearing House also circulates a daily email with up to 70 government departments and arms length bodies, which contains details about all the requests it is advising on.

Documents released to openDemocracy have been heavily redacted but they show that journalists from The Guardian, The Times, the BBC and researchers from Privacy International have been included on Clearing House lists.

This Clearing House daily email also includes the name of the requester, which appears to undermine a core principle of FOI - that requests are applicant-blind. The applicant-blind principle holds that a public authority's response should not be affected by knowledge of the requester's identity. 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.

The sharing of requesters' names across government may also constitute a failure to protect personal data in line with General Data Protection Regulation (GDPR) requirements and the Data Protection Act 2018. Requesters are not told by referring departments that their personal data is shared and therefore they cannot consent to it.

The Clearing House was operated by the Ministry of Justice for ten years after the Act's introduction, but in 2015 it was transferred - along with responsibility for FOI policy - to the Cabinet Office. Over the last five years, the Cabinet Office granted the fewest (26%) and withheld the most (60%) requests across all of Whitehall. It also upheld in full its refusal to disclose information in 95% of its internal review decisions. Yet many of these decisions were overturned on appeal. In the same period, the ICO ruled against the Cabinet Office in full or in part in 35% of its Decision Notices.

In 2017, the Office of the Scottish Information Commissioner conducted an assessment into the handling of requests by the Scottish government in 2017 following complaints from journalists that special advisers were screening requests for political damage. The Scottish Information Commissioner concluded that the practice was inconsistent with the applicant blindness principle.

The inquiry also found that journalists' requests were subject to different clearance rules, and that the additional clearance rules led to delays in accessing information.[2] The OSIC required the Scottish government to promptly draw up and implement an action plan to remedy these issues, and has continued to engage the government since - publishing progress reports in 2019 and 2020.

A page of a Clearing House daily update dated 25 July 2018

FOI and EIR Round Robin list - 25 July 2018						
Shaded rows are previous round robins						
Request Reference (please quote)	Received by Clearing House	Applicant	Request	Dept recvd	Deadline *may differ for different depts	Any advice? *this week's advice is in bold
RR953	25/07/18	[REDACTED]	<p>(1) All internal correspondence and communications that mentions, or refers to, death penalty assurances in relation to Alexandra Kotey and Shafee El-Sheikh.</p> <p>(2) All external correspondence and communications (including correspondence and communications with US government departments and authorities, as well as correspondence and communications with UK government departments) that mentions, or refers to, death penalty assurances in relation to Alexandra Kotey and Shafee El-Sheikh.</p> <p>(3) Details of previous occasions where death penalty assurances have not been requested, including associated internal and external correspondence and communications.</p> <p>(4) All policy papers (including their drafts) that mentions, or refers to, death penalty assurances.</p> <p>By 'correspondence and communications', I define this as including, but not limited to the following:</p> <ul style="list-style-type: none"> - Emails (and their attachments) - Letters - Memos - Minutes taken during meetings 	AGO MOD	20/08/18	[REDACTED]

²⁰ The Times, 30 September 2005, quoted on p118 of R. Hazell, B. Worthy and M. Glover, 'The Impact of the Freedom of Information Act on Central Government in the UK', London: Palgrave Macmillan, 2010.

²¹ <https://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016/ScottishGovernment.aspx>

Complaints to the ICO

The second stage of appeal is overseen by the Information Commissioner’s Office (ICO), which is the regulator in charge of enforcing eleven pieces of legislation related to information rights²². The most significant of these is the Data Protection Act 2018. In 2019–20, the ICO’s data protection income was £48 million – more than twelve times greater than its FOI budget (£3.7 million)²³.

The ICO enforces FOI and the Environmental Information Regulations (EIRs), a parallel access law governing environmental information, in the UK (excluding Scottish public authorities²⁴). To discharge its responsibilities, the ICO has powers to investigate complaints, order public bodies into remedial action, and to take enforcement action against non-compliant authorities. It also promotes good practice in complying with the Act more widely. The current commissioner, Elizabeth Denham, was appointed in July 2016 for five years.

Outcomes of ICO complaints 2016–20

Complaint outcome	2015–16	2016–17	2017–18	2018–19	2019–20
Decision Notice served (%)	27	26	25	23	22
Informal resolution (%)	25	25	23	17	18
Complaint made too early (%)	27	30	33	40	36
Ineligible complaint (%)	18	17	16	18	21
Complaint not processed (%)	3	2	2	2	3
Total (%)	100	100	100	100	100

Source: ICO annual reports 2015–16 to 2019–20.

Less than 1% of requests to central government and other monitored bodies are taken to the ICO, according to statistics collected by the Cabinet Office²⁵ (there is no data for the wider public sector).

The ICO does not investigate the majority of the complaints it receives because they are either made too early – before internal review – or they are deemed ineligible for other reasons.

Around a fifth of complaints are “informally resolved” in a mediation process between requester and authority. Another fifth of complaints result in the ICO issuing a formal Decision Notice.

²² <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

²³ <https://ico.org.uk/media/about-the-ico/documents/2618021/annual-report-2019-20-v83-certified.pdf> See Analysis of net expenditure by segment on p127.

²⁴ Scottish public authorities are overseen by the Office for the Scottish Information Commissioner, which enforces the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004.

²⁵ <https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2019>

Informal resolutions

Almost half of all eligible ICO complaints conclude with an informal resolution - akin to an out-of-court settlement. Sometimes, for example, an authority will recognise it has made an error, amend its position and disclose the requested information. If the requester consents, the ICO will not issue a Decision Notice because the complaint has been resolved.

The ICO does not produce detailed records of informal resolutions, which makes the process relatively fast and cheap, but it also prohibits the ICO - or any other body - from identifying authorities that make repeated mistakes or have structural problems that require enforcement. This makes it harder to correct bad practice and leaves the system open to abuse. This study was not able to analyse the ICO's informal resolution casework - a substantial part of its workload - because the data does not exist.

Decision Notice methodology

This study draws on 6,168 Decision Notices issued by the ICO between 2015-16 and 2019-20²⁶. A Decision Notice is a public record of the ICO's investigation and resolution of a requester's complaint. It may also contain an order by the ICO for a public body to take remedial action.

In all Decision Notices, the ICO records the outcomes of its findings on each relevant section of the Act. An 'upheld' finding is a finding for the requester, a 'not upheld' finding is a finding for the public body, and a 'partly upheld' one finds for both sides. In the 6,168 Decision Notices analysed, there were 9,495 individual findings. Of these, 27% were upheld, 39% were not upheld and 34% were partly upheld.

openDemocracy classified the 6,168 complaints based on their 9,495 findings. Complaints with exclusively upheld findings were classified 'upheld', complaints with exclusively not upheld findings were classified 'not upheld', and those with mixed findings (upheld, not upheld or partly upheld) were classified as 'partially upheld'. Decision Notices were further classified by financial year (ending 31 March), relevant law (FOI/EIR), and complaint type (procedural/exemption-based).

With the help of mySociety, pdfs of the 6,168 Decision Notices were then algorithmically analysed to extract key information about the complaints' chronologies (date of request and date of complaint to the ICO). This allows us to see how long it takes requesters to move through the request and internal review stages and how quickly the commissioner processes complaints. Additional algorithmic analysis identified key phrases that are proxies for certain actions and behaviours by both public bodies and the ICO (full details are in the methodology section).

The result of this is the first macro-level picture of ICO complaint resolution, which has generated new insights on the outcomes and durations of ICO complaints, and on two types of Decision Notice that serve very different purposes.

It should be stressed that Decision Notices are neither representative of the full spectrum of the ICO's work nor of FOI practice across the public sector. In the absence of such illustrative data, however, analysing Decision Notices offers indicative insights into both public sector compliance and ICO enforcement.

Part one of this section is based on a sample of 5,350 Freedom of Information and Environmental Information Regulations²⁷ Decision Notices. The remaining 818 Decision Notices serve a different purpose and are analysed separately below.

In these 5,350 cases, the ICO reviewed an authority's handling of and response to both the request and the internal review. In some cases, it also considered whether exemptions applied to the requested information and, in some of these cases, whether the public interest favoured disclosure.

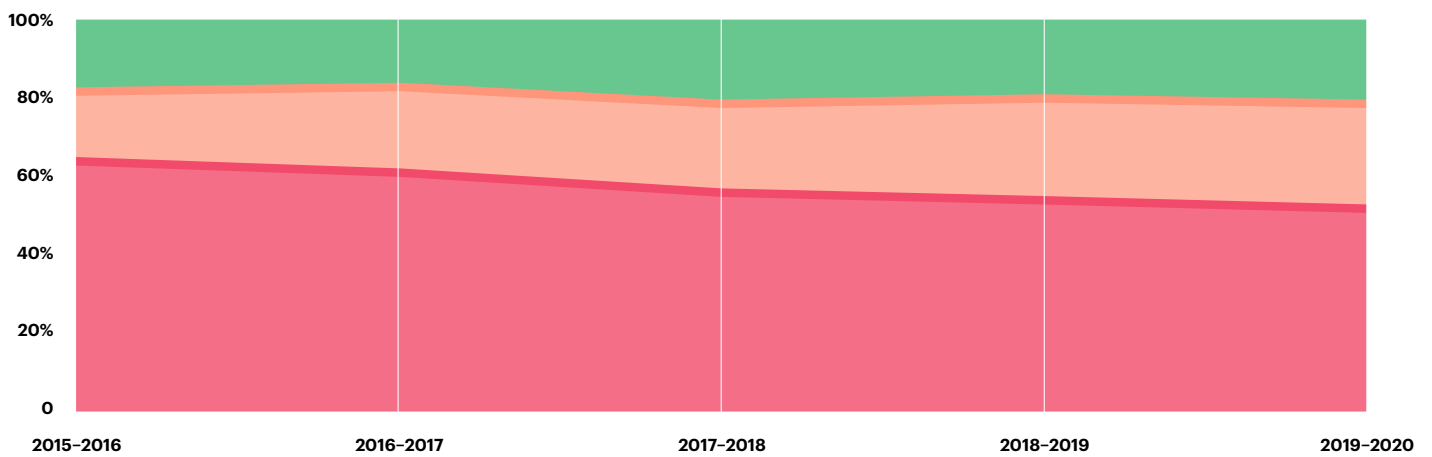
²⁶ This represents all the Decision Notices published by the ICO in the last five years - minus 514 Decision Notices that were excluded by openDemocracy from the analysis because we were unable to machine-read and extract information from them accurately. An additional 282 Decision Notices were not published by the ICO in this time - due mainly to administrative error.

²⁷ The Environmental Information Regulations 2004 is a parallel instrument that governs public access to environmental information. Its origins lie in the UNECE Aarhus Convention and the EU Council Directive 2003/4/EC.

ICO Decision Notices

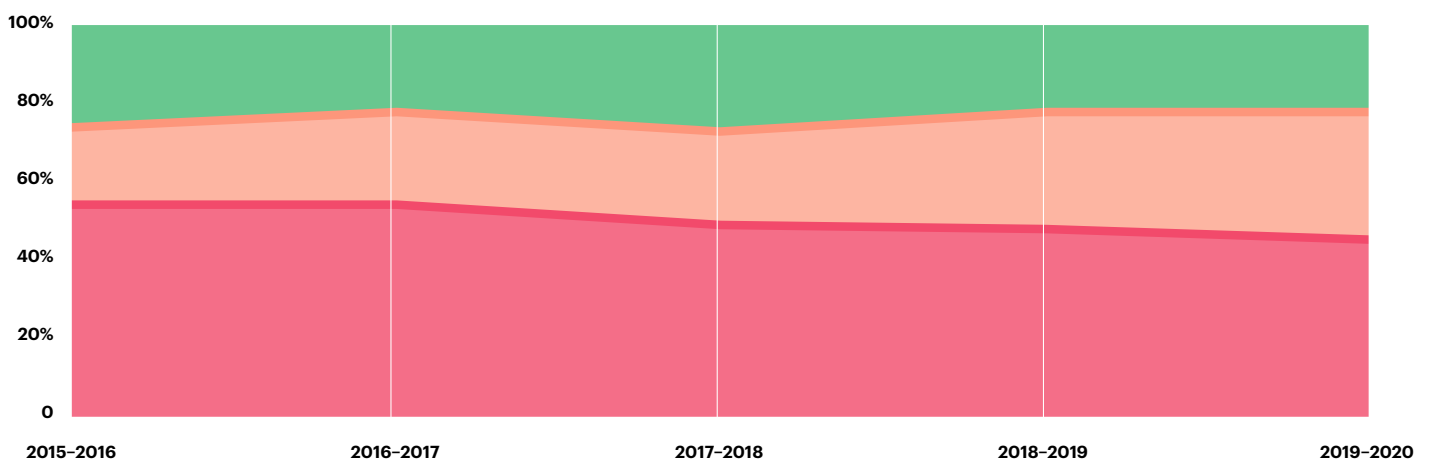
Our analysis shows that the ICO is increasingly finding in favour of requesters. The number of partially or fully upheld decisions has increased by a third over the last five years. In 2019-20, 48% of complaints were fully or partially upheld. This means that public bodies failed to apply the Act correctly almost half the time.

Fig 5: Outcomes of ICO complaints



Decision Notice outcome by sector

Fig 6a: Outcomes of ICO complaints: local government (2,102 Decision Notices)



- Upheld
- Partially upheld
- Not upheld

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

Decision Notice outcome by sector (continued)

Fig 6b: Outcomes of ICO complaints: central government (1,491 Decision Notices)

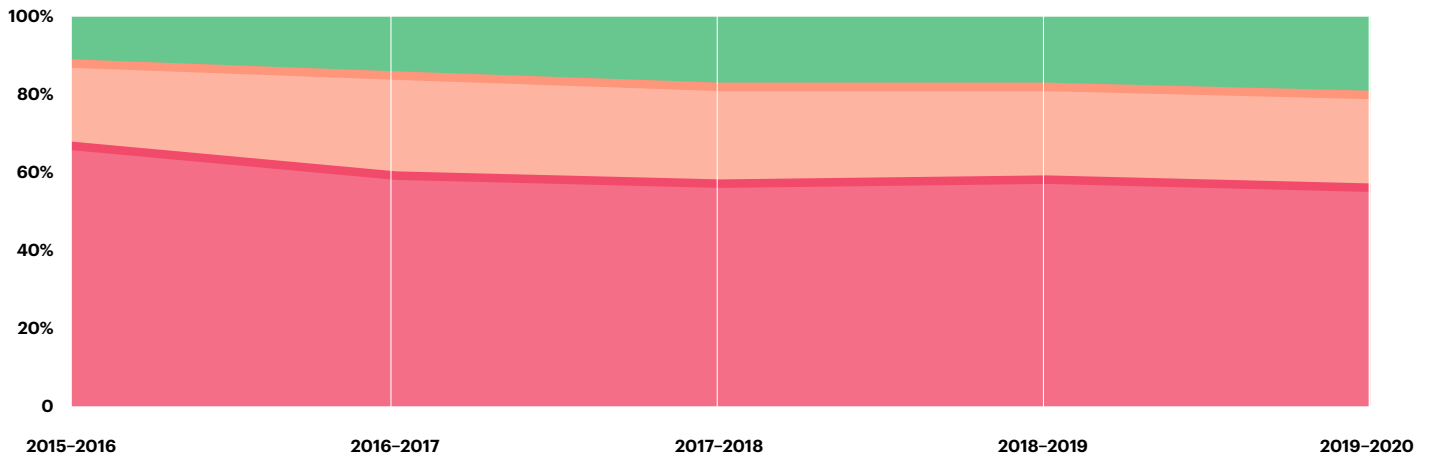


Fig 6c: Outcomes of ICO complaints: police and criminal justice (499 Decision Notices)

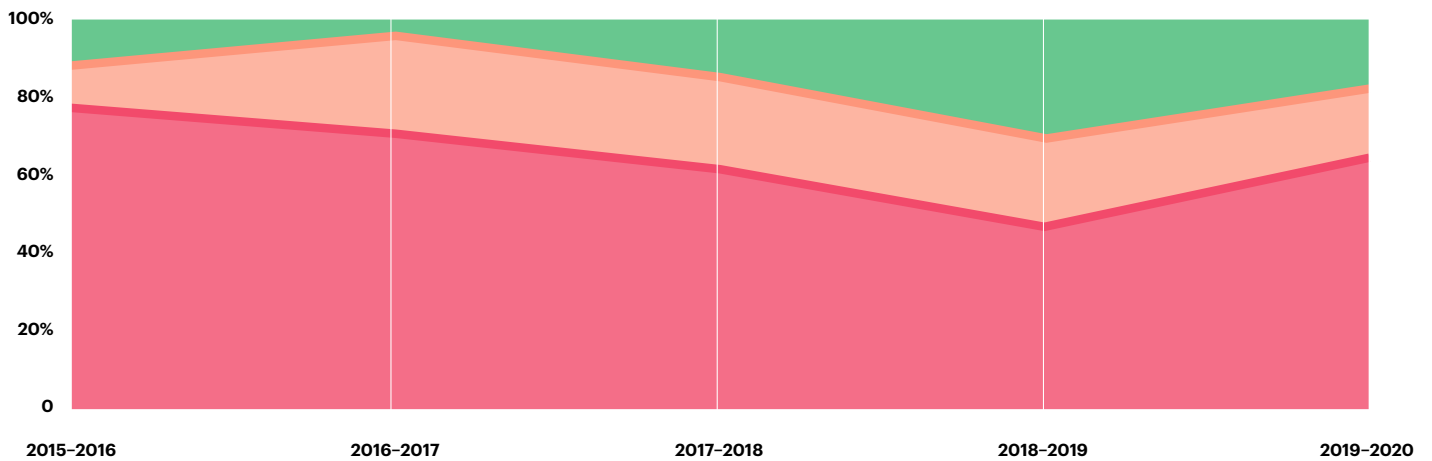
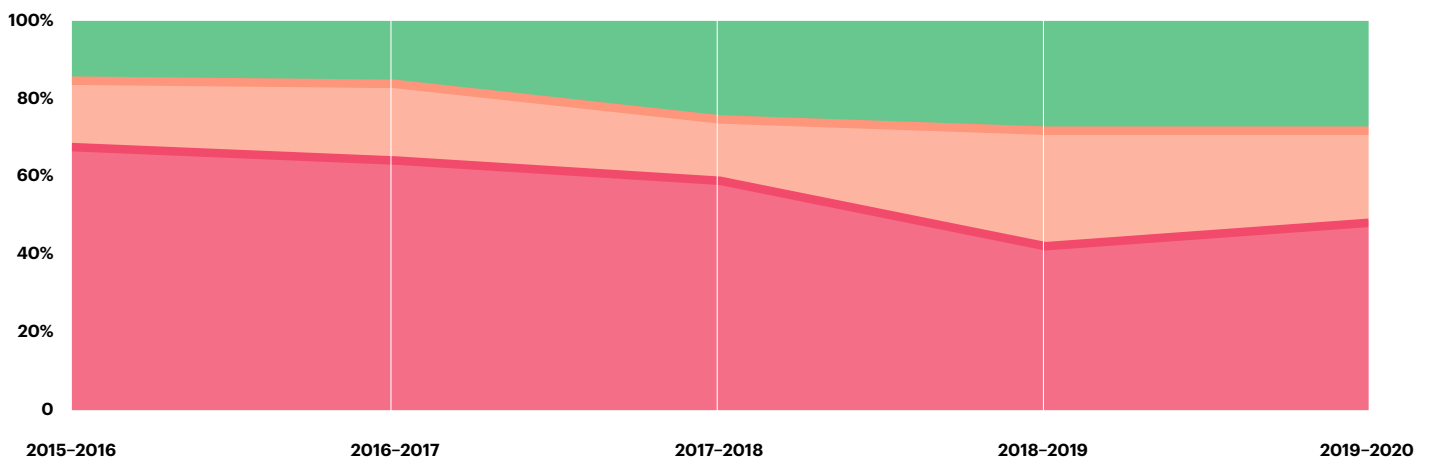


Fig 6d: Outcomes of ICO complaints: health (429 Decision Notices)



- Upheld
- Partially upheld
- Not upheld

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

Exclusively procedural complaints

The increase in ICO findings against public bodies has been driven by a surge in the number of fully or partially upheld exclusively procedural complaints²⁸. These complaints are only concerned with the way a request was handled: did the authority interpret the request correctly? Did it reply within twenty days? Did it issue a valid refusal notice?

The number of procedural complaints has remained relatively steady over time - increasing from 43% to 47% over the last five years. But the percentage of these that were fully or partially upheld has increased from 38% in 2016 to 55% in 2020.

This is not a sign of good health. It suggests that authorities are fumbling the basics of a high - and growing - proportion of requests. In 2019 and 2020, the ICO ruled against public bodies on procedural issues more than half the time.

Exemption-based complaints

Exemption-based complaints challenge an authority’s decision to withhold information from disclosure by application of one of the Act’s 24 exemptions (for example, because the information is personal data or because disclosure would or would be likely to prejudice UK relations with another country). Some exemptions have a public interest test which means that - even if the exemption applies - the public interest may still favour disclosure.

These complaints are usually more complex than procedural ones because they require the ICO to analyse the disputed information, rule on whether the exemption has been correctly applied and on where the public interest lies. The number of fully or partially upheld exemption-based complaints has increased by 20% over the last five years and now stands at 42%.

Fig 7a: Outcomes of procedural ICO complaints (2,374 Decision Notices)

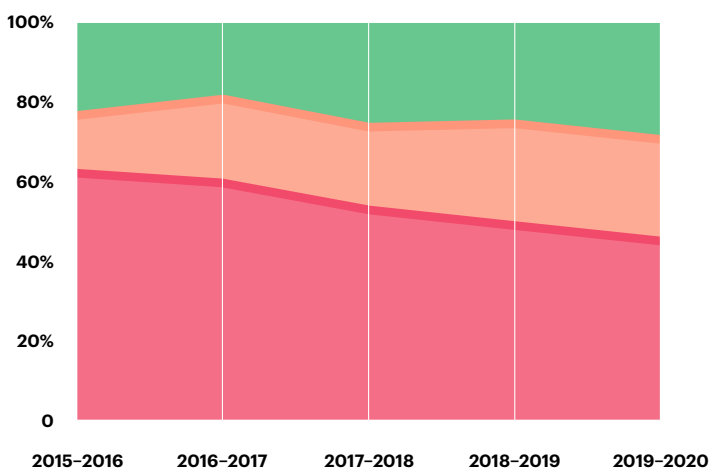
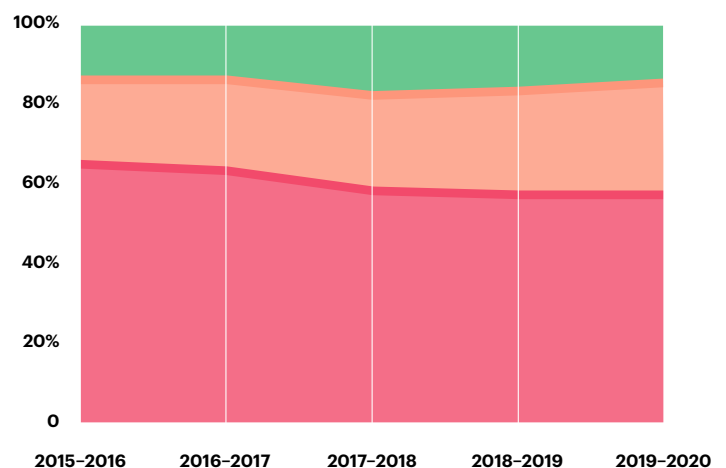


Fig 7b: Outcomes of exemption-based ICO complaints (2,975 Decision Notices)



- Upheld
- Partially upheld
- Not upheld

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

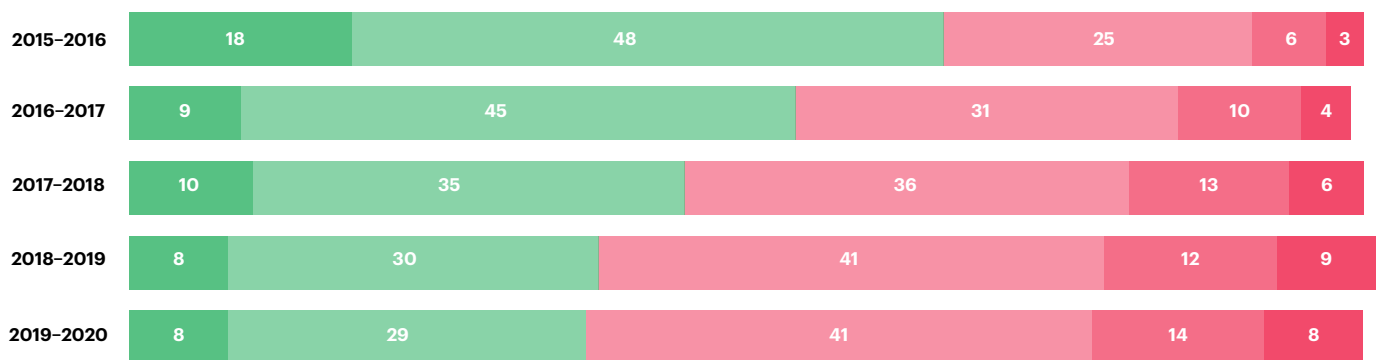
²⁸ openDemocracy has classified Decision Notices that make a ruling on one or more sections of Part I of the Act only (sections 1-20) as exclusively procedural.

Timeliness

In the early years of FOI, the ICO was criticised for allowing a large backlog of casework to develop, and for regularly taking more than a year to process complaints²⁹. These delays were perceived to be a ‘teething problem’ and the second commissioner, Christopher Graham, successfully reduced wait times significantly.

But the ICO is backsliding. In 2016, 66% of complaints were resolved within 180 days, but by 2020 only 37% were resolved in the same time frame. Given the reductions in openness at the request and internal review stages (as described above), these delays are particularly significant. Disclosures under the Act are now bottlenecking at the ICO.

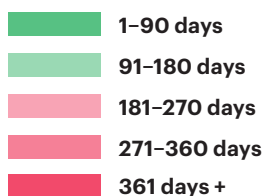
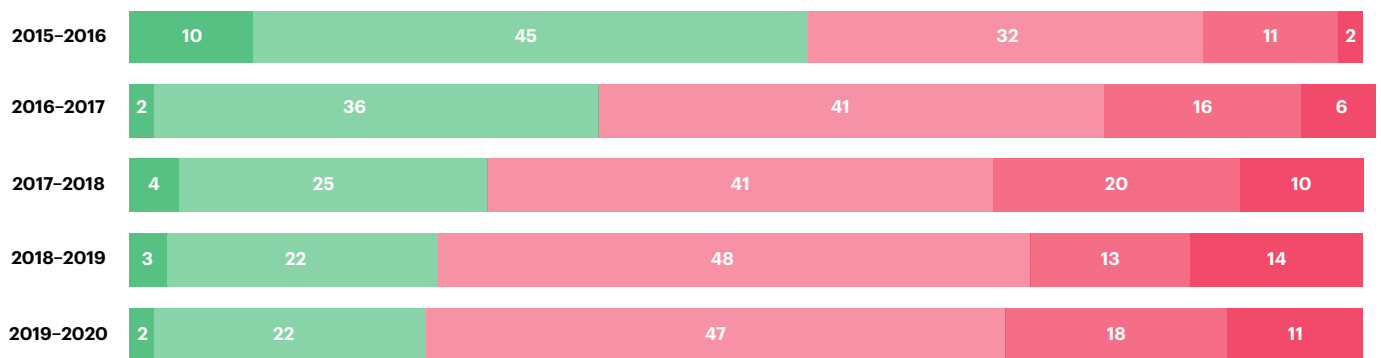
Fig 8a: Average duration of ICO complaints concluding with Decision Notices (calendar days)



Decisions with instructions

The wait times are even longer for decisions that instruct a public body to take remedial steps - such as disclosing information or issuing a new response. These cases are complex but they are also the ones that ‘actually mean something’ for transparency and accountability. The ICO takes significantly longer to issue these decisions - with more than a quarter of them taking longer than 271 days. In one case, a complainant waited 1,013 calendar days for the ICO to issue a decision against E.ON, the energy company, under the EIRs³⁰.

Fig 8b: Average duration of ICO complaints concluding with Decision Notices that contain instructions (calendar days)



Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

²⁹ <https://www.palgrave.com/gp/book/9780230250345>

³⁰ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617169/fer0678164.pdf>

Cumulative delays

The growth in wait times at the ICO is disheartening news for requesters who already face delays at earlier stages of the process. A request and internal review should normally take no more than 28 calendar days each, but analysis of the chronologies in our sample of Decision Notices shows that these processes took, on average, a cumulative 123 calendar days. Many took significantly longer - in 197 complaints more than one year elapsed between the date of request and date of complaint to the commissioner.

(We cannot tell how much of this is due to delays at the public body's end and how much is due to the tardiness of requesters in preparing their appeals. The data in section one does indicate that central government bodies are frequently late in responding to requests and internal reviews, but requesters also take time to prepare their appeals.)

In cases with instructions, the ICO then took an average of 226 calendar days to issue its findings. Since the ICO also gives authorities 35 days to comply with its instructions, this means that successful complainants wait more than a year, on average, to obtain information.

Case study

On 18 January 2018, openDemocracy sent a request for communications between Steve Baker, Minister for the Department for Exiting the EU (DExEU), and members of the parliamentary European Research Group (ERG) - of which Baker was a former chairman.

On 5 March, DExEU responded, refusing the request - citing section 35(1)(a), which exempts information related to the formulation of government policy, and section 35(1)(d), which exempts information related to the operation of any ministerial private office. Both these sections are subject to a public interest test, which means if the public interest in disclosure outweighs the public interest in withholding the information, then the exemption ceases to apply.

At the time, the ERG, a publicly funded group composed exclusively of elected MPs, was widely reported to be exerting significant influence over the government's Brexit policy. Despite this, the ERG's membership, activities and research outputs were secret. The request carried an urgent public interest because it was important for the public to know whether Baker had continued to communicate, as a minister, with the secretive and influential group that he had once led. For this reason, on 13 April, open Democracy requested an internal review of the DExEU decision.

On 6 July, DExEU completed its internal review. The department stated that some information it initially considered within the scope of the request but exempted by s.35(1)(a) was actually out of scope because it was party political and not relevant to Baker's ministerial brief. It found that the public interest in withholding the information caught by s.35(1)(d) outweighed the interest in disclosure - save for a line of correspondence about the logistics of meetings. Additionally, it stated that the names and emails of correspondents were exempt by virtue of s.40(2), which protects the release of personal data.

But the FOI legislation also requires the authority to consider whether disclosure of personal data is 'fair'. MPs and high-ranking public officials expect scrutiny in the course of their jobs, and their names and email addresses are often already in the public domain, which would often make it fair to disclose in a context like this.

On 6 September, openDemocracy complained to the ICO and challenged the application of s.35(1)(d) and s.(40)2 - as well as whether the information that DExEU claimed was party political was in scope. The commissioner issued a decision on 4 March 2019, which ordered DExEU to release the exempted information - but agreed with DExEU's finding that the information deemed out of scope was party political.

On 5 April 2019, DExEU finally disclosed the names of the ERG members who had corresponded with Baker. The disclosures showed that prominent eurosceptic Conservative MPs, former Conservative cabinet ministers and a Conservative MEP were part of a 'senior circle' within the ERG³¹. The disclosure was hard fought - resisted and delayed by DExEU every step of the way - and was sixteen months in the making.

Why does the ICO take so long to issue Decision Notices?

Investigating FOI complaints is time-consuming and resource-intensive. The ICO may need to correspond with the complainant, obtain information and submissions of evidence from the public authority, consult the legislation, analyse the requested information, and consider the public interest test - before writing it all up in a Decision Notice.

The problem with long wait times is that as information ages, it loses potency. Long waits at the ICO are compounded by regular delays at the request and internal review stages and mean that requesters often wait in excess of twelve months for their information - which is a long time in British public life.

At least some of the delay in investigating complaints could be overcome if the ICO used its enforcement tools more liberally. While investigating a complaint about the Cabinet Office in 2019, the ICO wrote to the department five times over a ten-week period to request submissions of evidence in support of its refusal, and a copy of the requested information³². The ICO received no response - it was stonewalled.

Later in the year, the Ministry of Defence (MoD) and Department of Health and Social Care (DHSC) also failed to comply with multiple requests for information over periods of fifteen weeks³³ and nine weeks³⁴, respectively (although they did offer responses).

In all three cases, the ICO ultimately issued a formal Information Notice ordering the bodies to provide the required information within thirty days - or have the matter referred to the High Court. But what these notices suggest is that the ICO is patient to a fault. It is prepared to accept multiple delays, requests for extensions and even stonewalling before it issues an Information Notice.

It is unclear why the ICO makes such infrequent use of Information Notices (the ICO's website states that as of November 2020 it has issued 28 since June 2019³⁵ while processing more than 1,000 complaints). Information Notices give authorities thirty days to submit a copy of the requested information and its arguments for withholding it, which seems a reasonable time frame. After all, authorities should have prepared this material during the request and internal review stages.

It is plausible, however, that public bodies require extensions because they are not responding to requests in good faith and are betting on requesters failing to use the appeals process.

The ICO may argue it does not wish to unduly burden authorities with formal enforcement procedures. Yet requesters may counter that the commissioner does not consider their right to access information promptly with due regard.

³¹ <https://www.opendemocracy.net/en/dark-money-investigations/key-members-of-jacob-rees-moggs-pro-brex-it-mp-lobby-group-finally-revealed/>

³² <https://ico.org.uk/media/action-weve-taken/information-notices/2617123/fs50811968.pdf>

³³ <https://ico.org.uk/media/action-weve-taken/information-notices/2617363/fs50838374.pdf>

³⁴ <https://ico.org.uk/media/action-weve-taken/information-notices/2617537/fs50829652.pdf>

³⁵ <https://ico.org.uk/action-weve-taken/information-notices/>

Complaints about stonewalling

Analysis by openDemocracy has found that ICO decisions perform two distinct functions. The ICO's primary role is to review a public authority's decision to withhold information under the Act (as described above). This section, however, examines a lesser-known function of Decision Notices: to intervene on behalf of requesters in cases where public bodies have failed to issue a response of any kind whatsoever.

On 15 June 2017, the day after the Grenfell Tower fire, the Royal Borough of Kensington and Chelsea (RBKC) received three FOI requests asking for records of previous fire-related incidents, whether the council had considered installing a sprinkler system, and for the minutes of fire safety meetings. On the same day, the council received another request for correspondence between key individuals in the council, the press office and the tenant management organisation.

More requests were submitted over the next two months, seeking:

- correspondence between councillors and refurbishment contractors
- refurbishment tender documents and invoices from contractors
- safety, legal and financial governance protocols between the council and the tenant management organisation
- a structural engineering report of the fire damage to Grenfell Tower
- information on the rehousing of residents following the fire.

The urgency and public interest of these requests was exceptional. Public debate on the legacy of austerity, the likelihood of corporate manslaughter charges, and the welfare of tenants would dominate the summer. Yet reliable information was rare - the death toll was not even announced until five months after the fire (72 people lost their lives³⁶).

Councillors and executives at RBKC had much to fear and little to gain by disclosing the requested information. Yet refusing the requests would allow requesters to begin the appeals process and, after internal review, to complain to the ICO, which might order damaging disclosures. In the end, RBKC neither granted nor refused the requests - the council simply did not respond at all.

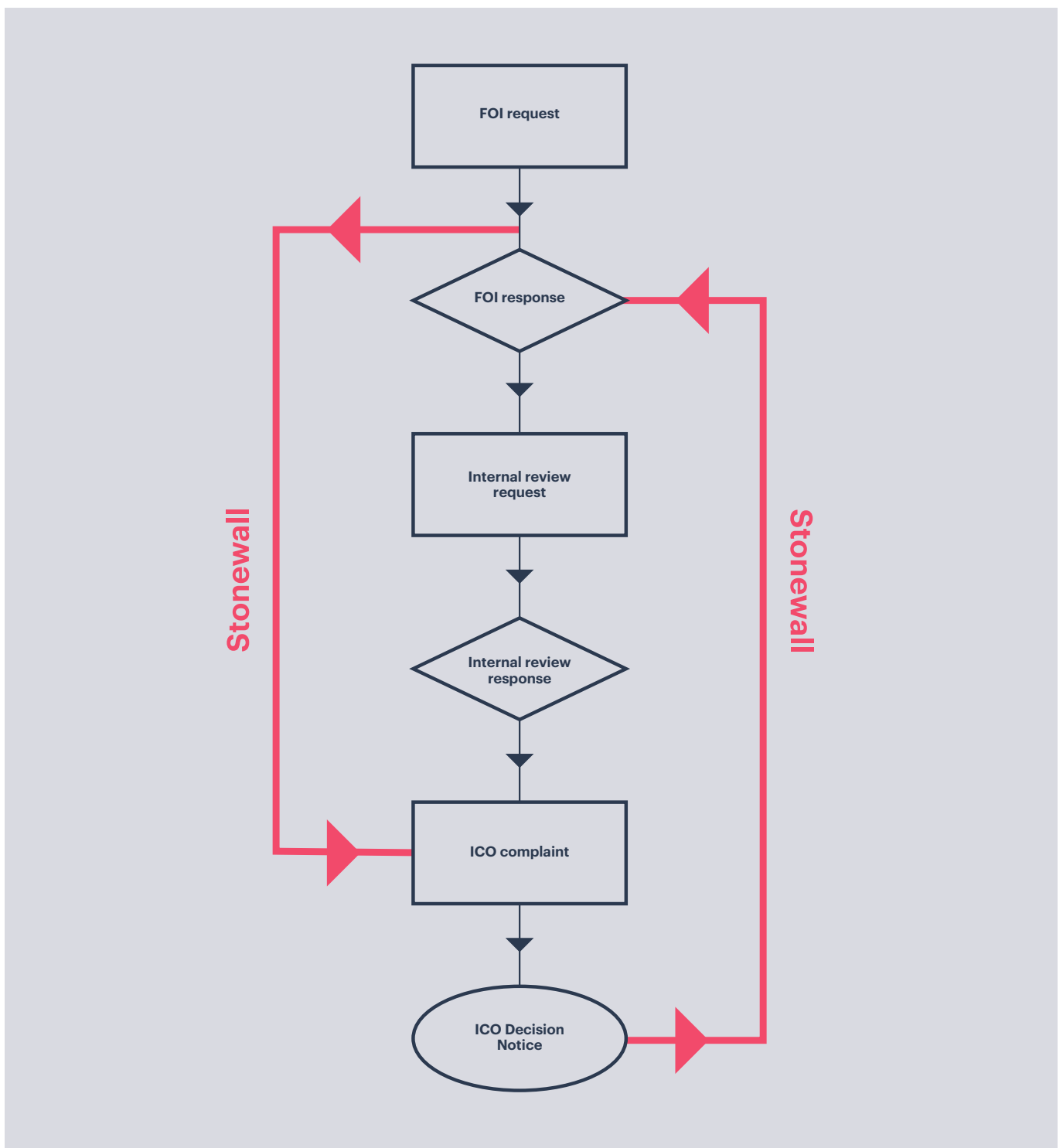
When a request is refused, it can be appealed. But what happens to a request that is neither granted nor refused? It is trapped in a legal limbo where the requester can neither access the information she wants nor fully enter the appeals process. This tactic - of refusing to engage in the process itself to delay an outcome - is called stonewalling. The term (borrowed from marriage counselling) was popularised in politics by Richard Nixon during the Watergate crisis when he was recorded on tape urging his aides to "stonewall it".

Requesters who get stonewalled can complain to the ICO, but only about the fact that their request has not been responded to. This is in contrast to the rules on 'administrative silence' in other FOI jurisdictions such as Ireland and Spain, in which a failure to respond to a request is deemed to be a refusal. This 'deemed refusal' can then be appealed and the regulator can review all aspects of the request - including whether the requested information should be disclosed, not merely the fact that the authority did not respond.

In the two months after the Grenfell Tower disaster, at least seven complaints about RBKC stonewalling were submitted to the ICO. In each case the commissioner asked the council to respond to the requests within two weeks. But RBKC continued to do nothing: it did not even acknowledge the ICO's letters.

In these seven cases, an average of 129 days passed before requesters complained to the ICO, which then took an average of 87 days to investigate the complaints and issue Decision Notices that (standardly) granted RBKC 35 more days to comply. In total, requesters waited around 251 days - more than eight months - for RBKC to provide a response to their requests. This response, when it came, could still have been a formal refusal that would require requesters to re-enter the appeals process.

Fig 9: Stonewalling complaints procedure



Stonewalling across government

RBKC was not the first or the last public body to use this tactic to avoid or delay a disclosure. In 2016-20, the ICO issued 818 Decision Notices ordering public authorities to simply respond to a request. Not to release information, consider the application of exemptions, or weigh up the public interest in disclosure - but to intervene on behalf of the requester to compel a public body to simply provide a response.

Outcomes of ICO complaints about stonewalling (818 Decision Notices)

Outcome	2015-16	2016-17	2017-18	2018-19	2019-20	Total
Not upheld	0	0	0	0	0	0
Partially upheld	0	0	1	0	1	0
Upheld	116	130	162	211	197	816
Total	116	130	163	211	198	818

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

This report - the first overview of stonewalling - shows that it is now happening more frequently and in more bodies across the public sector. The number of Decision Notices about stonewalling has increased by 70% since 2016. The number of public bodies guilty of stonewalling requesters has also more than doubled from 51 to 116 in that time. In total, 99.8% of complaints about stonewalling were upheld in full - with 0.2% partially upheld - in the last five years.

These documented instances may be nominally low, but only a small fraction³⁷ of requests are pursued to ICO complaint stage. Moreover, the ICO's "usual practice"³⁸ is to try to resolve a stonewall complaint informally, which does not create a public record of the process.

Nonetheless, in 2020 more than 15% of all the ICO's Decision Notices were stonewalling interventions, which suggests the true scale of the problem is significant. Stonewalling may also have a disproportionate impact on requests with an urgent public interest. openDemocracy has heard off-the-record reports that some public bodies use stonewalls sparingly but strategically to undermine requests that carry reputational risks.

³⁷ Less than 1% of requests to central government and other monitored bodies are taken to the ICO (there is no data for the wider public sector).

³⁸ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616428/fs50882320.pdf>

Stonewalling across sectors

Central government has historically been the worst sector for stonewalling, with the Home Office, Ministry of Justice, Cabinet Office and Foreign Office accounting for 85% of the ICO caseload in the past five years. Complaints against central government have declined since 2018, but this has been offset by growth in local government and policing complaints. In 2019, stonewalling decisions against local authorities increased fourfold - from 18 to 77.

Three police forces have chronic stonewalling problems. The forces of Sussex, the Met and the City of London were responsible for half of the 108 decisions in the police and criminal justice sector. NHS England, the organisation that leads the NHS, is by far the worst offender in the health sector - picking up 35% of all decisions.

Number of ICO complaints about stonewalling (by sector)

Sector	2015-16	2016-17	2017-18	2018-19	2019-20	Total
Central government	62	60	95	55	39	311
Education	6	10	10	6	9	41
Health	10	25	25	33	19	112
Local government	18	20	18	77	75	208
Other	1	7	9	12	7	36
Police and criminal justice	18	7	6	28	49	108
Private companies	1	1	-	-	-	2
Total	116	130	164	211	198	818

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

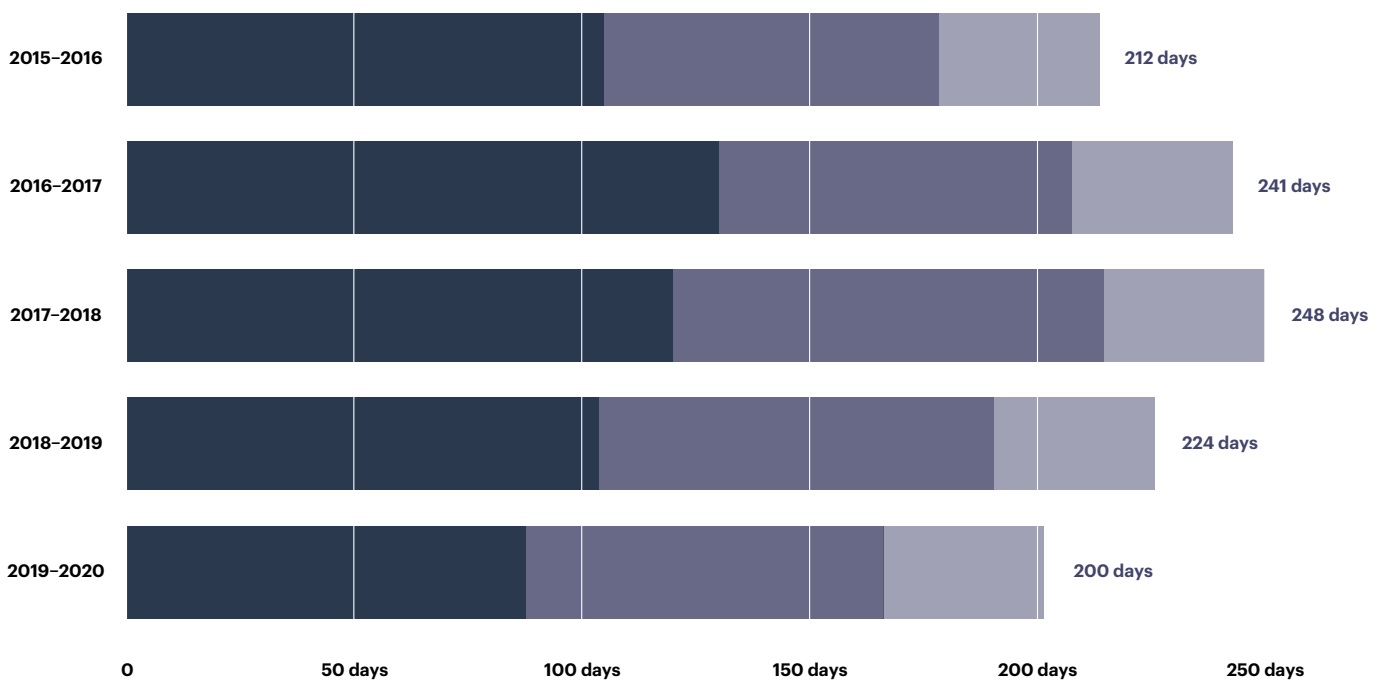
The waiting game

Although the outcome is never in doubt, the end-to-end process from request to response takes, on average, more than seven months to complete. By forcing requesters to play a waiting game, authorities can take the sting out of an embarrassing disclosure.

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.

The Decision Notice itself gives authorities 35 calendar days to comply with the ICO's direction, which means, on average, requesters who were stonewalled had to wait up to 223 days to receive a response to their request. This response could still be a refusal, which would require the requester to begin a fresh course of appeal.

Fig 10: Number of ICO complaints about stonewalling (by sector)



Information request
 ICO complaint
 Compliance period

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

What explains the growth in stonewalling?

The ICO has the remit and powers to take action against authorities with systemic compliance problems - such as stonewalling. But the commissioner has, historically, preferred a passive and patient approach to enforcement.

In the last five years, the ICO has issued at least one stonewalling Decision Notice per year - and often many more - against the Cabinet Office, Home Office, Foreign Office, Ministry of Justice, NHS England and the Metropolitan Police. To address such cases of systemic non-compliance, the ICO has two regulatory tools.

The ICO could issue an (advisory) practice recommendation which suggests how to bring compliance in line with the FOI Code of Practice. Or it could issue a (binding) enforcement notice, which compels an authority to take specified action. Yet the commissioner has never used either power directly in relation to stonewalling. This is concerning because - short of destroying official documents - stonewalling is among the worst offences an authority can commit in terms of information rights compliance.

The risk here is that the ICO's lack of action emboldens public bodies and creates new norms of non-cooperation. And once a principle of 'collective irresponsibility' is established, it becomes very difficult to challenge it. In this sense, there is a lot resting on the will and capacity of the commissioner to tackle stonewalling immediately.

Number of ICO complaints about stonewalling (by sector)

Public body	2015-16	2016-17	2017-18	2018-19	2019-20	Total
Home Office	19	30	60	22	12	143
Ministry of Justice	16	12	25	5	6	64
Cabinet Office	10	4	1	13	12	40
NHS England	2	12	12	12	2	40
Sussex Police	4	0	2	8	15	29
Metropolitan Police Service	4	1	2	3	12	22
Foreign and Commonwealth Office	6	3	4	5	1	19
BBC	0	1	5	8	0	14
Royal Borough of Kensington and Chelsea	0	0	6	6	1	13
Norfolk and Norwich University Hospitals NHS Foundation Trust	0	4	3	1	1	9

Source: openDemocracy analysis of 6,168 ICO Decision Notices issued between 2015-16 and 2019-20

ICO enforcement

The ICO's inaction on stonewalling highlights a wider lack of enforcement. Over the last decade the ICO has issued only one practice recommendation (to the London Borough of Waltham Forest in 2020) and one enforcement notice (to the Department of Finance and Personnel for Northern Ireland in 2015). This timidity has attracted criticism - notably in a 2013 Financial Times editorial that described the then commissioner Christopher Graham as a "Paper Tiger"³⁹.

ICO enforcement has remained anaemic under the leadership of the current commissioner Elizabeth Denham - despite pledges to ramp up activity. The ICO's 2019-22 FOI strategy 'Openness by Design' promises a "step change" in enforcement that targets non-compliance through enforcement⁴⁰. But the strategy is light on detail and gives no concrete information on how it will pursue enforcement or use its powers. The commissioner's broader 'Regulatory Action Policy' strikes a similar note⁴¹. The issuance of a single new practice recommendation in 2020 is encouraging - but clearly there has been no step change.

There are two primary reasons behind the ICO's troubles with enforcement: money and politics. Deep austerity cuts and rising caseloads have massively diminished the commissioner's capacity. The ICO's FOI budget was cut from £5.2 million in 2010-11 to £3.7 million in 2014-15 and has remained at roughly this level. This amounts to a 41% budget cut over a decade after adjustment for inflation.

Meanwhile, the number of casework complaints the ICO receives annually has risen by 46% in the same period. Consequently, the ICO's funding per complaint has dropped from £1,460 in 2010-11 to £589 in 2019-20 - a decrease of 60%. Cuts of this scale are bound to have profound consequences for the scope and scale of the ICO's enforcement.

³⁹ <https://www.ft.com/content/a5122378-fb68-11e2-8650-00144feabdc0>

⁴⁰ https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_design_strategy_201906.pdf

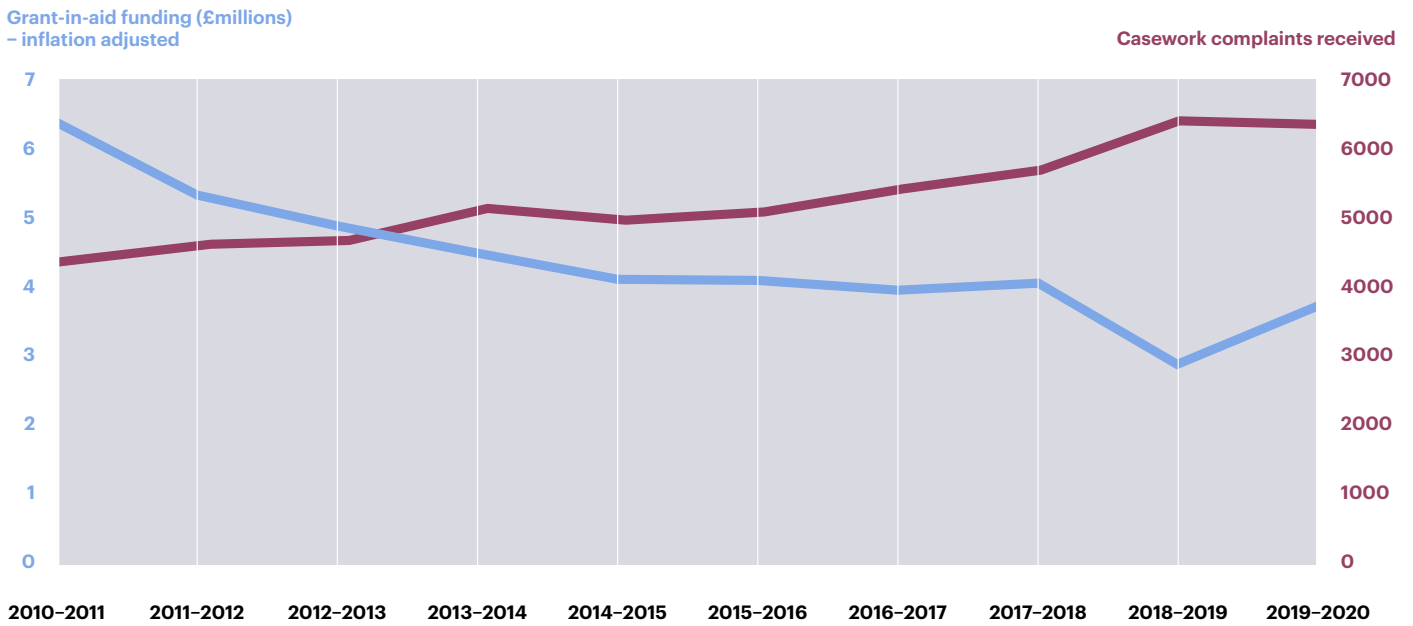
⁴¹ It is also remarkable for the lack of attention it gives to FOI, in comparison with data protection.

⁴² <https://www.cfoi.org.uk/2020/06/robust-approach-to-foi-time-limits-stalled-by-pandemic/>

There may have been, until recently, appetite for a more robust enforcement approach within the commissioner's office. An FOI request in 2020 highlighted by the Campaign for Freedom of Information (CFOI) revealed that the ICO drafted enforcement notices against the Metropolitan Police and another unnamed body in the police and criminal justice sector in January 2020. The request also revealed that in 2019 the ICO had internally recommended monitoring the response times of 38 public bodies (five government departments, eleven police forces and 22 London Boroughs).

Yet the COVID-19 pandemic appears to have ended this wave of action before it started. The enforcement notices against the police authorities were never issued and ongoing monitoring was paused. In response to the request highlighted by CFOI, the ICO stated that the approach under which this enforcement activity took place was changed in May 2020. The ICO added that it "will now 'be concentrating on producing thematic reports, our FOI self-assessment toolkit, and sharing good practice'", according to CFOI⁴². It remains to be seen whether the ICO will attempt to revert to this approach in a post-pandemic world.

Fig 11: ICO: funding and casework complaints 2010-11 – 2019-20



Source: ICO annual reports 2010-11 to 2019-20

Underfunding has undoubtedly hindered enforcement, but, even while fully funded, the ICO’s enforcement approach was less than robust. Both the commissioner’s lack of funding and her light-touch regulatory approach are rooted in a bigger problem: a lack of autonomy.

The ICO describes itself as an “independent authority” - and in many respects it is. The commissioner is appointed by the Crown - meaning her appointment is subject to the approval of the Queen and a resolution of both Houses of Parliament is needed to remove her from office. Most of the ICO’s revenue is earned from data protection fees levied on businesses.

The ICO’s FOI budget, however, is ring-fenced and allocated annually by a departmental sponsor (DCMS). This arrangement clearly makes the commissioner vulnerable to political pressure because she depends on government ministers to sign off her budget.

A regulator that reports directly to parliament is protected from ministerial manoeuvring and empowered to make decisions that are unpopular with the government. Many watchdog institutions are governed this way, such as the National Audit Office and the Parliamentary and Health Service Ombudsman.

The Office of the Scottish Information Commissioner (OSIC) is funded by and reports to the Scottish parliament. Recognising this need for independence, parliamentary committees in 2006⁴³ and 2014⁴⁴ have recommended reforms to make the ICO directly accountable to parliament.

The ICO’s governance arrangement was always a risk in principle, but five years ago it became a problem in practice. In 2015, sponsorship of the ICO was transferred from the MoJ (Ministry of Justice) to DCMS - but during this transition the Cabinet Office assumed “policy responsibility” for FOI⁴⁵. This was controversial because the Cabinet Office not only represents the highest level of British political power, it also has the worst FOI record of any major government department (as detailed on page 15).

⁴³ <https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/991/99109.htm#a22>

⁴⁴ <https://publications.parliament.uk/pa/cm201415/cmselect/cmpublicadm/110/11009.htm>

⁴⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566470/HMG_TR_ICO_report.pdf

The Cabinet Office also regularly stonewalls requesters (the ICO has issued 40 Decision Notices against the department for stonewalling since 2016) and even stonewalls the ICO during its investigations (twelve of the 28 ICO Information Notices issued since June 2019 have been to the Cabinet Office).

Yet the department now oversees the ICO's FOI policy, and the government can exert additional influence via DCMS when setting the ICO's annual budget. This doesn't necessarily make Elizabeth Denham a Paper Tiger - although the ICO's enforcement record speaks for itself. It is clear, however, that the commissioner is working in a governance structure that is constitutionally inadequate for an independent regulator.

It is also worth considering just how invested the ICO's leadership team are in FOI. The commissioner's data protection income is around twelve times its FOI budget and the ICO's latest annual report writes up its FOI activity in just half a page.

The loophole in the law: public contractors

Over the past two decades, the government has massively increased its use of private contractors to deliver public services. Today, public procurement is worth £284 billion⁴⁶ - roughly a third of all public spending.

Private contractors have run hospitals, railways and prisons for many years. Today, they also deliver major government policies. The complex supply chains that support them span businesses and voluntary organisations of all shapes and sizes.

But FOI doesn't apply to the contractors delivering "modern public services"⁴⁷. When the Act was passed in 2000, public services were generally delivered by public bodies - so it was logical for the law to focus on them. That has changed.

The scope of the law is now shrinking as more and more government business is outsourced. FOI can no longer deliver its core aims - of increasing the transparency and accountability of government - without reaching into public services now delivered by other means.

The urgent need for reform has been underlined by the poor performance of many private contractors tasked with delivering Personal Protective Equipment (PPE), testing and contact-tracing services during the Covid-19 crisis⁴⁸.

A consensus on closure

A consensus is developing among civil society, parliamentary committees and even companies themselves that the 'contractors' loophole should be closed and that FOI rights should follow the public pound - regardless of how that pound is spent.

In 2019, the ICO's report 'Outsourcing Oversight?'⁴⁹ stated: "The current law is not fit for purpose. It needs to keep pace with the changes in the modern public sector and public expectations."⁵⁰ Both the Committee on Standards in Public Life⁵¹ and the Public Administration and Constitutional Affairs Committee (PACAC)⁵² voiced similar concerns a year prior.

Contractors themselves also seem to understand demands for more transparency. In 2013, the Public Accounts Committee (PAC) wrote that Atos, Capita, G4S and Serco "were content that Freedom of Information provisions should apply to public sector contracts with their companies"⁵³. During the inquiry into the collapse of Carillion, "the CBI said that there was little if any information that companies would be unwilling to disclose", according to PACAC⁵⁴.

Government opposition

PACAC added that, according to the CBI, "it was public sector authorities rather than private sector companies who obstructed publication." This echoes the conclusions of the PAC, which suggested that since contractors are accepting of the need for FOI, "the barriers lie instead with government itself."⁵⁵

The incentive for maintaining secrecy is clear. Opening up contractors to FOI would lead to a new wave of criticism and perhaps even scandal. But this transparency would, in the long run, ensure that public money is used more scrupulously. This is one of the reasons FOI was introduced.

⁴⁶ <https://www.instituteforgovernment.org.uk/summary-government-procurement-scale-nature-contracting-uk>

⁴⁷ <https://ico.org.uk/media/about-the-ico/documents/2614204/outsourcing-oversight-ico-report-to-parliament.pdf>

⁴⁸ See for example <https://www.opendemocracy.net/en/dark-money-investigations/useless-deloitte-accused-of-ppe-failings-amid-covid-19-deal-secrecy/>; <https://www.mirror.co.uk/news/politics/tory-linked-firm-behind-contaminated-22504634>; <https://www.bbc.co.uk/news/business-53678246>; <https://www.ft.com/content/27dfb02e-7442-4c9d-9cd5-538b88758764>

⁴⁹ The author of this study, Lucas Amin, in collaboration with Spend Network, wrote a background study for the ICO on this subject in 2018.

⁵⁰ <https://ico.org.uk/media/about-the-ico/documents/2614204/outsourcing-oversight-ico-report-to-parliament.pdf>

⁵¹ <https://www.gov.uk/government/news/limited-progress-on-ethical-standards-in-outsourced-public-services-cspl-publishes-latest-report-on-ethical-outsourcing>

⁵² <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/748/748.pdf>

⁵³ <https://publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/77703.htm>

⁵⁴ <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/748/748.pdf>

⁵⁵ <https://publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/777/777.pdf>

There is a particularly strong public interest in extending the Act to contractors because the government's capacity to manage contracts is often found lacking. A 2018 National Audit Office survey of Whitehall bodies, for example, found that "contract management continues to be seen as one of the weakest areas of government's commercial capability"⁵⁶. Public scrutiny could change that.

Paradoxically, this is why the government resists reform. The Cabinet Office confirmed shortly after the ICO's report was published that it had "no plans to legislate in this area" in response to a parliamentary question about extending the scope of FOI to contractors⁵⁷.

In a fuller response to the ICO, Chloe Smith, the Minister for the Cabinet Office, stated that the government accepted the need for greater transparency in contracted services. But she added that the government would deliver this without legislative reform and instead "focus on the implementation of the policies already in place"⁵⁸.

The rationale for this is twofold: the government wants to protect small organisations from the regulatory burden of FOI compliance, and the government can deliver contracting transparency through proactive publication and provisions in the FOI Code of Practice. There are reasons, however, to be highly sceptical of both these claims.

Regulatory burden

Smith states in her letter to the ICO: "There are significant concerns about the potential impact of more regulation on SMEs, the voluntary sector and social enterprises." These concerns are widely shared and discussions on how to introduce FOI to contractors have taken them into account. For example, the ICO has considered using thresholds⁵⁹ based on a contract value, a transaction value or a contract duration - or a combination of these - to deliver transparency on higher-value contracts while protecting smaller companies from regulatory burden. Yet Smith's letter does not once mention thresholds or the ways in which a balance could be struck between the need to increase transparency and the need to avoid burdening smaller organisations.

Smith uses the 2016 Independent Commission on FOI to support her argument on regulatory burden. She writes: "the [commission] looked at the issue of private contractors providing public services. It concluded that 'extending the Act directly to private companies would be burdensome and unnecessary'." But this is not entirely accurate.

Extending FOI to contractors was outside the terms of the 2016 inquiry - but frustrated civil society groups submitted evidence on the subject regardless. Following these submissions, the commission stated: "On reflection, we consider that we should address this issue. But given that we did not explicitly seek views on this question in our call for evidence, we do not consider that we have received sufficient evidence to make a recommendation."⁶⁰ This is significant because Smith is suggesting that the commission had considered the issue and reached an evidence-based conclusion. That simply did not happen.

The government's concern about regulatory burden on voluntary organisations seems to exceed the worries of the organisations themselves. The National Council for Voluntary Organisations, which represents 14,000 voluntary organisations, responded positively to the ICO's report. It stated: "Given our ambition for more openness, it is difficult not to support extending FOI in principle. We welcome the ICO starting a conversation about how to do it."⁶¹

It seems more likely that 'protecting the little guy' is a smokescreen for maintaining an opacity that prevents real accountability.

⁵⁶ <https://www.nao.org.uk/wp-content/uploads/2018/12/Departmental-Overview-Commercial-and-Contracting-2017-18.pdf>

⁵⁷ <https://www.parliament.uk/written-questions-answers-statements/written-question/lords/2019-01-29/HL13262>

⁵⁸ http://data.parliament.uk/DepositedPapers/Files/DEP2019-0516/Letter_to_ICO_from_MfC.pdf

⁵⁹ Ironically, the ICO's efforts to model the impacts of these thresholds have been hampered by the lack of high-quality public contracting data in the public domain - a direct result of the government's poorly implemented proactive publication policies.

⁶⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf

⁶¹ http://data.parliament.uk/DepositedPapers/Files/DEP2019-0516/Letter_to_ICO_from_MfC.pdf

Existing measures

Smith states that “measures have already been put in place to increase transparency” and references three existing policies. But each of these is limited by flaws in design or execution, or both.

Smith refers to the (non-binding) FOI Code of Practice, which recommends that contracting authorities determine on a case-by-case basis how requests for information held by contractors will be managed. Yet it is precisely the inconsistency and uncertainty inherent in this case-by-case approach, identified by the ICO in 2015⁶², that has driven calls for legislative reform. In practice, many contracts do not include these clear and precise provisions and the public does not know when these agreements have been struck (and consequently whether they have a right of access).

Smith also namechecks the government’s proactive publication policies on contracting transparency. She writes: “Government bodies are required to publish all procurement opportunities, tenders and contracts over £10,000 on Contracts Finder, and to publish any public spend over £500 on data.gov.uk.” This is indeed a vitally important element of contracting transparency. But does it happen in practice?

Research by the Institute for Government shows that less than 40% of tender notices and less than 30% of contract award notices were actually published between 2015 and 2018⁶³. The limitations of non-enforceable and piecemeal proactive publication provisions were discussed in ‘Outsourcing Oversight?’, and the ICO recommends a comprehensive review of proactive disclosure arrangements. Yet Smith also rejected the need for such a review in the same letter.

Additionally, Smith states that the government will deliver further transparency by publishing the three most important key performance indicators (KPIs) for each government contract. Clearly, the publication of three numbers, important ones though they are, is a far lesser degree of transparency than the wide-ranging FOI Act offers. How useful are these KPIs? It is a moot point, because the government is yet publish them - eighteen months after Smith’s letter was published.

Previous extensions

Implementing an extension to FOI has sometimes been framed as a great challenge. To be sure, there are tricky questions to resolve - such as how to designate effective thresholds. But the question of how to implement should not obstruct the larger one of whether to bother at all. Information rights already extend into the private sector, thanks to multiple pieces of legislation, which serve as a reminder that implementing an extension to contractors is not the barrier it sometimes appears to be.

More than 8,000 schools have now converted to academies⁶⁴ and, although they are companies limited by guarantee, the Academies Act 2010 also makes them subject to FOI. GPs, dentists, opticians and pharmacies, which provide services under contract with the NHS, are subject to FOI with respect to NHS-related information due to the National Health Service Act 2006⁶⁵. And in 2015, three private companies in the Network Rail group were designated as public authorities⁶⁶.

Meanwhile, the Environmental Information Regulations (EIRs) have long included private bodies that have public administration functions within their scope. The EIRs’ definition of public authority includes “any other body or other person, that carries out functions of public administration”. As such, water companies⁶⁷, energy companies⁶⁸ and airports⁶⁹ are already subject to, and compliant with, the EIRs.

⁶² <https://ico.org.uk/media/1043531/transparency-in-outsourcing-roadmap.pdf>

⁶³ https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFG_procurement_WEB_4.pdf

⁶⁴ <https://www.gov.uk/government/news/education-secretary-calls-on-more-schools-to-become-an-academy>

⁶⁵ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616596/fs50835478.pdf>

⁶⁶ The Freedom of Information (Designation as Public Authorities) Order 2015.

⁶⁷ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624010/fer0611558.pdf>

⁶⁸ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617169/fer0678164.pdf>

⁶⁹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617181/fer0844872.pdf>

Extending information rights to the private sector, from a technical point of view, is not as difficult as some suggest. Indeed, it has already been done several times, in recognition of the value of transparent and accountable public services.

The need to extend FOI to contractors has also been recognised internationally. Research by the Campaign for Freedom of Information and the UK government states that several countries, including Australia, Brazil, Estonia, Ireland, Macedonia, New Zealand and South Africa have already extended FOI to cover private contractors⁷⁰.

⁷⁰ https://www.opengovernment.org.uk/wp-content/uploads/2016/03/Extend-Freedom-of-Information-to-all-public-contractors_A-proposal-for-the-UKs-2016-18-OGP-National-Action-Plan.pdf

Recommendations

The ICO should:

- Develop, in consultation with civil society, and implement clear, concrete thresholds for monitoring and enforcement.
 - Publish quarterly updates of all monitoring and enforcement activities including the name of the authority, the reason for monitoring/enforcement, the action taken, and copies of relevant documents created and/or received from the authority.
 - Respond to stonewalling complaints by using enforcement notices to order authorities to respond to all overdue requests immediately.
 - Publish an annual update on the informal resolutions process that demonstrates the ICO is capable of monitoring its own systems for potential abuse.
-

The government should:

Recognise the national interest in an independent and fully funded regulator of information rights

- Address the ICO's critical lack of funding and independence by making the regulator accountable to and funded by parliament (thus implementing recommendations from the 2006 Department of Constitutional Affairs Committee and 2014 Public Administration Committee inquiries).
- Transfer responsibility for FOI policy from the Cabinet Office to the ICO.
- Ensure the ICO's requests for budget allocations are met in full.

Raise standards of compliance

- Open a committee-led inquiry into the operation of the Clearing House, which comprehensively investigates whether its operation is GDPR-compliant, whether journalists are being monitored and/or blacklisted, whether it undermines the applicant-blind principle of the Act, whether its operation leads to delays in the request process and whether its advice is legitimate.
- Introduce an administrative silence rule whereby a failure to respond to a request within the requisite time period is deemed to be a refusal and can be appealed in full to the ICO (enabling the ICO to rule on whether the requested information should be disclosed and not only on the fact that the response is late).

Remove obstacles to the effective transparency of government and public services

- Extend FOI to information held by prime contractors relating to all newly signed contracts worth more than £10 million. Schedule an implementation review by the Public Administration and Constitutional Affairs Committee for twelve months after the policy is introduced.
- Encourage departmental investment in hiring and training information rights professionals to provide high-quality, legally compliant FOI services.

Annex: methodology

This analysis is based on two datasets.

1. Annual government FOI monitoring statistics of central government and other monitored bodies 2010-2019.

This is the same data used by the Institute for Government's Whitehall Monitor, however, rather than using quarterly reports we have used annual data only.

2. Metadata on the ICO's FOI and EIR Decision Notices issued over last five financial years.

This data is hosted on the ICO's website and supports its Decision Notice finder tool. Through our own analysis and the use of pdf extraction tools we significantly enriched this data to make it possible to measure ICO complaint durations and outcomes over time - and to analyse Decision Notices by other factors such as the relevant law, number of findings, whether substantive action was taken, and what purpose the decision served.

The database contains 6682 records. Each record has fields for:

- Case reference
- Date
- Public authority
- Sector
- Case summary
- Section(s) of the Act/Regulations under consideration
- Findings of each section.

We analysed this data and created additional fields:

- Outcome (of whole case - either not upheld, partially upheld, fully upheld)
- Financial year
- Law (FOI/EIR)
- Type of complaint (exclusively procedural/full complaint)
- Number of findings (how many sections of FOI/EIR were considered)

Date extraction

The database also includes a url to a pdf of the decision notice. Using Python pdfplumber we downloaded all pdfs and converted them to text stored in json files. We then ran scripts on the text of every Decision Notice to extract the following information:

- Date of request
- Date of internal review
- Date of complaint to the ICO

The date of internal review proved too complex to reliably extract but we accurately parsed the dates of request and complaint to the ICO for 6168 (93 percent) of the Decision Notices. We could not parse the remaining dates because they were irregularly presented, incorrect (due to human reporting error), or not present at all. These 513 Decision Notices were excluded from the analysis.

For 6168 Decision Notices we were able to measure the timeline of complaints at three points and observe how processing times had changed over time.

Key phrase extraction

We also ran scripts that identified key phrases in the documents that served as proxies for certain actions or behaviours. For example to identify Decision Notices which ordered substantive action - i.e. which ordered a public authority to take steps to comply with the legislation we identified a paragraph that was always present in such decisions.

“The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.” Due to slight variations in wording we looked instead for shorter phrases that would not be used anywhere else in a decision, such as “pursuant to section 54 of the Act”.

The focus of the key phrase extraction was on identifying decision notices which addressed ‘stonewalling’ - cases where authorities did not respond at all to a request and in which the ICO intervened to compel a substantive response.

This was a complex task which involved identifying numerous key phrases used by the ICO when dealing with cases of stonewalling. A comprehensive list of our key phrases is in the annex, however, a few particularly useful examples were

- “issue a substantive response”
- “issue a valid refusal notice”
- “issue a fresh response”
- “either disclose the requested information or issue a refusal notice”

We then conducted logical checks of the data to identify 311 false positives and 294 false negatives. The large majority of false positives were records caught by key phrases but also had one or more of the following:

- outcome not upheld
- did not require substantive action
- not exclusively procedural
- were exclusively procedural but contained findings on s12 or s14
- had more than two findings

The large majority of false negatives were identified by filtering for records not caught by a key phrase but which had all of the following:

- upheld
- required substantive action
- exclusively procedural
- one or two findings only

These records were then sorted by IC complaint time (time between the submission of the complaint and the date of issue of Decision Notice) - in the knowledge the stonewall decisions are resolved usually resolved quickly.

225 records matched the criteria and had IC complaint times of less than 100 days. 100 of these records were spot checked and all were stonewall cases and therefore false negatives. The remaining 125 records were then added to the sample. 51 matching records with IC complaint times of more than 100 days were spot checked and 40 of these were also identified as false negatives. Additional false positives and false negatives were identified during cleaning and exploration of the data.