



Our Ref: MFC/2329

Elizabeth Denham CBE, Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane, Wilmslow
Cheshire, SK9 5AF

31 May 2019

Dear Elizabeth,

I am writing to you to thank you for the report on reforming access to information law which you submitted to Parliament on 28 January 2019. I also note the recommendations you have put forward and will address them in this letter.

The Government is committed to greater transparency, and is grateful to you for your work on such a significant and complex matter. The report has attracted considerable interest, as have the recommendations you have made. As you are aware, a number of those recommendations would require legislation and so will require careful and detailed consideration by the Government.

Greater use of existing powers under section 5 of FOIA.

The Government accepts that as more public services are contracted out to the private sector it is important that they are delivered in a transparent way, to ensure accountability to the user and to taxpayers.

Measures have already been put in place to increase transparency; for example, Government bodies are required to publish procurement opportunities, tenders and contracts over £10,000 on Contracts Finder, and to publish central Government spend over £25,000 and monthly payment card data over £500.

The Open Contracting Data was put into place in 2016 and ensures that citizens can see a clear public record of how Government money is spent on public contracts and with what results. The Government has continued to look for opportunities to build on this success.

The Outsourcing Playbook was published in February 2019 and introduces a package of measures to improve decision making, service quality and value for money when government outsources to the private sector. A central part of these reforms is a commitment to increased accountability and transparency through publishing key performance indicators for all our key contracts. Publishing the three most important KPIs for our key contracts will enable the public to understand what the government is buying from its suppliers, how the supplier is performing and how well the contract is meeting its strategic objectives.

Orders under section 5 of FOIA require secondary legislation to be brought forward. As I set out to the House of Parliament on the debate on 6 March, when considering legislation, there are significant concerns about the potential impact of more regulation on SMEs, the voluntary sector and social enterprises.

In 2016 the Independent Commission on Freedom of Information 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.” It went on to say that “information concerning the performance or delivery should be treated as being held on behalf of the contracting public authority.” The amended Freedom of Information Code of Practice sets out that public authorities should agree what information is held on their behalf with private companies when entering into contracts.

The Government has considered how best to balance the competing interests of transparency and burdens. We recognise the importance in how public money is spent, but we are concerned about a disproportionate burden, because we do not want to discourage smaller organisations from serving the public.

Legislative reform of FOIA and the EIR

EIRs

The Environmental Information Regulations do not contain powers to designate public authorities. Rather, they provide that EIR public bodies comprise (i) most FOIA public bodies and (ii) all bodies fulfilling a functional definition based on their public responsibilities, functions and services relating to the environment. This definition is broad, and reflects the Aarhus Convention from which the EIRs ultimately derive. The report does not provide evidence that this has left gaps in coverage and we do not consider departing from the current scheme to be warranted.

We do not think it is necessary for changes to be made to the wording of the EIRs with regard to information held on behalf of public authorities by private contractors. The wording of the relevant provisions have a straightforward reading which allows the flexibility for public authorities to clarify on a case-by-case basis what information is held by contractors on behalf of the public authority. Model clauses for public sector contracts also clarify what information should be held on behalf of public authorities. This is subject to independent control by you (Information Commissioner) and the tribunals.

'Held on behalf of' provisions

The FOI Code of Practice already recommends that when a public authority enters into a contract, there should be agreement on what information will be held by the contractor on behalf of the public authority, and that this should be indicated in an annex or schedule of the contract. It goes on to set out that contractors must comply with requests by a public authority for access to such information, and must do so in a timely manner.

Reporting on coverage

The Government agrees that reporting to Parliament on the coverage of the legislation every two years would be a proportionate and useful change, which we commit to doing. This does not in itself require legislation.

Government review of proactive disclosure provisions regarding contracting

The Government recognises the concerns raised by your report in regards to proactive disclosure provisions. We do not agree that a comprehensive review of those provisions is necessary at this time. A further large scale review would cover much the same ground as existing reports by yourself, the Institute for Government, and the National Audit Office.

The Government has recently committed to publishing key performance indicators for our key contracts as part of our Outsourcing Playbook. We will therefore now focus on the implementation of the policies already in place.

The Government is committed to the principles of transparency and openness across the public sector and to supporting the effective operation of the Freedom of Information Act.

Copies of this letter will be placed in the Libraries of both Houses.

Yours,

A handwritten signature in black ink, appearing to read 'Kevin Foster', with a large, sweeping flourish extending to the right.

Kevin Foster MP