
Freedom of Information: Is Openness Too Expensive, Too Difficult or Too Dangerous?

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Abstract

The *Freedom of Information Act 2000 (FOIA)* is the New Labour Government's response to the general principle that citizens should be able freely to access information held by public bodies. This paper reports the results of a case study on the use of the *FOIA* to obtain research data from a sample of 36 local authorities. The paper finds that the commitment to openness in local authorities is patchy, and that whilst the majority of authorities sought to comply with the requirements of the *FOIA*, a significant minority failed to comply in material respects. A surprisingly high proportion failed to reply at all or their replies contained major omissions. The paper finds that this is due to administrative failings in dealing with potentially onerous non-standard requests and also to reluctance to disclose potentially embarrassing or damaging information. The paper also finds that the deadlines for compliance are often not met, and that existing deadlines are unrealistically tight. Poor systems mean that the cost of retrieval of information soon becomes excessive. Outsourcing of administrative functions is being interpreted by many local authority staff as a device to place public information beyond the scope of the *FOIA* contrary to its explicit intentions, and as outsourcing grows in extent and scope so this is likely to result in an increase in the amount of public information excluded from disclosure.

Introduction

Thatcherite dogma reduced direct public service provision in the UK whilst imposing tighter central control over what remained. The original ethos of public service has been redefined by centralisation and the imposed imperative of public service improvement (Boyne 2002). This includes the imposition of new duties on a sometimes sceptical local government sector.

Public service improvement involves, amongst other devices, the introduction of the "Best Value" suite of performance indicators for local authorities (Boyne 2003). The Freedom of Information Act 2000, something of an arriviste on the local government scene, may, in fact, turn out to be both a method of measuring performance and an indicator in its own right.

Freedom of information is a long-standing aspiration of advocates of liberal democracy:

"I would argue that information gathered by public officials at public expense is owned by the public - just as the chairs and buildings and other physical assets used by the government belong to the public."
(Stiglitz 1999)

Freedom of information legislation in the United States predates that in the United Kingdom, but both jurisdictions are similarly pre-occupied by its contradictions. The difficulty of making freedom of information a reality in modern government was encapsulated by Piotrowski and Rosenbloom (2002) who, commenting on freedom of information in the context of the Federal Government in the United States, pointed to the existence of a Madisonian¹ tension. In a free democratic society, the ideal of informed public debate requires informed citizens. However, the reality is that democratic governments have an innate tendency to wish to exercise control, without scrutiny or sanction, over their own deeds and misdeeds, unhindered by interference from over-informed citizens.

1. John Madison believed that neither the majority nor the minority can be trusted with absolute power, and that the Executive must always be subject to informed scrutiny and control.

The National Performance Review (1993-98) was established by the US Congress to examine the role of freedom of information and democratic debate in the functioning of the modern democratic state. It inspired Al Gore (then the Vice-President) to state that:

“the essential ingredient of self-government - is trusting the people involved. In this case, that means government employees and the people they serve”
(Gore 1995)

and elsewhere that:

“trust is possible because human nature is good.....people - in government or out - are, for the most part, neither crooked nor stupid. Most people want to do the right thing, so long as the right thing makes sense”
(Gore 1993)

Sentiments such as these were not far distant from the stated aims of the New Labour administration, which, as early as 1997, in a White Paper on freedom of information and its role in a modern democratic state, opined:

“Openness is fundamental to the political health of a modern state. This White Paper marks a watershed in the relationship between the government and people of the United Kingdom. At last there is a government ready to trust the people with a legal right to information. This right is central to a mature democracy.”
(Cm 3818 1997)

The Freedom of Information Act 2000 (FOIA) was to be the realisation of the aspiration that information held by public authorities should in principle be accessible to the public.

This paper seeks to investigate how far the aspiration of trusting *“the people with a legal right to information”* has translated into a practical mechanism for accessing potentially sensitive public information. It presents and analyses a case study in which the mechanisms available under the FOIA were used to seek information on the management of “tripping” claims by local authorities. “Tripping” claims arise when individuals seek to hold local authorities responsible for injuries arising from trips and falls allegedly due to defective maintenance of public highways and footways. This paper does not attempt to analyse the “tripping” claims information as such. The extent of the authors' success in the collection of data on “tripping” claims is a litmus test of the effectiveness of FOIA mechanisms to provide such information, and illustrates how far public servants in local government really are prepared to trust the public by releasing potentially embarrassing information about deficiencies in the provision of an important public service.

The Freedom of Information Act 2000

The *Freedom of Information Act 2000 (FOIA)* received the Royal Assent on 30 November 2000, and came into force in January 2005. Designed to promote greater openness and accountability, the Act established a statutory right to information, and imposed a duty upon public authorities to disclose information held by them (or by persons providing services for them) on the receipt of any request for information. *Schedule 1* to the Act identifies around 100,000 public authorities including local authorities within the meaning of the Local Government Act 1972.

The Act gives “any person” the right to access information held by public authorities as part of their public functions. The public authority may not question why the information is sought.

The Act introduced the Office of the Information Commissioner to oversee its operation and the Information Tribunal has wide powers to enforce the statutory rights granted by the Act.

On receipt of a request for information the public authority must “confirm or deny” in writing whether it holds the information requested (s1(1)). Communication of the information to the applicant is of itself deemed to satisfy the “confirm or deny” duty.

The right to access the information is subject to certain conditions:

- the time/cost of retrieving the information must not be excessive (currently £450/18 hours work for Local Authorities in England and Wales) (s12);
- the request should not be vexatious or repetitious (s14);
- authorities may charge fees for supplying information that cannot be retrieved within the statutory time/cost scale (s13).

All written requests for information must be dealt with “promptly” and in any event no later than 20 working days from the request being received (s10).

The Act sets out exemptions from the right to know and the duty to disclose, but provides for the release of certain exempt information if in the “public interest”.

There are 23 exemptions under the Act, either absolute or qualified.

Where an exemption is absolute², there is no right of access to that information under the Act and the information can be withheld without even considering the “public interest”.

In the case of qualified exemptions³, public authorities are still obliged to disclose the information if the “public interest” in disclosing the information is greater than the public interest in not releasing it (s2(2)(a)). “Public interest” is a difficult concept to define. A balance has to be struck between the general public interest in disclosure and the public interest in not disclosing. The presumption is in favour of disclosure, unless the harm likely to arise from disclosure would outweigh the public interest in making the information available.

The Act requires (s19) public authorities to produce publication schemes specifying the classes of information which they publish, or intend to publish, and the manner of publication. As Screene (2005) points out, a publication scheme is not only the first port of call for would-be applicants for information, but often provides immediate answers for them thus forestalling unnecessary requests.

Two statutory Codes of Practice are intended to give guidance to public authorities on 'desirable practice' in discharging this function under the Act and also in relation to records management (s45). The Act covers all information 'held', regardless of the form in which it is recorded, and it is fully retrospective. It covers all information held by the public authority at the date of the request including information arising prior to 2005.

2. Absolute exemptions include:

- information that is reasonably accessible to the applicant otherwise than under the Act (s21);
- personal information covered by the Data Protection Act 1998 (s40);
- information provided in confidence (s41).

3. Qualified exemptions include information relating to:

- law enforcement (s31);
- audit functions (s33);
- health and safety (s38).

Information that might reasonably be expected to be available may in practice be unavailable because either:

- the necessary data has not been recorded at all; or
 - it is in an inaccessible form that prevents collation and structuring of the data into useful information.
- Even where a public authority outsources its activities (e.g. records management) there is no escape from the FOIA. s5 provides that the Secretary of State may designate as a public authority “any person” who is not listed in Schedule 1, but who:
- a “appears ...to exercise functions of a public nature, or
 - b is providing, under a contract made with a public authority, any service whose “provision is a function of that authority”.

This provision brings any private provider of public services within the scope of the Act, for example under PFI /PPP contracts. Only a private provider’s public service activities fall within the scope of FOIA.

Information must be provided in the form requested where ‘reasonably practicable’. It is a criminal offence to alter, deface, block, erase, destroy or conceal information to prevent disclosure.

A person dissatisfied with the response of a public authority to a request made under the Act can invoke the complaints procedure under the FOIA (ss50-57). Complaints can include failures to:

- provide the information requested;
- respond to the request within twenty working days (or failure to explain why longer than twenty working days is needed);
- give proper advice and help
- give information in the form in which it was requested;
- properly explain any reasons for refusing the request;
- correctly apply an exemption under the Act.

The complaint should first be made directly to the public authority itself. Under the s45 Code of Practice it should have its own complaints procedure. The next step in the complaints procedure is to complain to the Information Commissioner within two months of the final response from the public authority.

Review and expectations of the operation of the FOIA.

The Information Commissioner published a review in January 2006, “FOI One Year On”, in which 500 public authorities in England, Wales and Northern Ireland, including 154 Local Authorities, were sampled.

The three stated objectives of “FOI One Year On”, were to:

- investigate whether the Act has engendered a culture of increased openness;
- estimate the volume of extra information made available to the public through publication schemes and general rights of access;
- measure public authorities’ perceptions of the Act.

Overall, its findings suggest dutiful rather than enthusiastic compliance with the Act, with a sizeable resistant minority. The report of the same name from the House of Commons Constitutional Affairs Committee (2005-6) was rather less sanguine and more acerbic in its conclusions about the operation of the Act.

4. EIRs came into force on 1 January 2005 to coincide with the FOIA, and are designed to clarify and extend previous rights to environmental information.

Useful insights on the operational aspects of the *FOIA* (and the Environmental Information Regulations 2004)⁴, were presented in research prepared for the Improvement and Development Agency relating to the first six months of the operation of the *FOIA* (Amos and Holsen 2005). 200 English local authorities contributed to this survey, which was conducted in two phases. Phase I was a web-based survey aimed at all local authorities in England and Phase II was a more detailed survey of 18 local authorities (representing all types of local authorities).

The attitudes revealed in the Information Commissioner's survey were confirmed by the authors of this paper in open-ended discussions with senior officers of local authorities. The discussions revealed local authorities had several concerns about compliance with the *FOIA* which echo the findings of Amos and Holsen.

The significant financial cost of processing requests for information

The potential cost of meeting information requests concerns those responsible for allocating resources within local government. The Commissioner's report records that 13% of the sample perceived this as a disadvantage of the *FOIA*. Amos and Holsen (p19) estimated that the average council surveyed spent around £61,000 in total (excluding the time spent by senior managers and legal advisers) in dealing with requests for information under the *FOIA* in the first six months of the Act's operation. One-off "set-up" costs of the *FOIA* might reduce these costs in the future.

The unpredictable demand upon resources of processing requests for information

Supplying information that may not be readily accessible could involve use of resources in an unpredictable fashion, without any mechanism to fund such activity. 22% of the Commissioner's sample thought requests might be excessively time-consuming. From both phases of their study, Amos and Holsen concluded that:

- 56% of local authorities have an electronic system to log and track requests;
- a further 43% have a mixed paper-based and electronic system to do this;
- only 2 authorities admitted to having no system in place at all.

The purpose for which information is sought

There is no restriction upon the purpose for which information may be sought as long as it is not "vexatious or repetitious" (s14). There is some evidence of mistrust within local authorities of the motives of those who seek information. This attitude has been witnessed by the authors of this paper, both in the preliminary discussions outlined above and also in some of the responses received to their questionnaire.

Information may in practice be requested for collateral purposes, such as trawling for instances of malpractice or mistakes. In the case of the "tripping" claims, there may be a perception among local authorities that revealing detailed/sensitive information could encourage more litigation against highways authorities, or a fear that replies indicating good maintenance of highways might lead to pressure to cut budgets. Of the Commissioner's sample 6% were concerned about vexatious requests and 4% about trivial requests.

Amos and Holsen asked respondents in both phases of their survey to identify the source of the *FOIA* requests received. Phase I respondents were asked, "Who to the best of your knowledge is making *FOI* requests to your organisation?", and asked to select the top three categories. The Phase II sample was asked to provide an evidence-based ranking of the top three sources of requests received. The responses from both phases gave the same order; private individuals followed by business and then journalists. The differences between the impression-based responses to Phase I and the evidence-based responses to Phase II refute many fears about

collateral purposes. Private individuals were indicated by 92% of the respondents to Phase 1, but only 60% of the evidence-based response to Phase II. Lawyers were selected by 18% of the Phase I respondents but by only 1% of the Phase II respondents. Academics or students were perceived in Phase I as accounting for 20% of the requests, but only 1% of the requests in the Phase II sample. Both samples indicated that the most time-consuming and problematic requests come from local campaign groups seeking information to advance their objectives, which is the ultimate affirmation of Stiglitz's assertion that *"information gathered by public officials at public expense is owned by the public"* and therefore of the FOIA itself.

Cultural resistance to releasing information

There remains a deeply ingrained resistance in public authorities to releasing information. Official Secrets legislation has long generated a secrecy culture, reinforced by the now widespread practice of inserting general confidentiality clauses into contracts of employment, potentially making disclosure of information an offence of gross misconduct with the most serious disciplinary consequences. Disclosure may present a personal risk to public officials who divulge information without authorisation. Some public information may be politically sensitive, even embarrassing. In such circumstances it is questionable whether an objective assessment of the public interest by a public servant can be made if the disclosure may have detrimental consequences for the reputation and interests of the public authority concerned, or its political or executive management.

The Research Methodology

The research engagement with the Freedom of Information Act 2000 arose from the need to collect comparative data on the experience of local authorities' management of "tripping" claim litigation. Some North West English authorities had reported significant increases in the incidence of "tripping" compensation claims (the "high-risk" authorities) following the introduction of "no win, no fee" litigation. The "tripping" claim research project looks at the management of this phenomenon and assesses whether it is replicated nationally.

The mechanism for collection of this data was an FOIA questionnaire, scaled-down from the version designed to collect detailed information from the "high-risk" authorities. The questionnaire was intended to be completed within 18 hours by local authorities holding the requisite data in a structured (preferably electronic) form. The information requested by the FOIA questionnaire was:

- 1 General information on the whole authority;
- 2 Information on management of tripping claims;
- 3 Highways maintenance.

The sample covered 36 English highways authorities stratified by type.

<i>Unitary authorities</i>	29
<i>Shire County Councils</i>	7

The unitary authorities surveyed included Metropolitan and London boroughs and unitary authorities in shire counties.

The questionnaires were posted first class to each sample local authority's nominated Freedom of Information Officer at the address specified for FOIA correspondence on that local authority's website. The covering letter contained an assurance of non-disclosure of the identities of respondents. Two of the respondents replied electronically asking for the questionnaire to be supplied as a data file. These both replied electronically.

The initial handling of requests

There is currently no specific requirement for respondents to acknowledge initial receipt of the FOIA request. However, 20 out of the 36 authorities (55%) of the sample did send an acknowledgement of receipt promptly:

Acknowledgement of FOIA request	Unitaries	Shires	Total	
Acknowledgement within 5 working days	16	4	20	55%
Later acknowledgement	2	0	2	6%
No acknowledgement	7	2	9	25%
Request reported as not received	4	1	5	14%
	29	7	36	

5 of the sample of 36 respondents claimed not to have received the FOIA request addressed to them (13.89%). This compares with Royal Mail's estimate that 0.07% of first class mail is not delivered (Source: Postcomm). Royal Mail considers incorrect addresses to be the main reason why mail is undelivered. The sample requests were correctly addressed to the contacts specified. Beyond reasonable doubt the high level of claimed non-receipt indicates failure of the internal administrative procedures for controlling the receipt and progress of FOIA requests at 5 of the sample authorities rather than non-delivery⁵.

A further 3 responses were received more than 10 weeks after the original request was made, and for which excuses were given that delay was due to the request having been mislaid or passed to the wrong person. Possibly some similar but more profound failure occurred at the 5 non-replying authorities. These findings indicate inadequate control over FOIA requests at some local authorities, where the administrative systems were insufficiently robust to cope with the non-standard workflow required by compliance with the FOIA.

The majority of local authorities who acknowledged receipt simply sent a notification that the request had been received.

The responses to the questionnaire

FOIA s10 requires that all written requests for information must be dealt with "promptly", and no longer than 20 working days from the request being received. In the case of complex requests where there may be a public interest test to override exemptions to disclosure under the FOIA (other than absolute exemptions), the Freedom of Information Good Practice Guidance (2006) issued by the Information Commissioner's Office states that:

"We consider that public authorities should aim to respond to all requests, including where the public interest is being considered, within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but, in our view, in no case should the total time exceed 40 working days."

5. Test of significance

Null hypothesis:

The sample result is consistent with the assumption that 0.07% of mail is not delivered.

The probability that at least 5 items of mail from a sample of 36 items would be lost and not delivered to the addressee is:

$$1 - [P(0) + P(1) + P(2) + P(3) + P(4)] = 0.00000000062227$$

The probability of 5 items not being delivered is therefore infinitesimal. The null hypothesis can be rejected at the 99.99% confidence level for a one-tailed p value.

This begs the question of what response is made. A response to an *FOIA* request may be a refusal. If the refusal is on the grounds of excessive cost (in the case of local authorities where the information will take more than 18 hours to supply) then under s12(2), although the authority does not have to comply with the request, it is still required to comply with the duty to confirm or deny that it holds the information requested. The Code of Practice issued under s45 provides that the local authority “*must provide advice and assistance to the applicant...If the costs exceed the appropriate limit, advise the applicant to reformulate their request and provide advice and assistance as appropriate*”. (para 14)

Outcomes of FOIA requests	Unitaries	Shires	Total	
Response within 20 working days	14	1	15	41.7%
Request converted to non-FOI but recieved on time	1	1	2	5.5%
Request converted to non-FOI - response awaited	5	0	5	13.9%
Information refusal within 20 working days	2	1	3	8.3%
Information refusal within more than 20 working days	0	0	0	0.0%
No response after 6 weeks	7	4	11	30.6%
	29	7		

The 5 local authorities that reported non-receipt of the request are included in the no response after 6 weeks category.

In total, a substantial 30.6% of local authorities surveyed failed to provide any substantive response after 6 weeks⁶. An additional 5 local authorities (13.9%) indicated that they could not meet the 20 working-day deadline.

The authors were prepared to relax the 20 working day deadline on request; 5 of the surveyed authorities requested a relaxation and that the request should be treated as non-*FOIA*. Encouragingly, only 3 of the local authorities (8.3%) refused the request on the grounds that excessive effort would be required (exceeding 18 hours of labour). 2 of these 3 subsequently negotiated about the nature of the request (as suggested by the guidelines) and agreed to supply a partial response to the original request. This meant that the respondents concerned sensibly directed limited resources to providing the most readily available information and then to the most important remaining questions.

There was no “public interest” exemption to delay the requests being processed, and responses to 17 out of 36 requests (47.2%) were returned within 20 working days. However, of these 17 responses, many were highly incomplete. Rather than negotiating about what could be provided within the 20 working day period, 13 of the 17 responding authorities did not consult with the authors about which parts of the requested information should be omitted. Good practice would indicate that the spirit of the *FOIA* is better served where respondents concentrated scarce resource on those questions perceived by the originators as the most important. Otherwise respondents may direct their limited resources to those issues that are easier or less politically sensitive/embarrassing. Therefore, contrary to good practice, only 41.7% of the respondents met the 20 working day deadline with a positive response, along with a further 8.3% that replied within the deadline with a refusal.

6. 29 working days after the requests were despatched, as there was one Bank Holiday during the six week period.

The authors recognise that the 20 working day deadline appears to be unrealistically tight for more complex *FOIA* requests that may have to be researched by staff who already have full workloads. Although organisations may have allocated resource to enable the FOI officer to discharge the functions of the role, that official will probably need to forward requests to the appropriate service department. Staff in service departments (possibly already under severe pressure) required to process *FOIA* requests may perceive them as unwelcome and un-resourced extra work.

Another issue that impacts upon the 20 working day deadline is the quality of systems for the manipulation and retrieval of data to construct the information requested. The data necessary to process the request may or may not be stored electronically or accessibly. It may or may not be well filed. It may not have been captured at all. It may not have been retained. Should the data be stored randomly, fewer data records would be accessible in the time allowed. The likelihood of a satisfactory reply is therefore governed by the quality and competence of the respondent's administration. It is intrinsically unsatisfactory that a valid information request should have a different outcome for this reason, and that poor administration may in a sense be rewarded as it justifies more non-replies under a flat-rate information request resource cap.

Most of the responses received in fact included statistical information on many hundreds, and in the majority of cases, thousands of tripping claims over a period of seven years. This implies that most of the respondents hold data on tripping claims in electronic form or have already collated details of claims for internal management purposes.

Analysis of the substantive responses

This analysis of responses relates to the 28 replies that were received in the 6 months from the date of the original request. Following the issue of reminder letters and verbal contacts with the authorities that did not reply initially, 8 authorities still failed to reply after 6 months.

The 8 non-replies comprise:

Refusal of entire request	1
Promised verbally to respond but did not do so	3
No substantive response	4

No data was obtained from 28.6% of the sample, which is a disappointingly high rate of non-compliance with a statutory duty. 4 authorities failed to co-ordinate a substantive response beyond a receptionist or clerical officer indicating that a response would be provided by a more senior officer, without such a response ever materialising. Verbal promises to respond by more senior staff in 3 other authorities did not result in provision of the promised response.

Although the *FOIA* imposes a statutory duty to respond to requests for information, this duty does not appear to be taken sufficiently seriously by some authorities. On the basis of verbal contact with the non-responders, the main problem appears to be that *FOIA* requests constitute non-standard tasks that do not fit comfortably within established work routines.

1. Responses to request for factual information about the Local Authority

The first 2 questions asked for information that the authors expected all local authorities would be able to provide readily, being straightforward general factual information about the authority. As expected, almost all respondents supplied the data requested. It is difficult to accept the response of the 1 local authority that refused to provide any data at all on the grounds that excessive effort would be required and therefore refused the whole request.

General Information on Authority		
Population/revenue budget/capital budget	Number	%
Full	21	75%
Partial	2	7%
None	5	18%
Length of highway/footway		
Full	23	82%
Partial	2	7%
None	3	11%

The information on population, revenue and capital budgets was intended to confirm the accuracy of data the authors had extracted from the local authorities' websites. The nil responses normally referred the authors to the local authority's website; it is a valid response under the FOIA to notify the respondent of where the information can be located within the public domain. The partial responses arose where only some of the data was provided. There may be a quality control issue with these 2 responses, again reinforcing the need for the FOI officer to oversee the quality of the response provided.

The information on highways and footways asked for a specific analysis of highways into main roads/side roads/back lanes and footways. This was in line with the analysis of highways length used by the Office of the Deputy Prime Minister to model potential changes to the basis of the calculation of 2005/2006 Formula Spending Share (FSS) for highways maintenance. The analysis was not available on any of the local authorities' websites.

The authors were surprised that 3 local authorities stated that they could not provide the specific analysis of the length of their highways in the classifications requested, and a further 2 could not provide the analysis requested in full. Either the basis of highways data used by the Office of the Deputy Prime Minister for FSS calculation purposes had not been provided by the local authorities concerned, or, alternatively, the information is, or at least was once, available but the official responding to the FOIA request was either not aware of its existence or chose not to reveal it. However, encouragingly 82% of the authorities responding did provide this information in full.

2. Costs of "tripping" claims and their management

The next section of the questionnaire sought information, which was not publicly available on the local authorities' websites or in their published accounts, relating to the quantification of the extent and cost of "tripping" claims, to assess whether there are significant regional differences in the patterns experienced, and to appraise the effectiveness of each local authority in managing this problem.

A number of the sample local authorities reported escalation in the number and value of "tripping" claims following the abolition of publicly funded legal aid and the introduction of "no win-no fee" claims in the 1990s. In the worst cases, the cost of settling such claims apparently rose by a factor of 3 or 4⁷.

This type of information may clearly be politically sensitive as described above, and the request for its disclosure under the FOIA puts to the test the assertion of central government that it was "ready to trust the people with a legal right to information. This right is central to a mature democracy" (Cm 3818 1997)

7. Equivalent to several pounds on the rate of Band D Council Tax.

The responses obtained were, in the event, disappointingly limited.

Number and cost of tripping claims		
Full	24	85.7%
Partial	2	7.1%
None	1	3.6%
Unusable - includes other types of claim	1	3.6%
Breakdown of settlement cost		
Full	12	42.9%
Partial	5	17.8%
None	11	39.3%

Most authorities were able to provide details of the number and cost of claims. 2 were not able to segregate “tripping” claims from other types of highway claims, and of these 1 did not respond with any detail at all while the other provided details of all claims, which was of no use for research purposes.

The associated question asked for a breakdown of costs between compensation, claimants' legal costs, the authority's own legal costs and other costs such as loss adjusters' fees. The purpose of this question was to ascertain whether evidence supported the assertion that costs under “no win, no fee” litigation really had escalated sharply, up to three times the level of compensation. Only a minority of the sample provided this analysis in full. 2 authorities could not report their costs even in total. 5 authorities could only report their own costs or, alternatively, reported costs in total, without the requested detailed analysis. Control of legal costs is a significant issue, as the complete responses indicated that the costs are indeed greater than the compensation, although overall somewhat less than double the compensation itself. The most common reason advanced for being unable to provide the analysis was that the costs were handled by third parties, insurance companies or loss adjusters, and therefore the authority did not have the information available. Despite the provision in s3(2)(b) that information is held by a public authority “if it is held by another person on behalf of the authority”, it appears that a substantial number of the authorities in the sample interpreted such data to be beyond the scope of the *FOIA*. An alternative explanation may be that requesting such information from third parties would involve substantial charges, and therefore immediately the *FOIA* request would be frustrated on the grounds of excessive cost.

The questionnaire also sought information from the sample of local authorities about the success of their policies to control tripping claims as measured by the repudiation rate achieved. These policies involve steps such as:

- removing the causes of claims by improvement of the physical infrastructure through carrying out better preventive and/or rapid-response maintenance;
- challenging the validity of claims and the extent of the resultant injury claimed;
- improving the extent and documentation of inspections;
- being prepared to take cases to court rather than routinely settling out of court.

Claim repudiation rate		
Full	15	53.6%
Partial	8	28.6%
None	5	17.8%

The questionnaire requested information from 1998/99 to 2004/2005 to enable assessment of the effect of the introduction of “no win, no fee” litigation and the success of the local authority’s response to the challenge posed by it. Just over half of the local authorities in the sample were able to provide the requested information. The partial responses were due to the authority not having records available for earlier years (usually because improved claims recording systems had been introduced part way through the period) or for later years because they had outsourced their administration part way through the period. Again, an information request can be frustrated by changes to administration arrangements.

The 5 authorities that did not respond give rise to concern. The repudiation rate is a very important key performance indicator measuring a critical success factor. The authorities that appear to have adopted the most active management policies generally provided fuller responses to this cluster of questions, and reported initially an increase in the repudiation rate and then, after a time lag, a fall in claims received. The inference to be drawn from a non-response to the repudiation rate question may be that the authorities concerned are reluctant to report the information (contrary to the requirements of the *FOIA* to disclose) because of concerns that it would have costly litigation implications. However, if an authority is failing to monitor a key measurement of their performance, then arguably the citizen seeking information should have the right to demand that important information should be created. The lack of such information can be used as a justification for non-disclosure therefore perpetuating possible under-performance.

A related question asked for details of claims handling policies. The responses received were:

Claims handling policies		
Full	20	71.5%
Partial	2	7.1%
None	6	21.4%

The questions sought information about how the authorities screened the claims received and decided when to engage loss adjusters. There is little correlation between the non-replies to this question and the non-replies on repudiation rate. The non-replies usually indicated that the authority left the processing of claims entirely in the hands of insurers and that they therefore reported no information on how or whether claims were screened and challenged.

3. Inspection policies and achievement

One of the most important factors involved in defending tripping claims brought under the *Highways Act 1980 s41* is that the local authority can demonstrate that it took such care as, in all the circumstances, was reasonably required to ensure that that part of the highway was not dangerous to users (*HA s58*). This requires the local authority to demonstrate that it has:

- a comprehensive and regular schedule of inspections of highways and footways;
- fulfilled the planned inspection programme;
- rectified defects promptly.

The next two questions therefore asked the authority to state the planned inspection frequencies for the various categories of highway and footway, and then to report the percentage achievement for each of the years 2002/2003 to 2005/2006. This vital information is needed to defend claims. Thus all authorities should hold this information.

The replies were as follows:

Inspection policies	Number	%
Full	26	92.9%
Partial	0	0.0%
No reply	2	7.1%
Inspection achievement	Number	%
Full	18	64.3%
Partial	3	10.7%
No reply	7	25.0%

All but 2 of the authorities confirmed their inspection periods. However, 7 authorities refused to disclose their percentage inspection achievement. A further 3 could not provide the information for earlier years. A clear majority of local authorities did provide this information and have complied with FOIA.

However, it is surprising that this information was not available in full from so many authorities. The authorities that did supply the information requested reported 100% or near 100% achievement of their inspection targets. There must be a suspicion that the authorities that failed to disclose this information wished to avoid disclosing an unsatisfactory level of achievement. A small number of authorities questioned the motivation for the survey, as they feared that disclosure of this information might be prejudicial to their interests as some questions in the questionnaire sought disclosure of unsatisfactory performance that could support litigation against the authority. This illustrates suspicion of FOI applicants' collateral purposes in seeking information, and an innate reluctance to supply it. As the data collected in the survey is solely for research purposes, and the identities of the local authorities concerned are withheld, there is no possibility of this.

Poor performance can all too easily be hidden if such data is withheld. It is unsatisfactory that 25% of respondents refused to supply information which is operationally essential and ought to be available. Central government may be ready to trust the public with information, but it appears that the culture of openness has yet to permeate some areas of local government.

The remaining questions asked about the authority's maintenance policies, with a particular focus on whether budget had been diverted from long-term maintenance to fund increased quick-response repairs that might result in a short-term tactical advantage but a long-term deterioration of the infrastructure.

Maintenance and defect response policies	Number	%
Full	23	82.1%
Partial	0	0.0%
No reply	5	17.9%

The overwhelming majority of authorities responded, as was expected, as the questions did not seek specific factual information but rather sought discursive answers on policies, their rationale and the effect on the state of the infrastructure. It is again surprising that 5 authorities declined to respond, but again there may have been a reluctance to make any potentially damaging admissions about the state of the infrastructure.

The final group of questions sought information on what steps the authority takes to identify fraudulent or inflated claims.

Fraudulent claim screening policies		
Full	14	50%
Partial	3	11%
Minimal	6	21%
No reply	5	18%

Half the respondents replied in full. 11 either did not reply, or indicated that they had minimal anti-fraud procedures. The 5 non-replies are again surprising, as these questions also did not involve the collation of any factual data. Possibly there was again reluctance in some cases to confirm on paper that there are few anti-fraud checks in place because of possible criticism or perceived future fraud exposure consequences of such an omission.

Expectation versus experience

Overall, the experience of using the FOIA has been positive. In most cases, responses from the local authorities contacted have been professional and courteous. The authors' expectations have been defined and discussed above, and their experience of the response to the questionnaire may be mapped against those expectations as follows:

1. The financial cost of processing requests for information

Where refusal to respond was on the ground of excessive effort it can be assumed that cost is at least a justification for that failure. However the number of complete or largely-completed responses indicates that the costs ought not to be excessive in a well-organised authority that is meeting its "best value" performance indicators.

2. The unpredictable demand upon resources of processing requests for information

An FOIA request involves extra work, without there being any extra resources to provide the response, thus increasing the pressure on busy staff.

This is clearly a fundamental problem for local authorities generally. Amos and Holsen point in their research to the variable commitment of local authorities to appointing a dedicated FOI officer to ensure compliance with the FOIA across all parts of the organisation. The authors of this paper have experienced indications of this resource-deficit in collateral communications with the local authority respondents. An example of this was the FOI officer in one local authority who expressed frustration with the failure of the legal department to deal with or take responsibility for relevant parts of the questionnaire. There were numerous incidents of reported holiday and sickness absence leading to "loss" of the questionnaire or delay in its handling.

Underpinning the responses/non-responses to the questionnaire itself, as outlined above, is evidence, less of a wilful refusal to comply, but more the lack of individual and organisational capability to deal with the request.

Related to the resource issue is the 20 working day timescale allowed for the provision of replies which the current research indicates is too tight. Several authorities in the sample asked for extra time to compile their responses. 40 working days would be a fairer and more realistic timescale.

There appears to be a need for administrative processes to be re-engineered to ensure that:

- requests are logged on receipt;

- responsible officials confirm to the FOI officer the nature and extent of the response estimated to be possible;
- FOI officers monitor the nature and timing of the replies to requests, and pursue operational departments to ensure that an appropriate response to valid requests is made within the timescale allowed.

3. The purpose for which information is sought

There are clearly suspicions that *FOIA* requests may be used to acquire information that can be used against the interests of the authority that provided it. This may explain some of the gaps in responses even more than the resource issue, although it is difficult to prove this.

4. Cultural resistance to releasing information

Some cultural resistance to *FOIA* has been made explicit in a minority of cases; 3 officials in different authorities expressed either displeasure that an *FOIA* request had emanated from employees of a public authority or the view that use of the *FOIA* by other public authority employees was not permitted. One respondent relied on the outsourcing of information to a private organisation as providing an exemption to the obligation to provide the information, despite the clear statutory stipulation to the contrary. In a minority of cases there has been a failure to respond at all, or the replies have been incomplete. All these responses or failure to respond indicates that an *FOIA* request is seen in a negative light or as unimportant.

Al Gore's comment that "*Most people want to do the right thing, so long as the right thing makes sense*" (1993) may well be true. However, openness about embarrassing or potentially damaging disclosures may not appear to be the right thing to do, because it does not make sense to officials used to a need-to-know culture and subject to tight bureaucratic controls and approval procedures. The passing of the *FOIA* did not automatically signal the passing into history of the culture of non-disclosure and even secrecy.

Unexpected findings

The extent of the failure of some local authorities even to acknowledge *FOIA* requests made to the advertised FOI officer at the specified address was unexpected and disturbing.

A further surprise was the incidence of FOI officers who failed to control the process of responding, after initially delegating the request, often resulting in considerable delay, or only a partial response to the questionnaire.

The authorities that complied in a proper and timely fashion with a *FOIA* request generally exhibited administrative competence with more clearly defined lines of responsibility. They hold and can more readily access the information requested. They have a good story to tell; they have shaken off the culture of secrecy and respect the right to know of the community that they serve.

Conclusion

Whilst the research has revealed inconsistencies and shortcomings in the application of the *FOIA*, the process has yielded much valuable research data that prior to the *FOIA* would not have been accessible. There have been far more helpful officials than unhelpful ones. Leicester City Council, which, having provided a prompt and largely complete response, even sent an *FOIA* user satisfaction questionnaire serves as an exemplar of good practice, demonstrating commitment to the spirit, as well as the mechanics, of freedom of information. The most optimistic conclusion is that the incidence of non-responses or incomplete responses to the questionnaire have indeed reflected Al Gore's observation about "*good people trapped in bad systems*"

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