



1 February 2008

Our ref: ICAEW Rep 15/08

Your ref:

Ayobola Akwarandu
Ministry of Justice
Information Rights Division
6.16, 6th Floor, Selbourne House
54-60 Victoria Street
London SW1E 6QW
By email

Dear Mr Akwarandu

FREEDOM OF INFORMATION ACT 2000: DESIGNATION OF ADDITIONAL PUBLIC AUTHORITIES

The Institute of Chartered Accountants in England and Wales (the Institute) welcomes the opportunity to comment on the Ministry of Justice's consultation on the Freedom of Information Act 2000: Designation of additional public authorities.

We have drafted our response on the basis that the government's aims of promoting greater transparency and accountability in both the public and private sectors need to be achieved in a balanced and proportionate way. The government needs to have regard to the costs and benefits of any changes, the increased burden that it may impose on organisations (when the Government's overall objective is to reduce the burden of regulation on the private sector) and the relevant legislative and regulatory frameworks that are already in place.

We have provided some general comments as well as considering the impact that potential designation under section 5 may have on the Institute itself and also on our member firms which provide a service through contracts with public authorities. We have also included responses to your detailed questions at Appendix A.

If you have any comments or questions on our response, please do not hesitate to contact Sumita Shah on 0207 920 8516 or email her at sumita.shah@icaew.com.

Yours sincerely

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**THE INSTITUTE
OF CHARTERED
ACCOUNTANTS**
IN ENGLAND AND WALES

ICAEW Representation

ICAEW REP 15/08

**FREEDOM OF INFORMATION ACT 2000: DESIGNATION OF ADDITIONAL PUBLIC
AUTHORITIES**

**Memorandum of comment submitted in February 2008 by The
Institute of Chartered Accountants in England and Wales, in
response to Ministry of Justice consultation paper Freedom of
Information Act 2000: Designation of additional public authorities
published in October 2007**

Contents	Paragraph		
Introduction	1		
Who we are	2	-	3
Major points	4	-	29

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INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales welcomes the opportunity to comment on the consultation paper *Freedom of Information Act 2000: Designation of additional public authorities* published by Ministry of Justice.

WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 130,000 members in more than 140 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 700,000 members worldwide.
3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

MAJOR POINTS

General comments

4. Paragraph 18 of the consultation outlines that the perception of what is a public function has changed over time, and that in recent years many functions that would have previously have been carried out by public authorities are now carried out by other bodies under contract. These changes have been driven by valid political considerations, including the need to provide a cost-effective service, without imposing unnecessary burdens on government spending requirements, on the providers of public services, or on their users. It would therefore be unfortunate if the benefits of the increasing use of private sector expertise in providing public services were to be undermined by treating such entities as if they were public bodies, and imposing on them the burdens of the Freedom of Information Act.
5. The consultation mentions the need for impact assessments, where individual bodies are considered for designation under section 5, at various points. However, the preparation of impact assessments is burdensome in its own right. In our view it would be better, more useful and less burdensome to consider the impact for a category of entities rather than on a body by body basis. If the result of this impact assessment highlights that the burden is greater than the value of designation for any category of body, then it will provide a basis for the argument against designation of individual bodies.
6. Where the government determines that the scope of the Act should be extended to private entities, the way in which, and the extent to which the extension is made need to be considered carefully, with a view to maximising the net benefit. For example, we understand that public authorities use considerable resources when determining individual requests for information only then to take a decision not to provide the information because what has been requested is subject to a full or partial exemption. It would be far more cost-effective if services provided

by these entities that are likely to be the subject to an exemption were to be excluded entirely from information requirements rather than for entities to spend large amounts of resources considering each and every request.

7. Furthermore, although it may be appropriate for private sector entities to disclose (and justify) the nature and quality of the services they provide and the total cost, they should not be required to disclose how they carry out their functions or the resources utilised (except where these directly impact the quality of those services). In some cases, access to this information may be necessary to ensure compliance with the law or regulatory requirements, but in those cases these should be required under the relevant regulatory or professional requirements, and not be a matter for the Freedom of Information Act.

Detailed Comments

8. The consultation considers the two main categories of organisation that could be designated under Section 5 of the Act, namely those which:
 - a. appear to the Secretary of State to exercise functions of a public nature; and
 - b. are providing, under a contract made with a public authority, any service whose provision is a function of that authority.

Bodies exercising functions of a public nature (not under contract)

9. Relatively little consideration is given to bodies which carry out a function of a public nature other than under contract. Although a case could be made for the provision of more information, available to the public, from some or all of these bodies, we do not consider that a genuine case has been made for the designation of such bodies under the Act. It is noted in the last bullet of paragraph 11 of the consultation that some bodies accept that they carry out functions of a public nature. However, it is unclear why that should necessarily result in designation within the scope of the Act. If bodies readily accept that they should provide more information in view of their public functions, then they should be free to do so voluntarily rather than through a statutory requirement.
10. For example, the Institute accepts that for certain of its activities, in particular the exercise of its disciplinary function, it may fall under the definition of a “public authority” under section 6 of the Human Rights Act 1998. However, it receives no public funding (either directly or indirectly) for its activities. We consider that designation would be both burdensome and unnecessary for our members, those who use their services and the public in general.
11. Therefore, we do not think that the time is ripe for decisions to be made on the designation of any non-public authorities, or any other body, which carries out its functions other than under contract with a public authority. There needs to be more consideration of the issues involved, including additional dedicated consultation with the categories of bodies concerned.
12. If, following such dedicated consultation, the government wishes to proceed with the designation of such bodies, it will need to consider the general principles under which decisions should be made, including taking into account the additional cost burdens that will inevitably be placed on those funding such organisations (their members) and whether the circumstances justify the additional costs. It is essential that these are fully considered prior to consultation with individual bodies.

Impact on member firms

13. In the consultation paper, there is reference to possible extension of coverage of the Act to contractors performing public functions. The current interpretation of the Act appears to allow extension to any firm or organisation that is awarded a contract for a new service. If this interpretation is correct, this would need a new section 5 order and a separate consultation would be required each time a new contract was being awarded which could cause delay in the procurement process and could be a considerable burden for the public service. In addition, it could raise the costs incurred by the firm or organisation contracting with the public authority and therefore the cost to that public authority (as the costs of compliance with the Act would be recharged). It could also result in organisations not bidding for contracts thereby reducing competition and choice for the public authority. In our view, this would not be to the benefit of the public.
14. Our member firms provide services to public authorities in the following ways:
- as external auditors appointed by the Audit Commission and the Auditor General for Wales; and
 - as providers of other services under contract to the public authority.
15. We are aware that there may be a call by public authorities, such as the Audit Commission, the National Audit Office or the Auditor General for Wales, with whom you are consulting, to encourage designation of our member firms as public authorities by virtue of the services that they provide, with the argument being that the service provided is comparable to the one that they and other similar bodies provide. We consider that all of these bodies have much wider responsibilities than our member firms and there is therefore a good argument for their being the subject of the Act. However, we have several concerns in relation to the argument that firms should be treated in the same way. In particular, we are concerned about the extent to which such designation will impact on our member firms, their business and the integrity of the profession as a whole.

External auditors

16. Whilst we believe that external audit clearly has a public benefit, it is important to understand that the main outputs from the audit of a public authority are already in the public domain and available to the public. Other information that the public may have an interest in obtaining from the external auditor would be in relation to the public authority itself and in our view, much of this information is already available through the public authority. It would not be in the public interest to have other papers that belong to the auditor available and open to the provisions of the Act for the reasons laid out in the next paragraph.
17. The exemptions that are currently offered under section 33 of the Act are, by no means, absolute and therefore costs would be incurred to deal with requests to ensure that additional information is not made available. Notwithstanding this, it is important to recognise that the audit process often relies on provision of information, in confidence, to operate effectively and in certain circumstances disclosures would not be in the public interest and could potentially damage the quality of the audit process. For example:
- The professional and ethical standards that govern audit processes and procedures mean that individuals at the client organisation involved in the audit are content to make all relevant information available to auditors,

including their personal views on specific matters. If individuals believe that an auditor's confidentiality might be compromised and their views may not remain anonymous, this could prejudice their willingness to voice their concerns openly, which could in turn undermine the effectiveness and rigour of the audit process.

- Auditors' working papers may include details of their audit methodology or risk analysis criteria relating to sensitive areas within their client's organisation. Making such information available could have serious implications for the auditor's relationship with management and could again compromise the effectiveness and rigour of the audit process if the individuals are aware of or have access to the audit methodology being used.
- Auditors often document the client's internal systems and identify areas which may be open to abuse. Availability of this information to the public could seriously undermine the integrity of the client's systems and subject them to potential abuse, infiltration or sabotage.

Other services as contractors

18. In the consultation paper, it is stated, "... *there is a need to distinguish between services that the authority provides or is expected to provide as part of its functions (e.g. child protection) and those that it commissions to enable or assist it to carry out its day to day activities...*" It does not however go on to define these activities or list them in detail. In our view, the services provided by our member firms to the public sector, including internal audit services and other professional advisory services, are those that the public authority commissions to enable it to carry out its day to day activities.
19. There will be a small number of other contractors who receive an extensive amount of public funding for carrying out a public function, but we would not class the fees that our firms receive for providing their professional advisory service to be classed as public funding nor for their services to constitute either:
 - a function of a public nature; or
 - services whose provision is a function of a public authority
20. There may be a case for designation under the Act for the small number of contractors who do receive a large amount of public funding and their services are a provision of the function of the public authority, but we do not consider that a wholesale designation of contractors is appropriate. Any extensions of designation should therefore be proportional and only target the core services provided by public authorities and those receiving public funding.
21. The need for a proportionate approach to the imposition of information requirements under the Act is clearly made in part 1 of the consultation. However, designation under the Act does not appear to allow a proportionate burden.

Other issues

22. We do not see that any additional transparency would be added if the firms' working papers were made available to the public. It would also not be helpful to the running of their business if their commercially sensitive information (current or retrospective) was available as a result of any such designation. There is rarely a situation where even the clients have access to the papers of their contractors and in a similar way, it would not be appropriate for another third party to have such access. Providing access to such papers could lead to the undermining of

firms' professional or ethical requirements (as outlined in paragraph 17) which are set internationally. It would not be appropriate for government requirements such as this to undermine the international standards and requirements that are set for the profession.

Designation of contractors and building disclosure obligations into contracts

23. We are not persuaded that there is benefit in the proposal to designate contractors and build disclosure obligations into contracts because it could result in:

- uneven application by different public authorities and across different services;
- raised costs of procurement and bidding, since negotiation periods are likely to be extended;
- public authorities taking an overly cautious approach and applying transparency obligations to an extensive range of contracts, rather than just those that are deemed to be public functions and therefore intended to be captured;
- contractual provisions being drafted in such a way as to increase the obligations of the contractor without taking account of appropriate exemptions; and
- organisations choosing not to bid for work because the cost of complying with the Act is considered to be too onerous.

24. In our view, it may be sufficient for access obligations to be built into contracts. However, we would not consider it appropriate for such contractual terms to be enforceable directly by the public through the requirements of the Act. Information on the services provided by contractors should be enforceable only through the public authority ultimately responsible for the provision of the service.

25. If this results in inconsistency in the availability of information, this should be addressed by issuing guidance to the public authority rather than imposing general obligations on the contractors. The guidance should provide public authorities with a steer relating to the information which an advisor may produce and which is held by the public authority.

26. If the government chooses this option, then it will need to consider very carefully how it intends to apply it so as not to impose a further burden or disincentive on either the public authority or the contractor providing the service.

Summary

27. We do not consider that the Act should be extended to other organisations just because they appear to have a public function. There needs to be careful consideration of:

- what the public function is and the services that the body provides;
- an impact assessment;
- its funding and ultimately who will bear the cost if designation were to occur; and
- the value of the public benefit as compared to the cost of compliance.

28. Similarly, extension of the Act to our member firms may result in little additional useful information being made available to the public, but could significantly increase the costs of compliance with the Act and potentially lead to market

failure if costs rise and suppliers withdraw from the market. The costs and burden that this would create would, in our view, outweigh any public benefit.

29. We would welcome the opportunity to discuss our comments with you in more detail when you have had a chance to review and consider our response.

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Appendix A: Response to the detailed questions

Q1: Do you support extending the coverage of the FOI Act to organisations that carry out functions of a public nature and to contractors who provide services to a public authority whose provision is a function of that public authority?

We support the extension of the FOI Act only to contractors at this stage, and then only when they provide services of a public nature where they are of sufficient scale, and are services rather than activities that the public authority commissions to enable or assist it to carry out its day to day activities. In addition, there needs to be consideration of the impact on the organisation in terms of the costs of compliance with the Act, and therefore the potential effect on the provision of services and the willingness of business to contract with the public authority to deliver or provide these.

Q2: Of the five proposed options, which do you consider the best option? Or would some other option, or combination of options, be preferable? Please explain your reasoning.

We do not consider that designation of any private bodies under section 5 of the Act is necessary or appropriate. Where additional disclosure requirements are appropriate, they should be provided for under contract (see paragraph 23 – 26 of the main response).

Q3: Should some form of public funding be essential in order for an organisation to be considered for inclusion in a section 5 order, or should this be just one of a number of relevant factors to be considered?

In our view, extensive public funding should be an essential criterion (see paragraph 19).

Q4: Are there any organisations or categories of organisations that do not receive public funding but that you believe should be covered by the Act? Please explain why.

No.

Q5: Do you agree that the balance between the public interest and the potential burden of FOI is an appropriate consideration when deciding whether to cover an organisation?

Yes - it is important that the Government is not seen as unnecessarily adding to the burden on bodies (See paragraphs 5 – 7).

Q6: To what extent do you think that the factors listed, or any other factors, should be taken into account in determining whether organisations performing public functions should be brought within the ambit of the Act?

We agree with the factors listed. In addition, we suggest that consideration should be given to the extent of information that is already available through Schedule 1 bodies, or by other means. As a general principle, requests should only be made to Schedule 5 designations where information is otherwise unavailable.

Q7: Do you agree that the coverage of FOI should extend to contractors who provide services under contract with a public authority whose provision is a function of that authority? If you disagree, please give your reasons.

It is unclear what the scope of core functions is and therefore which activities may potentially fall under this definition. This needs to be clarified. There may be a small number of contractors who receive an extensive amount of public funding for carrying out a public function for whom there may be a case for designation. However, we do not consider a wholesale designation of contractors to be appropriate

Q8: Do you agree that information relating to an organisation's administration of a public service or function, for example in the areas listed in paragraph 33, should be subject to FOI? If not, please give your reasons.

No, as these areas are likely to be mixed with other activities falling outside FOI.

Q9: Which organisations, or types of organisations, do you believe should be considered for inclusion in any extension of FOI under s.5 of the Act, and why?

Other than the few cases identified in the answer to question 7 above, no other organisations should be considered for inclusion.