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**Title:** The UK's openness watchdog lacks teeth and transparency

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## **The UK's openness watchdog lacks teeth and transparency By Heather Brooke**

- ***Information Commissioner fails to meet his own deadline***
- ***Default position is secrecy***

The UK watchdog charged with ensuring that public bodies obey the new Freedom of Information Act already has a huge backlog of appeals that will take years to clear. An even greater surprise is that these figures, along with early decisions, were withheld and were only made public after filing an FOI request.

The Freedom of Information Act 2000 and Freedom of Information (Scotland) Act 2002 both came into force 1 January 2005. The two countries' laws are similar but each country has its own Information Commissioner. In the UK, just over 22,000 FOI requests have been received between 1 January and 30 June 2005 by the 42 central government bodies monitored by the Department for Constitutional Affairs<sup>1</sup>. The Scottish Executive reported that from 1 January to 5 April it received approximately 900 requests for information that were centrally recorded by the Executive's Freedom of Information unit.

Applicants must first exhaust a public authority's internal review process before appealing to the Commissioner, even though in 79 per cent of cases, public authorities uphold their initial refusal. The table below shows the statistics for the UK and Scottish Information Commissioners as of 4 November 2005<sup>2</sup>.

	UK Commissioner	Percentage of total received	Scottish Commissioner	Percentage of total received
Closed cases	640	31%	99	21%
Decision notices	69	3 %	44	9%
Ongoing	1325	65%	327	70%
Total number of applications	2034		470	

Even at the quickest rate of issuing decisions - 16 in July, it will take the UK Commissioner more than eight years to clear the present backlog.

<sup>1</sup> Freedom of Information statistics for Q1(1 Jan-30March) and Q2 (1 April-30 June 2005)

<sup>2</sup> Figures from James Ford, spokesman for the UK Information Commissioner's Office and Claire Sigsworth, spokeswoman for the Scottish Information Commissioner.

Whereas the Scottish Commissioner, Kevin Dunion, has committed to dealing with cases within four months, the UK commissioner has been reluctant to state any similar performance targets. However, at the Society of Editors conference in Cumbria 17 Oct 2005, Deputy Commissioner Graham Smith stated the Information Commissioner's Office (ICO) has now set a minimum target of resolving 50 percent of cases within 12 working weeks. But caseload data is not published on a regular basis, so there is no way of knowing if this most basic target is being met.

The Commissioner had four years to prepare for implementation of the FOIA. In addition, the ICO paid for a study published March 2004 (Hazell, 2004) by University College London's Constitution Unit, which predicted the number of appeals and subsequent staff needed. The study forecast that between 1250 and 3000 appeals would be received during the first year – an entirely accurate prediction.

Not every request can be predicted, of course, but the most contentious were certainly well known. The Attorney General's advice to Tony Blair on the Iraq War had been sought since March 2003, yet when the appeal came to Commissioner Richard Thomas, he was unable to commit to a date for delivering his verdict. In the end the information was leaked to the media. Restaurant inspections, fire safety inspections, and the names of MPs' staff were all predicted as being major FOI test cases, and yet to date, the commissioner has failed to make a decision on appeals seeking exactly this type of data.

### **Early decisions and case lists kept hidden**

The UK Commissioner even seemed unprepared to issue decisions. The Scottish Information Commissioner published his first decision 17 May 2005. I telephoned the UK Commissioner's press office to see if any decisions had been issued. A spokeswoman told me there were 10 decisions to date but they were unavailable. After two weeks, they were still not public, so I made an FOI request for the decision notices 1 June.

I received the first 11 decisions by email on 15 June and posted them on the 'Your Right to Know' website [www.yrtk.org](http://www.yrtk.org). The next day, Mr Thomas told an audience at the FOI Live 2005 Conference in London<sup>3</sup>, that there had been a policy of secrecy. "Perhaps we were a little nervous before in not publishing," he told the conference delegates, "but we are changing our policy and I'm announcing today that summaries of all our decisions will be published online 48 hours after they are made."

As well as publishing decisions, the Scottish Commissioner also publishes a list of all the cases his office has under investigation on a monthly basis.

"Publishing the decisions? It's not something I ever thought of *not* doing," Dunion said (interview 11 August 2005). "And I thought it would be useful to put up our database of cases under investigation because it helps people to see what kind of information others are asking for and hopefully that encourages the public to use the Act."

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<sup>3</sup> FOI Live 2005: Third Annual Information Conference for the Public Sector held 16 June 2005 at Victoria Park Plaza, London

The UK Commissioner does not publish such a list, and so on 1 June 2005 I filed an FOI request for this information. The answer came back on the last day of the statutory time period (30 June), yet the number of cases on the database was just 368 when the Commissioner stated his office had received over 1,000 appeals. Where were the remaining 600+ cases?

After a month of chasing, the final database came through on 4 August 2005, long after the statutory time period had elapsed. The delay arose, I was told, because the ICO had misunderstood my request for "a listing of all complaints received and their file numbers" to mean only a partial listing.

To date, the only place to view the caseload database is on my website<sup>4</sup>, and unfortunately the data I was given excludes detail on what the request was for but it does give case numbers and the name of the public authority in question.

The accuracy of the data is questionable. For example, the database includes two entries for Norfolk County Council, yet Norfolk's corporate FOI Officer, Deirdre Sharp, contacted me to say the council has had no communication from the Commissioner about either of these requests, one of which the council has no knowledge. A citizen, Denis McCready, contacted me 21 October 2005 to say his organisation has filed three applications with the ICO about refusals to see extracts from the 1911 and 1921 censuses for England & Wales and the 1937 census for Northern Ireland<sup>5</sup>. He says: "Although the ICO has acknowledged our complaints, the case database doesn't list two of our complaints and our case against the Office for National Statistics shows that our case was closed months ago. That's news to us!"

Publishing a list of the cases under investigation is the only way for the public and even public authorities to accurately assess who is using the act and the Commissioner's effectiveness. ICO is still refusing to publish this data. "I realise you would like the caseload to be made public on an ongoing basis," said ICO spokesman James Ford. "Compiling that information takes time – time and resource we currently spend on dealing with appeals."

### **Weak Decisions**

Of the Commissioner's 64 published decisions, only three have ordered disclosure. In the vast majority of cases, the Commissioner had taken so long to make a ruling that the public authority had already 'answered' the request, even if that meant issuing a proper refusal notice. The Commissioner was unable to take any punitive action, even in the cases where public authorities flouted the law either by failing to respond in time, ignoring the request or denying the request without legal reason.

The three orders for disclosure are against local authorities rather than central government. Bridgnorth District Council, Shropshire, (Case Ref: FS50062329) was ordered to release council files in a land dispute. Corby Borough Council (Case Ref: FS50062124) was told to release salary details of a temporarily employed finance officer. Luton Borough Council (Case Ref: FS50064062) was ordered to release correspondence related to a land sale.

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<sup>4</sup> <http://www.yrtk.org/secret-squirrel/ic-caseload/>

<sup>5</sup> McCready has posted a summation of his cases at: <http://home.clara.net/denis.mccready/index.htm>

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In other cases, ranging from a list of the revenue generated by speed cameras to information about how council tax bands are calculated, the Information Commissioner sided with the public authority, or simply declared that a refusal notice had not been properly issued.

Where a complainant's account differs with that of a public authority, the Commissioner has given the benefit of the doubt to the public authority. For instance, he accepted that the Human Fertilisation & Embryology Authority "complied with the Act in posting a response to the complainant within 20 days", even though the complainant stated no such letter had ever been received.

Matthew Davis, news director of John Connor Press Association, will become one of the first people to take his appeal to the Information Tribunal after the UK Commissioner upheld the National Maritime Museum's refusal to disclose to Davis the cost of a public sculpture (Case Ref: FS50063478). He is still waiting for a decision about his complaint filed with the ICO on 7 February against Sussex Police's refusal to release the number of registered sex offenders.

"I suspect they (the Commissioner's Office) are worried sick about giving out information that has never been disclosed before," Davis said (interview, 29 September 2005) "So they just stall and stall, hoping it will leak out like the Iraq War advice."

Davis is also dubious about the Commissioner's handling of requests: "One of the first cases I sent to the Commissioner's Office was lost," he said. "I only discovered it when I received an acknowledgment letter for another complaint. When I called up they said it had been lost and that I'd need to re-send the file, so I did - this time by registered post."

Both public authorities and applicants have cited the ICO's severe lack of communication as a problem. Some authorities such as Norfolk are not aware they are even under investigation, whereas applicants (including myself) are left in the dark for many months. Written guidelines (section 19, Memorandum of Understanding) state that the ICO should communicate with applicants every 28 days, yet this is not happening.

Stephen Gradwick, a consultant in Merseyside who has made almost 40 FOIA requests said (interview 26 September 2005) the only way he has been able to keep track of his cases was by telephoning the Commissioner's Office. "They are just not being helpful or user-friendly, and I'm given no information about the status of my cases unless I ring. At one point, the Deputy Commissioner Phil Boyd then sent me an email telling me to stop enquiring about my cases."

It is admirable that Richard Thomas has spoken out against government secrecy, but this must be followed with tough action. The first step would be to institute greater transparency in his own office, making it an example for other public authorities to follow.

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