

## A case for extending the Freedom of Information Act (2000) to private companies delivering public services through government contracts

### Introduction

The past 40 years have witnessed a fundamental shift in the nature of central and local public service provision, through the huge expansion of outsourcing to private firms. Contracting out public services accounts for approximately half of what the public spends on goods and services each year,<sup>1</sup> with one recent estimate putting its value at £251bn.<sup>2</sup> The local government outsourcing market alone was said to be worth £30bn in 2014,<sup>3</sup> with many local councils looking to outsource the entirety of their services to private contractors.<sup>4</sup> The outsourcing market has been characterised by a lack of competitiveness, whereby most government contracts are won by a handful of firms: in 2012 - 2013, four major firms alone (G4S, Atos, Serco and Capita) held government contracts worth over £4bn.<sup>5</sup> This shift towards increasing privatisation was driven by the need to reduce public debt, as well as an ideological commitment across the political spectrum to the belief that opening up public services to the private sector results in better and cheaper service provision.<sup>6</sup>

Recent years have been characterised by notable catastrophic failures in the provision of public services by the private sector, which has caused widespread public mistrust in the ability of the private sector to provide essential services. IT outsourcer Concentrix's 'meltdown

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<sup>1</sup> National Audit Office (NAO), *The Role of Major Contractors in the Delivery of Public Services*, HC 810, 12 November 2013, p.10

<sup>2</sup> Public Administration and Constitutional Affairs Committee, Report on *After Carillion: Public Sector outsourcing and contracting*, July 2018, p.3

<sup>3</sup> Local Government Chronicle, 'The Size and Shape of the Market', 22 May 2014

[<http://www.lgcplus.com/news/growth/more-on-procurement/the-size-and-shape-of-the-market/5070944.article>]

<sup>4</sup> The Guardian, 'Outsourced and unaccountable: the future of local government', 15 December 2014, [[https://www.theguardian.com/commentisfree/2014/dec/15/local-services-barnet-council-town-hall?CMP=aff\\_1432&awc=5795\\_1538147560\\_7c4851707bdadc4e29d4a712f148d700](https://www.theguardian.com/commentisfree/2014/dec/15/local-services-barnet-council-town-hall?CMP=aff_1432&awc=5795_1538147560_7c4851707bdadc4e29d4a712f148d700)]

<sup>5</sup> NAO, *The role of major contractors*, p.5

<sup>6</sup> Cabinet Office, White Paper on *Open Public Services*, 1 July 2011 p. 6

[<https://www.gov.uk/government/publications/open-public-services-white-paper>]

in performance' in handling of HMRC's roll out of universal credit between 2014-16 resulted in almost 90% of appealing claimants winning their cases, resulting in widespread outrage and eventual termination of their contract.<sup>7</sup> The collapse of construction firm and outsourcing group Carillion in 2018, which had around 420 public sector contracts amounting to £1.7bn ranging from HS2 development to providing school meal services, is set to cost the taxpayer £148m.<sup>8</sup> In August 2018, the Ministry of Justice had to intervene in the running of HMP Birmingham after private security firm G4S's management deteriorated to a dangerous extent, the same firm whose security failure at the London 2012 Olympics forced the army to step in. The crash of the upgraded NHS IT system run by CSC, noted as the 'biggest IT failure in history', cost the taxpayer £10bn.<sup>9</sup>

Rather than prompting a much-needed re-examination of the relationship between the state and the private sector, the current Government appears unwavering in its commitment to outsourcing to the private sector. It is near impossible to imagine public service provision without the private sector, as long as extensive renationalisation remains off the political agenda.

In light of this reality, in this essay I propose that the Freedom of Information Act 2000 ('the Act') is in urgent need of reform by way of extending its scope to include firms with substantial government contracts. The Act was created to encourage transparency, public scrutiny and openness through the provision of a public 'right of access' to information held

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<sup>7</sup> House of Commons, Public Accounts Committee, Progress Review Report on *Universal Credit and fraud and error*, 3 November 2016 [<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/489/48902.htm>]

<sup>8</sup> BBC, 'Carillion collapse to cost taxpayers £148m', 7 June 2018, [<https://www.bbc.co.uk/news/business-44383224>]

<sup>9</sup> The Guardian, 'Abandoned NHS IT system has cost £10bn so far', 18 September 2013, [<https://www.theguardian.com/society/2013/sep/18/nhs-records-system-10bn>]

by public authorities relating to the delivery of public services. In its nascent stages, architect of the Act, Tony Blair commented:

‘A Freedom of Information Act is not just important in itself. It is part of bringing our politics up to date, of letting politics catch up with the aspirations of people and delivering not just more open government but more effective, more efficient, government for the future.’<sup>10</sup>

However, as long as the Government continues to outsource close to a majority of its public services, the Act in its current form will never come close to providing the openness and efficacy that were its foundations.

### *The Freedom of Information Act 2000*

Britain was a relative latecomer to freedom of information (FOI), part of the ‘third wave’ of countries that introduced FOI after the global democratic overhauls of the 1990s.<sup>11</sup> The Act came after a series of gradual reforms aimed at political transparency. These reforms were accelerated in the late 1970s during the Lib-Lab Pact, when the government published its green paper on *Open Government* and supported Liberal MP Clement Freud’s *Official Information Bill*, which never became law.<sup>12</sup> During the 1980s, reform slowed but access to information was extended to local government in the *Local Government, Planning and Land Act 1980* and a right to access personal data was introduced under the *Data Protection Act 1984*. The pace of change picked up in the 1990s, culminating in the 1994 *Code of Practice on Access to*

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<sup>10</sup> R. Hazell et al *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI work?*, 2010, pp. 15 - 16

<sup>11</sup> *Ibid.*, p. 3

<sup>12</sup> *Ibid.*, p. 10

*Government Information* and the initial government white paper for the Act in 1997, called *Your Right to Know*, which stated:

‘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 people with a legal right to information’.<sup>13</sup>

The Act came into full force in January 2005, applicable to approximately 100,000 public authorities. The Act provides public access to information by obliging public authorities to publish certain information about their activities and allowing members of the public to request information from said authorities. FOI requests predominantly come from journalists, MPs, charities and businesses. Recorded information requested includes printed documents, computer files, letters, emails, photographs and sound and video recordings. The Act does not give people access to their own personal data such as health records (this is covered by subject access requests under the *Data Protection Act 1998*). In the 13 years since its inception there have been thousands of public interest discoveries that were only made possible through FOI requests. Notable discoveries include: the MP’s expenses scandal in 2009;<sup>14</sup> that British pilots were carrying out air strikes in Syria without Parliamentary knowledge or approval;<sup>15</sup> that more than a third of people with serious degenerative conditions such as Parkinson’s and MS were deemed ‘fit to work’ and had their benefits cut in 2014.<sup>16</sup> The use of FOI has recently proliferated partly due to a trend towards data journalism: in 2017 there were 46,681 Freedom

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<sup>13</sup> Cabinet Office, White Paper on *Your Right to Know: the Governments proposals for a Freedom of Information Act*, December 1997, foreword by the Chancellor of the Duchy of Lancaster [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272048/3818.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272048/3818.pdf)]

<sup>14</sup> The Telegraph, ‘MPs’ expenses scandal: a timeline’, 4 November 2009, [<https://www.telegraph.co.uk/news/newstopics/mps-expenses/6499657/MPs-expenses-scandal-a-timeline.html>]

<sup>15</sup> Reprieve, ‘UK pilots conducted strikes in Syria’, 17 July 2015, [<https://reprieve.org.uk/press/uk-pilots-conducted-strikes-in-syria/>]

<sup>16</sup> The Independent, ‘Thousands with degenerative conditions classified as ‘fit to work in the future’ – despite no possibility of improvement’, 23 October 2014, [<https://www.independent.co.uk/news/uk/politics/thousands-with-degenerative-conditions-classified-as-fit-to-work-in-future-despite-no-possibility-of-9811910.html>]

of Information (FOI) requests received across all monitored bodies, which marked a 3% increase on the year before,<sup>17</sup> 46% of which were granted in full. Since its inception, the Act has become instrumental to how the public hold national and local government to account, both in court and in the press.

*Which bodies fall under the remit of the Act?*

Currently, the Act covers any recorded information that is held by a public authority in England, Wales and Northern Ireland. Information held by Scottish public authorities is covered by Scotland's own *Freedom of Information (Scotland) Act 2002*. Section 3 of Part 1 of the Act defines those bodies or holders of office that are categorised as 'public authorities':

*3. - Public Authorities*

*(1) In this Act 'public authority' means –*

- a. Subject to section 4(4), any body which, any other person who, or the holder of any office which –*
  - i. is listed in Schedule 1, or*
  - ii. is designated by order under section 5, or*
- b. a publicly-owned company as defined by section 6.*

Schedule 1 of the Act lists the bodies that fall under its remit, which includes but is not limited to: government departments and their executive agencies, the House of Commons and Lords, devolved governments, the armed forces, local authorities, parish councils, the Greater London Authority, the National Health Service, maintained (state) schools and academies, higher

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<sup>17</sup> Cabinet Office, Annual Bulletin on *Freedom of Information Statistics in Central Government for 2017*, 26 April 2018, [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/704094/foi-statistics-annual-2017-bulletin\\_\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/704094/foi-statistics-annual-2017-bulletin__1_.pdf)]

education institutions, police forces, and public advisory committees.<sup>18</sup> The Cabinet Office is responsible for updating Part 1 of the Act and the Information Commissioner can investigate whether or not a body is a public authority to fall under the remit of the Act.

Section 5 of the Act gives the Secretary of State the power to designate further bodies as public authorities. This was intended to be used to specify major public-sector contractors as public authorities. In theory, this provision allows for the inclusion of bodies not specified in Schedule 1 and those that cannot be added by order under section 4 or 5. The first order under section 5 designated the Universities and Colleges Admissions Service (UCAS), the Association of Chief Police Officers (APCO), and the Financial Ombudsman Service (FOS) as public authorities for the purposes of the Act in November 2011. However, since the Act came into force, this power has not been used by the Secretary of State to designate any contractors as public authorities, whether wholly or partially.

From September 2013, any companies which are wholly owned by the Crown, the wider public sector, or a combination of both are also included, in the amended section 6 of the Act. For instance, some local authorities have transferred responsibility for services such as social housing to private companies wholly owned by them (referred to as arm's length management organisations or ALMOs). Therefore, in accordance with section 6 these companies count as a public authority in their own right so are also subject to FOI requests.<sup>19</sup>

Public authorities may apply for exemptions from FOI requests according to the 'public interest test', set out in Part 2 of the Act, whereby a public authority may be exempted from

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<sup>18</sup> The Freedom of Information Act 2000, sch 1

<sup>19</sup> ICO, *Public Authorities under the Freedom of Information Act*, pp. 4-5, [[https://ico.org.uk/media/for-organisations/documents/1152/public\\_authorities\\_under\\_the\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1152/public_authorities_under_the_foia.pdf)]

complying with the general right of access. There are twenty-four exemptions to the general right of access. Exemptions are afforded for reasons such as national security, commercial interests, defence, pending investigations, intention for future publication, personal information etc.

### *Proposed Reform*

According to the current statutory position (largely outlined in Schedule 1 of the Act), over 50% of public service provision is precluded from any public scrutiny by way of FOI requests. This essay proposes to extend the Act by way of widening its remit. This reform falls broadly in line with proposals put forward by Andy Slaughter MP, whose proposed *Freedom of Information (Extension) Bill 2017 – 2019* ('the Bill') is due a second reading in the House of Commons in October 2018. The Bill, in its current form, proposes to insert the following into the relevant aspect Section 3 as detailed above:

#### **3A Application of this Act to contractors**

- (1) Any contract made by a public authority with any person ("the contractor") for the provision of services to or on behalf of the public authority shall be deemed to include the specified disclosure provision*
- (2) Where such a contract is to any extent performed by means of a sub-contract with another person ("a sub-contractor"), that sub-contract shall be deemed to include the specified disclosure provision.*
- (3) In this section the "specified disclosure provision" means a provision stipulating that all information held in connection with the performance or proposed performance of the contract by—*

- (a) *the contractor,*
- (b) *a sub-contractor, and*
- (c) *any other person acting on behalf of the contractor or sub-contractor* <sup>20</sup>

The Bill therefore seeks to extend the Act to include *any* contractor or sub-contractor working with a public authority to deliver public services. As this is a simple extension, it requires that private contractors be subject to FOI requests in the exact same way that public authorities currently are under the Act. This way, the practical implications of the extension are relatively straightforward. However, given the enormous scope and range of outsourced public-sector contracts I argue that it would not be proportionate for all contractors to fall under the remit of the extended Act. Nor would this receive widespread support across the political spectrum, through fear of making government contracts commercially unattractive prospects. One way to designate firms that should fall under the reformed Act would be to only include contracts of a significant monetary value or length. The Information Commissioners Office puts forward a strong case for this approach, suggesting reforms for the inclusion of outsourced services over £5 million in value, those which continue over 5 years, or where the contractor solely derives its revenue from public sector contracts.<sup>21</sup> This way, the majority of significant contracts will be included under the new Act. This would therefore require further detail in the amended Section 3A to this effect.

Additionally, I propose that information that has previously been held by private contractors in connection with the delivery of outsourced public services should instead be held on behalf of the public authority who initiated the contract. This added provision would be best achieved

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<sup>20</sup> House of Commons, *Freedom of Information (Extension) Bill*, HC Bill 23, 19 July 2017, [[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0023/cbill\\_2017-20190023\\_en\\_2.htm#11g1](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0023/cbill_2017-20190023_en_2.htm#11g1)]

<sup>21</sup> Information Commissioners Office, *Transparency in outsourcing: a roadmap* (2006), p. 6



by amending the ‘commercial confidentiality’ exemption in Part 2 of the Act, the most cited reason for refusal of disclosure on the part of private contractors. This would ensure that data held by the government or firms in relation to contracts (tenders, fees, performance etc) can be subject to FOI requests.<sup>22</sup> This amendment is critical for ensuring that public authorities work more closely with their contractors and may prompt a proper interrogation of lazy or opaque business practice, such as the use of personal email accounts for official business. By opening up data held by contractors related to carrying out service provision, it may encourage firms to proactively publish data relating to their practices and performance. This provision may also go some way in affecting the current complacency inherent in outsourcing. In 2018, the Committee on Standards in Public Life raised concerns on ‘the growing tendency for government contracts for services to be extended, without a rigorous re-examination and renewal of ethical or other requirements’.<sup>23</sup> They warn that in reality ‘very little is known about how actively staff in large service providers engage, apply and challenge the ethical standards espoused in these codes. Even less is known about the norms being developed in the firms following corporate renewal’, the obvious example of this being Carillion.<sup>24</sup> By making public authorities more accountable for the data related to their contracts this reform is likely to bring about increased internal scrutiny, and as a result promote more ethical and responsible practice. This is likely to lead to increased public trust in government, as evidenced in a 2011 survey carried out on behalf of the ICO, which found that 81% of public bodies questioned agreed that the Act had increased the public’s trust in their organization.<sup>25</sup>

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<sup>22</sup> Tom Gash et al, *Making Public Service Markets Work*, Institute for Government, July 2013 [[http://www.instituteforgovernment.org.uk/sites/default/files/publications/Making\\_public\\_service\\_markets\\_work\\_final\\_0.pdf](http://www.instituteforgovernment.org.uk/sites/default/files/publications/Making_public_service_markets_work_final_0.pdf)], p.38

<sup>23</sup>House of Commons, Committee on Standards in Public Life, Report on *The Continuing Importance of Ethical Standards for Public Service Providers*, May 2018, p. 18 [[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705884/2018\\_0510\\_PSP2\\_Final\\_PDF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705884/2018_0510_PSP2_Final_PDF.pdf)]

<sup>24</sup> Ibid.

<sup>25</sup> Information Commissioners Office, *Guide to Freedom of Information*, [<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/what-is-the-foi-act/>]

Finally, The Bill also proposes extending the powers set out in Part 6 of Schedule 1, to ensure that certain contractors are bound to inclusion in the Act. Amongst the proposed insertions into Part 6 in the Bill are social housing providers. It states:

*‘A provider of social housing within the meaning of section 80 of the Housing and Regeneration Act 2008, other than a local authority, in respect of information relating to the provision of social housing’.*<sup>26</sup>

The inclusion of housing associations is particularly important as they currently have the ability to refuse to answer requests about fire and safety risks, eviction policies and housing register lists. The coalition government promised a consultation on extending FOI to housing associations in 2011, and the Scottish Government is currently consulting on bringing housing associations under the Scottish FOI Act.<sup>27</sup> Whilst in theory English housing associations should be obliged to disclose information relating to environmental issues, such as fire safety decisions, under the Environmental Information Regulations, housing associations conventionally are not expected to abide.<sup>28</sup> The tragedy of the Grenfell tower fire, and the resulting national debate about social housing provision and safety, shows just how important it is for the public to have information about tenant complaints, vacant properties, and safety precautions.

Public opinion is largely behind reforms to extend the Act. In a 2015 survey carried out for the ICO, 48% of those surveyed agreed that it was very important that private companies acting on behalf of public authorities should be subject to FOI requests, and a further 27% said

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<sup>26</sup> House of Commons, *Freedom of Information (Extension) Bill*, HC Bill 23, 19 July 2017, [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0023/cbill\_2017-20190023\_en\_2.htm#11g1]

<sup>27</sup> Campaign for Freedom of Information, ‘Bring housing associations and public service contractors under FOI’, 6 July 2017, [https://www.cfoi.org.uk/2017/07/bring-housing-associations-and-public-service-contractors-under-foi/]

<sup>28</sup> Ibid.

it was fairly important.<sup>29</sup> This view is reflected in the numerous formative evaluations that the Act has received from Parliament, which cite support (both from Parliament and contractors) for the reforms outlined in this essay. For instance, the House of Commons Public Accounts Committee heard evidence from the four contractors (Capita, Serco, Atos and G4S), and all four noted that they were happy that the Act provision should apply to public sector contracts with their companies, with the Committee reiterating that transparency rather than commercial sensitivity should be the default position in relation to provision of public services.<sup>30</sup>

### Conclusion

The current Government and local councils are showing no signs of slowing their commitment to extensive outsourcing. More than that, they are looking to embrace new technologies, such as artificial intelligence and machine learning, through outsourcing contracts to tech firms to make up for shortcomings resulting from lack of funds. For instance, most recently journalists at the Guardian discovered that in the face of mounting financial pressures, local councils of Hackney and Thurrock have hired Xantura (a private firm) to develop and implement a predictive analytics system using thousands of people's data in the hope to algorithmically identify families for attention from social services – to essentially predict child abuse.<sup>31</sup> These technologies are currently without standardised ethical practice or indeed much transparency.<sup>32</sup> They also require vast amounts of data, personal and otherwise, to work effectively. These contracts are being offered with no degree of public consent or consultation at all, and there is

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<sup>29</sup> The Information Commissioner's Office, ComRes Annual Track September 2014, [<https://ico.org.uk/media/about-the-ico/documents/1043485/annual-trackseptember-2014-individuals.pdf>]

<sup>30</sup> ICO, *Transparency in Outsourcing: A Roadmap*, March 2016, p.10

<sup>31</sup> The Guardian, 'Councils use 377,000 people's data in efforts to predict child abuse', 16 September 2018, [<https://www.theguardian.com/society/2018/sep/16/councils-use-377000-peoples-data-in-efforts-to-predict-child-abuse>]

<sup>32</sup> Department for Business, Energy & Industrial Strategy, *Policy Paper on AI Sector Deal*, April 2018, [<https://www.gov.uk/government/publications/artificial-intelligence-sector-deal/ai-sector-deal>]

currently no means of ascertaining how public data is being used or analysed. These potentially alarming developments, unfolding with near complete immunity from public scrutiny, demonstrate just how desirable reforming the Act is. Appropriate, wide reaching information legislation is foundational to any modern, innovative political establishment. As long as the current statutory position continues as it is, the British government cannot claim to be open or transparent in its provision of public services. Extending the Act is a simple and practical process, as shown by the succinctness of the Bill proposed by Andy Slaughter MP and recommendations from the ICO. An extended Act will go a long way in undoing the complacencies inherent in the outsourcing market and will push towards better contracts through a deeper consideration of business practice. However, if outsourcing continues to be characterised by failure at least the public will have recourse to know the full story.

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