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Title: Examining the Effectiveness of Current Information Laws and Implementation Practices for Accountability of Outsourced Public Services

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Abstract

Recent events linked to outsourcing such as the Grenfell Tower disaster in June 2017 and the collapse of Carillion in 2018 have again highlighted the challenges of maintaining democratic accountability of public services and government expenditure contracted out to private companies. Although not the only focus of policy debate, pressure is building from both parliamentarians and the Information Regulator to extend UK information laws to the rapidly expanding number of private companies holding major public sector contracts. However, there remains a lack of evidence as to the nature and extent of this accountability gap and the implications for legislative reform. This paper presents findings on non-compliance from a comprehensive field experiment using Freedom of Information requests on the Private Finance Initiative model of outsourcing. We demonstrate the limits of FOI as a tool for accountability and argue both legislative and regulatory reform are needed to enable proper public scrutiny of outsourced public services.

Keywords: Accountability, Private Finance Initiative, Right to Information, Outsourcing, Oversight, Freedom of Information.

The UK public sector is now believed to be the largest single outsourcing market outside the United States with an estimated value of £284 billion in 2017/18[1]. The scale of outsourcing poses significant challenges to maintaining democratic accountability of public services and government expenditure contracted out to private companies. An important driver of outsourcing has been the Private Finance Initiative (PFI) through which the private sector has become increasingly responsible for the construction and management of hospitals, schools, roads and other public infrastructure. The accountability deficit in relation to PFI and public-private-partnerships (PPPs) has been the focus of a growing body of literature highlighting the lack of available contract information (Demirag et al., 2004; Shaoul et al., 2012; Hellowell and Pollock, 2009). A key area of concern is the suitability of existing Public Information Rights (PIR) such as those enshrined in the Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations (EIR) 2004 for enabling the public and its parliamentary representatives to properly scrutinise these and other outsourcing models.

[1] https://www.instituteforgovernment.org.uk/publications/government-procurement

This accountability gap has been recognised by UK parliamentarians in a succession of select committee investigations and through Private Member Bills seeking to extend FOI legislation to publicly-funded private contractors and publicly-owned companies, so far unsuccessfully. It has also been recently underlined in report to Parliament by the Information Commissioner, which concluded that in relation to outsourcing FOI is 'no longer fit for purpose' (ICO 2019, p.6). However, the nature and extent of this accountability gap remains unknown due to the absence of systematic research on how PIR are being used and requests handled in relation to outsourcing contracts. (ICO, 2019) Such a lacuna presents a significant challenge for developing effective legislative and regulatory reform.

Using PFI as a case study, in this paper we present new research findings from 687 FOI requests made over three related field experiments during 2016 and 2017 designed to test the capacity of FOIA to enable disclosure of vital information about PFI contracts in the public interest. We found not only clear evidence of FOIA's provisions and implementation practices facilitating an accountability gap with respect to outsourced public services, but also widespread non-compliance behaviours among public bodies in relation to FOI requests more generally. We argue that the wider FOIA regime needs significant reform if it is to play a functioning role in democratic oversight.

This article is organised as follows: section one briefly reviews literature on transparency and accountability to understand the current limits of UK public information rights (PIR) in the context of outsourcing in general and PFI in particular; section two details the research methodology including development of more nuanced categories of compliance; section three presents an analysis of public authority responses to our FOI requests; section four discusses the implications of our findings for current parliamentary debates on proposed reforms to address the challenges to information rights and the wider accountability of an increasingly outsourced state.

1. Public information rights and the rise of outsourcing: the challenge to accountability

Enabling accountability is at the heart of PIR: that the public should have a statutory right to access information necessary for democratic oversight and scrutiny, with opportunities to question those providing it, backed by sanctions or consequences if standards or legal requirements are not met (Bovens 2005; Dubnick 2007; Heald, 1979, 2006; Shaoul et al., 2012). The legislative foundation of PIR has hitherto been predicated on clearly demarcated public and private spheres. However, the public-private divide has become increasingly blurred across the world as a result of the neoliberal turn privileging private contractors and public-private-partnerships (PPPs) for the delivery of public service infrastructure (Roberts, 2007). As the public sector has become progressively hollowed-out through privatisation and outsourcing, public services, infrastructures and associated expenditures have in turn been placed beyond the reach of FOI legislation and other PIR regimes (Hodge and Coghill, 2007).

This challenge to accountability and PIR from the rise of outsourcing can be clearly illustrated with respect to the UK.

The UK's accountability deficit in action

While UK governments have always relied heavily on the private sector to build public infrastructure, the Local Government, Planning and Land Act (1980) marked the beginning of a systematic drive by successive Conservative governments (1979-1997) to outsource all public works and services across local government and the National Health Service (NHS). This agenda was embodied in the Compulsory Competitive Tendering (CCT) regime introduced under the Local Government Act (1988) that contracted out large swathes of municipal government to the private sector (Boyne et al., 2003). CCT was eventually replaced in 1999 by the Labour government's Best Value approach, which re-opened the door to in-house local provision. However, Labour's outsourcing took a new direction under the PFI model it inherited from the outgoing Conservative government which became a preferred route for governments to invest in building and maintaining public infrastructure like hospitals, schools, roads, prisons, waste treatment, leisure centres, and social housing. Outsourcing, in various guises has continued apace under austerity with the coalition government strengthening local authorities' ability to outsource services under the Localism Act 2011 and insisting on competitive tendering of NHS contracts under the Health and Social Care Act 2012 (Walker and Tizard, 2018).

The Private Finance Initiative

Although PFI has fallen out of favour since 2010 and future PFI schemes were officially ended by the Chancellor Phillip Hammond in the October 2018 budget, there are currently 715 PFI schemes operating nationally, with a combined capital value of £59 billion and total contractual payments worth £309 billion over the period 1990 to 2050.[2] In many respects PFI is 'outsourcing on steroids' (Hodkinson, 2019, p.9), taking outsourcing to new extremes. A typical PFI contract involves handing over the *entire process* of financing, building, managing and maintaining public buildings and assets to special purpose vehicles (SPVs) – typically a subsidiary company representing the interests of private developers, banks and investors. The SPV then sub-contracts all works and services specified by the PFI contract to its principal contractors who, in turn, further sub-contract different aspects of their contracts with the SPV to companies, who then do the same. Instead of the government directly borrowing the funds to pay the builders, this is also contracted out to the SPV, which raises the finance

[2] Figures based on HM Treasury spreadsheet Current PFI projects as at 31 March 2017, https://www.gov.uk/government/publications/private-finance-initiative-and-private-finance-2-projects-2017-summary-data [accessed 13 October 2018] it excludes the dozens of expired PFI projects, 31 schemes that have been subject to public sector buy-outs and termination, and the Scottish government's variant model of PFI (the Non-Profit Distribution scheme)

through commercial borrowing. The SPV then receives monthly contract payments (unitary charges) from the public sector. The PFI contractor is supposedly incentivised to perform well through a contractual mechanism linking payment to results, this aspect of the schemes was an important element in gaining popular support for these contracts. However, instead of the public authority monitoring and financially penalising where it finds non-compliance, instead it typically pays the SPV to monitor and enforce the contract, creating a significant gap in accountability as well as undermining one of the key justifications of this model of outsourcing.

As Shaoul et al. (2012, p.215) have argued, PFI thus represents 'a new and special accountability case', one that has courted controversy since its introduction in respect of the oversight and scrutiny of public services. PFI has been the focus of more than 30 National Audit Office and Parliamentary Select Committee reports, which, alongside academic research, have demonstrated the unnecessary additional expense of raising public investment via private finance; hidden liabilities within PFI contracts, (Vecchi at al., 2012) excessive profiteering, cuts to other service budgets (Pollock et al., 2002, Edwards et al., 2004) and widespread tax evasion (Whitfield, 2016). This literature has also highlighted a systematic accountability deficit at the heart of PFI through non-disclosure of information. The absence of available information has stymied proper understanding and evaluation of PFI's supposed benefits, including operational efficiency, value for money at procurement and ongoing lifecycle costs, and the transfer of financial and human risks to the private sector (Pollock and Price, 2008, Hellowell and Pollock, 2009). The latest report by the House of Commons Public Accounts Committee (PAC) concluded that a lack of up-to-date and comprehensive data has made it impossible to 'identify a robust evaluation' of PFI at either a project or programme level (PAC, 2018, p.18). This point was reiterated in the Information Commissioner's report to Parliament (ICO, 2019).

A further information deficit identified over the course of this research relates to the paucity of reliable information about PFI contracts placed in the public domain. The sole published national database of information across all PFI schemes is the annually updated HM Treasury spreadsheet. This database is inconsistently updated by individual contract holders, is frequently inaccurate with missing data. It contains very little useful information on where the PFI schemes are geographically located, which public assets, including land, are included in the contracts, or indeed any measures of contractual performance or financial penalties. The implications of this information vacuum are even more significant as most PFI projects are in the post-construction operational phase and evidence grows of performance failures linked directly to systemic deficits in accountability (Whitfield, 2017). For example, research on social housing regeneration (Hodkinson and Essen, 2015, Hodkinson, 2019) and new PFI hospitals[3] uncovered stark differences between official declarations of performance by PFI

[3] BBC Radio 4 File on Four: The Price of PFI broadcast Sunday 10th July 2016 https://www.bbc.co.uk/programmes/b07j537j

contractors, and evidence of poor and sometimes dangerous standards of delivery under what are essentially self-monitored contracts. The risks of this in-built self-certification system were exposed in January 2016 when 9 tonnes of masonry, part of an external wall of the PFI-built Edinburgh Primary School collapsed, sparking investigations that revealed more than 80 PFI schools in Scotland with similar structural problems. An independent inquiry, which also uncovered widespread fire safety defects, highlighted the decisive role played by PFI's largely self-regulatory and self-monitoring model in preventing the earlier detection of these construction failures and (Cole, 2017).

Following the Local Audit and Accountability Act (2014) that abolished the Audit Commission in March 2015, the official auditing of local authority accounts in England has passed to an approved list of private accounting firms.[4] The fact that procurement of private sector contractors relies on a relatively small pool of legal and accounting firms providing technical, financial and legal advice to both public and private partners raises further questions about current auditing practices and potential conflicts of interest. It has been found that in some high-profile cases, such as the Chalcots Estate in Camden, where PFI contracts are deemed to have failed, the same company group that advised the PFI consortium in procurement audits both the SPV and the local authority (see Hodkinson, 2019). The Chalcots Estate was temporarily evacuated after the Grenfell Tower fire due to fire-safety failings that have since led to the termination of the PFI contract. While accountancy firms routinely claim their advisory and auditing functions are conducted by separate companies within their group structures, such relationships at the least undermine confidence in democratic accountability, and at the very result in collusion and corruption as seen in the recent high-profile prosecutions involving KPMG (Brooks, 2018).

Freedom of Information legislation: fit for purpose?

Given the much-reported controversies and problems that have beset PFI projects over several decades, the absence of systematic client or government monitoring of PFI contracts, as well as the lack of open data about each project, has seen concerned members of the general public rely increasingly on FOI and other PIR legislation to unlock important information about PFI schemes. This has raised serious questions about the suitability and effectiveness of the UK's PIR legislation as an accountability tool.

It is well known that the UK's eventual FOI legislation was watered down in relation to the private sector compared to the initial vision set out in the Labour government's radical 1997 White Paper, *Your Right to Know*, which was heralded as potentially world-leading transparency legislation (Roberts, 1998, Worthy, 2017). Early drafts of the Bill proposed private organisations carrying out statutory functions would automatically be covered by FOI

[4] The change in legislation did not affect Scotland and Wales' audit structure

yet this provision was removed from the eventual Freedom of Information Act (FOIA) 2000 while protections for information regarded as commercially sensitive or confidential were also strengthened. In general, only public organisations are covered by FOIA and even within this a significant number of bodies, such as Housing Associations, fall outside the scope of the Act. The outcome was to decisively shift the law's emphasis towards protecting private information, while severely limiting the public's ability to request information relating to or held by private bodies providing public services. (Shaoul et al., 2010, Agyenim-Boateng et al., 2017, Palcic et al., 2018 Ruane, 2019). Section 5 of the Act does empower the Secretary of State to designate further bodies as public authorities, but this has been consistently criticized by Information Commissioner's in Scotland[5] and England & Wales (ICO, 2015, 2019) for failing to meet the changed public sector environment.

The first decade following the FOI coming into force has seen significant efforts, to shift away from reforming or strengthening FOI legislation to proactive or mandated data disclosure., including government contracts. These initiatives, most notably Cameron's Open Government Data (OGD) have been critiqued as "a way to increase …credibility on the world stage, without actually implementing any policies to increase accountability" (Yu and Robinson in Bates, 2014) The ICO's 2019 report pointed out that proactive disclosure approaches had failed to improve transparency in relation to outsourcing and warned they should not be viewed as an alternative to a robust FOI regime.

Recent UK parliamentary interventions have sought to enable greater scrutiny of outsourced public services and associated public expenditure. The FOI (Extension) Bill[6] was heard in June 2017, just weeks after the Grenfell Tower disaster. It drew attention to the limitations of FOIA regarding publicly-funded private contractors and publicly-owned companies like the Kensington and Chelsea Tenant Management Organisation (KCTMO) who were responsible for managing the disastrous refurbishment of Grenfell Tower between 2011 and 2017. These weaknesses prevented Grenfell residents from accessing vital safety information before and after the deadly fire. Following the 2018 collapse of construction giant Carillion, one of the UK's largest recipients of government contracts, MP Louise Haigh tabled an FOI (Amendment) Bill seeking to extend FOIA to 'persons contracted to provide services' for or on behalf of public authorities. Haigh argued the explosion of public sector outsourcing has created 'an ever-growing shadow state', dramatically altering the landscape in which UK information rights operate.[7] The premise of these unsuccessful bills was reaffirmed by the ICO's (2019) recent parliamentary intervention, the first of its kind in a decade, which called for a

[5] Kevin Dunion (Scottish Information Commissioner) press release 25th October 2007 https://mail.google.com/mail/u/0/

[6] Andy Slaughter MP (Hammersmith and Fulham) (Lab) *Freedom of Information (Extension) Bill*, 19th July 2017, Col. 878

[7] Louise Haigh MP (Sheffield, Heeley) (Lab), 1st Reading, HC, *Freedom of Information (Amendment) Bill* 31st January 2018, Vol. 635

parliamentary inquiry into the accountability issue, and detailed proposed reforms that would identify and bring certain private companies within the scope of UK PIR as well as giving 'a clear legislative steer about what information regarding a public sector contract is held for the purpose of the legislation' (p.9). The Institute for Government, supporting these latter proposals claiming arguments that extending FOI will create red tape and unnecessary burden for small businesses are weakened by the fact that some of the biggest outsourcing companies who would be affected have already stated they would be happy for the law to be extended to cover them (Sasse et al., 2019).

Such debates extend well beyond the UK and the weaknesses of UK FOI law are mirrored globally. The 10th International Conference of Information Commissioners lamented the lack of response by governments to adapt information laws and passed a resolution calling on governments to 'improve access to information legislation in relation to contracted out services and services delivered by non-public organisations' (2017). Only two FOI regimes, in Nigeria and South African FOI Acts (2011 and 2000 respectively) have included private bodies doing public work under the scope of the legislation but the effectiveness of both in tackling this issue has been critiqued for poor implementation[8].

In the remainder of the paper, we provide new and systematic evidence to support and inform proposals for reforming FOI, contributing a new perspective on how the UK FOI system works in practice in relation to outsourced public services and infrastructure.

2. Methodology

The focus of our research was to evaluate how FOIA performs when information is being sought about outsourced public services, in this case under PFI contracts, using a comprehensive field experiment and categorisation exercise, which we explain below.

2.1 Field experiments

In FOI research, field experiments entail making multiple information requests to test different aspects of legislation in practice. As a methodology, field experiments are ideally suited to generating the kind of data that allows a more detailed analysis of the quantity and quality of information disclosed and 'a more precise identification of problem areas' (Snell, 2001 p.29). Our research builds on this methodology and contributes a hitherto lacking perspective on the UK PIR system in practice. We argue that this 'street level' (Wilson, 2015 in Worthy et al., 2017) understanding is vital to ensure the implementation and regulation of

[8] http://www.freedominfo.org/2016/05/nigerian-foi-law-not-effectively-implemented/ & www.r2k.org.za/wp-content/uploads/CER-Shadow-Report-2016-Final.pdf

any reforms translates into increased access to information essential for the oversight of public sector contracts.

While still a relatively underused approach, field experiments in FOI are growing internationally, spanning different legislative, political and administrative frameworks including UK Parish Councils (Worthy et al., 2017), Arizona Police Agencies and School Districts (Cuillier, 2010) and Slovakian local government.
These studies focus, almost exclusively, on testing legal compliance with PIR laws. Some have paid attention to the extent to which different types of request influence the eventual response, such as comparing formal with informal styles (Worthy et. al., 2017), helpful versus threatening tones (Cuillier, 2019), or requests that make explicit the status or identity of the requester, for example, (Rodríguez and Rossel, 2018) found men were more likely to receive a better response to requests than women. However, as a result of the inevitable variation in resourcing between regulatory regime or even between authority type, compliance behaviours in general and response rates in particular, vary enormously between studies i.e. from as low as 10% (Worthy et al., 2017) to 85% (Parsons and Rumbul, 2019) making meaningful cross-study comparisons difficult.

While opinions vary on the usefulness of 'league table' measures in ascertaining the health of an FOI regime (Snell, 2001), there is agreement, even across divergent studies, about the range of factors influencing variations in response rates: including how established the FOI regime is, the level of requests ordinarily received and therefore experience of dealing with them (Grimmelikhuijsen et al., 2018); how FOI teams are resourced and trained and where responsibility sits within an organization (Parsons and Rumbul, 2019, Shepherd et al., 2010). A low response rate therefore, could indicate a lack of resource or training but might also be a result of systemic obstruction or adversarial behaviours (Snell, 2001) and similarly an apparently high response rate may obscure other non-compliant behaviours leading to very low levels of quality information disclosure. As Rumbul and Parsons (2019) discuss in their recent study of FOI in Local Government, the disparity in data collection and case management systems means that in the UK Local Government sector, very little data is currently collected on the volume of information disclosed, (Parsons and Rumbul, 2019) a weakness that we explicitly sought to address in our project.

2.2. Research design

During 2016 and 2017, we conducted a field experiment comprising three separate FOI requests aimed at UK public authorities with PFI projects. In total 687 information requests were submitted, covering 678 of the 715 operational PFI projects in the UK and 315 of the total 331 public authorities involved, amounting to a 95% coverage of contracts and authorities. Request 1 was submitted to all public authority types with PFI contracts including government departments, NHS trusts, councils, and police and fire authorities; Request 2 was

submitted to NHS Trusts and Local Councils; and Request 3 to English Local Councils only. Our three FOI requests responded to specific aspects of the accountability gap in PFI monitoring set out in section 1:

Request 1: Postcodes and Deductions (P&D) – April 2016. Responding to the lack of nationally-held data about PFI contracts, we submitted requests for postcode data of all land/ buildings covered by the contract and details of financial deductions for poor performance to 301 public bodies, covering 642 PFI contracts. Postcode information was sought to enable accurate geo-mapping of all public assets tied into PFI contracts; while previous research on fire safety in hospitals indicated that access to information about financial deductions would be a useful indicator of poor performance and the presence or absence of robust contract monitoring by the relevant public authority[9].

Request 2: Safety Audit (SA) – May 2017. Following the well-publicised collapse of a wall in a PFI school in Edinburgh[10] and subsequent independent investigation (Cole, 2017), which uncovered widespread structural defects across Scottish PFI-built schools, we submitted requests for a range of information on the structural safety of public buildings including inspection arrangements during construction, the structure of PFI monitoring team(s) responsible for ongoing monitoring and details of any deductions made for structural or fire safety defects over the course of the project. and after construction to 260 public bodies (164 local councils and 96 NHS trusts, covering 525 PFI contracts).

Request 3: Conflict of Interest (CoI) – May 2017. Responding to concerns about current auditing practices of PFI contracts, we made requests for details of companies who had provided technical, financial and legal advice to the council in relation to each PFI scheme as well as any declarations of potential conflicts of interest relating to that advice. Requests were submitted to 127 English local councils[11] covering 317 PFI contracts.

Requests were devised in collaboration with an investigative journalist experienced in conducting PFI research and a national PFI campaign group[12] to ensure there was a strong public interest in disclosure. They were piloted and, where necessary, refined to avoid automatic rejection on the grounds that responding would exceed the statutory time/cost limits. Learning from previous field experiments, each request cited the legislation in both the subject line and body of the request and made specific reference to likely exemptions and arguments against their engagement to elicit improved response rates. Request 1 was sent

[9]The publication of attempted deductions of £9m and £33m in Hereford and Central Manchester Hospitals respectively had alerted the public to significant fire safety defects.

[10] https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-38907714 accessed April 15 2019

[11] Scottish and Welsh authorities were not affected by the same change in audit practice.

[12] http://peoplevspfi.org.uk/

from a specifically created email account and included the requesters names and professional positions. The online public requesting platform www.whatdotheyknow.com, was used for Requests 2 and 3, ensuring disclosed information was made publicly available without mediation or delay. This platform only allowed for requests to be sent from one named account holder and were therefore submitted by the primary researcher. As response, disclosure and compliance rates varied between request types, with the highest levels from Request 2 and lowest from Request 3, we concluded the format of request had no significant effect on the level or quality of response behaviours.

2.2 Response categorisation

Our analytical framework combined a quantitative-based categorisation of both the scale of information disclosure and the level of compliance with the law, with a more interpretative analysis of responses in line with our exploration of FOI's ability to close the accountability gap in relation to PFI and outsourcing. Part of our focus on request handling was what Snell (2001, p.29) calls the 'raw rejections rates [and] processing times… of the league table approach' to administrative compliance. Here we examined three main sets of behaviours: (i) response rates – whether the public authority responded, and whether the information was disclosed in full or part, or completely refused; (ii) response times – whether the response was provided within the statutory time limit; and (iii) response justification – whether the public authority used the correct legislation to answer the request. The inclusion of this third set of behaviours was informed by the influential work of Professor Alasdair Roberts in his key examination of the Canadian FOI regime (1998) which examined the detail of day-to-day implementation of information legislation, a more nuanced approach which Snell argued provides insight into 'key areas of attitude and culture' vital for identifying necessary reforms of the 'legislative architecture of interpretation and enforcement' (2001, p.29).

Table 1 sets out our seven-point categorisation which combines a disclosure element (refused, partial or full) and a compliance element. For a response to be logged as compliant, it must have been received within 20 working days with legitimate reasons provided for any withheld information and any exemptions engaged in accordance with the law and code of practice.

Table 2 provides a breakdown of this compliance categorisation in relation to justifications for withholding information. It includes the most frequently used reasons by those authorities in this field experiment as well as exemptions relating to confidentiality and commercial sensitivity.

Table 1. Disclosure and Non-Compliance behaviour types

Response Type	Disclosure Definition	Non-Compliance behaviour
No Response (Non-compliant)	No response provided	Acknowledgement followed by no response, or no response whatsoever
Refused (Non-compliant)	All information withheld	Refusal after 20 working days &/ no reasons given &/ exemptions not engaged in adherence with the law
Refused (Compliant)	All information withheld	Refusal within 20 working days, reasons given for information withheld any exemptions properly engaged
Partial (Non-compliant)	Partial information disclosed	Partial response after 20 working days &/ no reasons given for information withheld &/ exemptions not engaged in adherence with the law
Partial (Compliant)	Partial information disclosed	Partial response within 20 working days, reasons given for information withheld, exemptions engaged in adherence with the law
Full (Non-compliant)	All information disclosed	Full disclosure of all requested information after 20 working days
Full (Compliant)	All information disclosed	Full disclosure of all requested information within 20 working days

Table 2. Understanding non-compliance in responses

Response element	**Definition of compliance: relevant Sections of FOIA 2000 (Section) or EIR [Regulation] and Code of Practice**	**Examples of non-compliant behaviour**
Response time	(S.10) [Reg. 5(2)] Response within 20 working days; more time may be requested for specific reasons.	Late response with no justification or request within the law for additional time.

Information not held	No disclosure is required where information is not held (S.1) [Reg. 5(1)] and is not held by another organisation on behalf of the public body (S.3(2)(b)) [Reg.3(2)(b)].	No justification for statement; wrongful assertion that the request does not apply or should be redirected elsewhere.
Exceeds time/cost limit	(S.12) [Reg.4(b)] Should provide a 'reasonable estimate' of how limit would be exceeded with 'cogent evidence' to assist requester to bring request within the limit.	No relevant information about how the cost limit is exceeded; cuts and pastes estimate from unrelated requests or provides an arbitrary figure with no explanation.
Confidential information	(S.41) [Reg.12(5)(e)] must establish the confidential nature of the information and then set out why breach of that confidence is likely to be legally actionable.	Blanket use of exemption to *all* elements of the request; fails to outline confidential nature or likelihood of an actionable breach as required under law; conflates confidential and commercially sensitive information.
Commercial sensitivity	(S.43) [Reg.12(5)(e)] must demonstrate with specific examples how disclosure would be likely to cause harm either to the public body or someone else, and then demonstrate balance test to determine whether there is stronger public interest in withholding or disclosing that information.	Blanket use of exemption covering all elements of the request; likely harm not established; no public interest balance; conflates confidential and commercially sensitive information.

3. Findings and discussion

This section presents the main findings of our field experiment with a detailed data analysis covering three areas. Section 3.1 focuses on the more traditional 'league table' measures of FOI request-handling compliance; section 3.2 offers a detailed analysis of those responses where information was refused in full or part; section 3.3 examines and the prevalence of a range of non-compliant behaviours which characterised responses. Section 4 discusses the; implications in terms of PFI accountability and potential legislative and regulatory reform.

3.1 Request handling

This section looks at the response behaviours usually used to measure the health of FOI regimes, levels of response; timeliness and whether any information was provided.

Response rates

The first and arguably most relevant test of an FOI regime's effectiveness for accountability is the extent to which the information requested is disclosed. On this our findings were

overwhelmingly negative. Of foremost concern was the significant extent to which public authorities *did not respond at all* to our requests. Section 1 of FOIA 2000 legally requires public bodies 'to confirm or deny' whether they hold the requested information; failure to respond breaches the public's general right of access to information which underpins the Act. Yet across all 687 requests, 15% (101) did not respond at all. While this may seem an improved rate compared with other UK studies (Worthy et al., 2017, Parsons & Rumbul, 2019) it is worth noting that our cut off period for logging a non-response was much longer than the Parish Council study which only logged 'responses' which were received within two months of the request date. Moreover, of the 586 requests where a response was received, there was considerable unevenness in the amount of information disclosed: just 28% were disclosed in full, 40% produced a partial disclosure and a striking 32% were refused. Overall, including the non-responses, 42% of our requests led to no information being disclosed and a further 34% were met with only some disclosure. Furthermore, the quality and quantity of both partial and full responses was considerable. It was common to receive a 'partial disclosure' of one paragraph of information relating to only one of an authority's three PFI schemes and in another case, a 'partial disclosure' of 30 documents relating to an authority's single PFI scheme.

The lowest response rates came from the SA request, with 18% not responding compared with 11% in the CoI request and 8% P&D. While the SA request was most complex both SA and P&D were contained more potentially sensitive information than CoI which makes it difficult to interpret differing response rates. What is clear from these results however, is that at a basic level of using FOI does not seem to be functioning as a democratic tool for asking questions and receiving responses.

Late Responses

A second test of FOI's accountability function relates to the timeliness of information disclosure which enables the public to monitor services in real time and raise issues or complaints within relevant legal timeframes i.e. Judicial Review. Here again our findings demonstrated serious shortcomings. S.12 of FOIA 2000 gives public bodies 20 working days to response to an FOI request, and yet there was systematic disregard by public authorities for those legal time limits. Across our 586 requests where a response was received, more than half (318) exceeded the legal time limit; and in nine instances, authorities took more than 100 days to respond, the longest being Somerset County Council, which took 350 days to answer the P&D request. Extensions can be permitted under FOIA[13] if more time is needed to carry out a public interest test, and under EIR to deal with more complex requests. However, only 15 (5%) of late responses provided a legal justification for doing so, most simply declaring an extension without appropriate explanation. Where reasons were given, staff absence was

[13] Unless otherwise stated, references to FOIA also apply to Scottish equivalent FOI(S)A

commonly cited, presenting a picture of under-resourced FOI departments with officers pushed for time and/ holding additional responsibilities (Parsons & Rumbul, 2019). SA requests were again more likely to be late than the other two requests types, a possible reflection of the relative complexity of this request.

No information – No explanation

Under both FOIA (S.17) and EIR [Reg 14(1)], when information is withheld the public body must issue a refusal notice that (i) informs the requester of the decision (ii) cites the section(s) relied upon to refuse information and (iii) provides a reason for that decision all of which facilitate the appeals process. Our research again found systematic non-compliance in this regard. Of the 403 requests refused partially or entirely, almost a third (130) failed to provide any legal justification or explanation for non-disclosure. This included 30 instances of authorities providing information on one PFI scheme but making no reference to others, and 26 cases where authorities claimed to have provided a full response despite failing to do so.

3.2 Detailed analysis of partial disclosure and refusal responses

The analysis so far suggests that in general FOI and EIR are not equipped to support public accountability of outsourced services and infrastructure. This leads us to our second main issue: to what extent is current FOI law the main obstacle to accountability compared to both the way it is interpreted by public bodies, and how the overall system is governed and resourced. To begin this analysis we need to establish whether the requests refused in whole or part were done so lawfully or unlawfully by looking at the reasons provided by a public authority.

Under FOIA, there are 24 exemptions under which requested information can justifiably be withheld: 15 of these are 'qualified exemptions' that require a public interest test and nine are 'absolute' that can be applied without considering the public interest[14]. There are also a number of 'other reasons' that allow an authority to refuse a request e.g. if responding would take too long, and therefore cost more than the limit set by the legislation; if the request/er is considered vexatious; or if the information is not held.

Our analysis found that of the 403 requests refused in part or entirely, almost a third minority (32%) provided no reason for doing so. In the remaining 273 responses where some or all information was refused, 68% of authorities provided at least one reason for their decision, (a total of 345 reasons were provided). Of these, a quarter cited 'exemptions' while the overwhelming majority (75%) gave 'other reasons' and we found the vast majority (77%) of these 'other reasons' to be non-compliant, as per the behaviours set out in Table 2. Further

[14] Under EIR all exemptions are effectively qualified and a public interest test must be conducted

analysis of these responses reveals more worrying patterns of behaviour by public authorities being asked for information about their PFI contracts.

Exceeding the statutory cost limit

Under FOIA Section 12, a public body is legally empowered to refuse a request in its entirety if responding would exceed the stipulated cost limit of £600 for central government bodies and £450 for all other public authorities. Under EIR 12(4)(b), the equivalent regulation does not prescribe a limit but states the duty to respond does not apply where a request is 'manifestly unreasonable'.

Exceeding the legal cost limit was the most commonly used 'other reason' for non-disclosure across all requests, at 43% (150/345), but this was routinely engaged without foundation. According to the Information Commissioner's Office Code of Practice, which forms the basis of considerations in the appeals process, authorities relying on this argument should provide a reasonable cost estimate to evidence how responding would exceed the limit. According to *Randall v IC Medicines* (EA/2007/0004), a 'reasonable estimate' is defined as one that is 'sensible, realistic and supported by cogent evidence'. Based on this guidance, we categorised the vast majority (83%) of responses relying on the cost limit justification as non-compliant because they either failed to provide any reasonable cost estimate or offered single figure with no explanation or 'cogent evidence' as to how it was arrived at. For example, in response to the P&D request, Dundee City Council simply claimed 'the cost of complying with your request would exceed £600'[15], and Stoke-on-Trent City Council stated a response to the SA request would 'cost approximately £37,000'[16]. These suggest either arbitrary applications of the estimation or divergent systems of information management of the same projects.

Cost limit was used far more by authorities dealing with the SA (46%) and P&D (43%) requests than in response to the CoI request (11%). This variation might be partly explained by the relative complexity and simplicity of the SA and CoI requests respectively, however the P&D request was also relatively simple, suggesting a more obstructive use of S.12 in response to P&D. NHS Trusts were also 10% more likely to rely on cost limit than Local Authorities. One potential explanation for this difference may be that S.12 was being deliberately engaged to obstruct disclosure where other reasons would be difficult or time consuming to justify. We also found no correlation between the number of schemes a particular authority had and the likelihood that they would use S.12 - some authorities with many schemes released more comprehensive information than those with only one. Again, suggestive of an obstructive use of the justification.

[15] FOI P&D Response 11 May 2016

[16] FOI SA Response 23 May 2019

Information not held on behalf of the public body

Under FOIA the duty to confirm and provide information is based on the requested information being deemed to be held by the public authority or 'by another person on behalf of the authority'. This provision for requesting information held by another (private) body on behalf of a public authority is one of the key measures in existing legislation for addressing the existence of outsourcing and PPP arrangements.

In our view, all of the information requested should have been held by either the public authority or by another person or body on its behalf. It is therefore striking that 36% (124/345) of justifications for non-disclosure stated that the information was 'not held'. 70% of justifications to the SA request relied on 'not held' with 24% of CoI 'reasons' compared with just 13% in the P&D request. While the majority of CoI uses claimed the information requested was historic and therefore no longer held, the uneven use of 'not held' is harder to explain not least because 70% of instances claiming information was 'not held' failed to set this out in accordance with the legal definition, either issuing blanket statements such as 'we have reviewed our records and we can confirm that we do not hold the information you are seeking'[17]; or erroneously claiming the public body was no longer responsible for the project.

However, detailed analysis of responses did highlight many examples of clear confusion on the part of the public authority about the relationship between the public body in question, the PFI contract and the scope of FOI legislation. Salford Royal NHS Foundation Trust claimed not only that they did not hold the information, but that 'PFI is also exempt from FOI'.[18] The use of 'not held' for P&D request was surprisingly frequent given that the public authority would be expected to hold information about the postcodes of PFI schemes and any deductions made to the monthly Unitary Charge. In almost a third of instances (28%), our request was referred directly to the private PFI consortium demonstrating that FOI officers not only lacked a clear understanding of the current legislation but displayed a flawed interpretation of the contractual relationship between PFI public and private partners.

In response to questions about monitoring during the construction of council offices, Denbighshire Council replied that the information was not held because it was 'not responsible for the build, we were merely the end users'[19]. Abertawe Bro Health Board also claimed the hospital in question 'does not belong' to them. Most notably, just one week after the Grenfell Tower fire of 14 June 2017, Salford City Council provided the following response to a set of questions about contract monitoring and building safety checks:

[17] FOI P&D Response 23 May 2016

[18] FOI response email 22 August 2017

[19] FOI response email 13 June 2017

> The Council does not hold the information you have asked for. In a PFI school, Salford City Council are not responsible for the buildings. They are managed by a PFI Project Company…for 25 years. The Council does not inspect the buildings. These inspections are carried out by the Project Company and FM provider[20]

Our findings here chime with the Information Commissioner's recent report to Parliament, which highlighted the difficulties posed by outsourcing. It cited a recent Tribunal case[21] where a report by Carillion into fire safety at an NHS hospital built under PFI was deemed not to be held on behalf of the NHS Trust and therefore not accessible under FOIA, an outcome which "was clearly out of step with reasonable public expectations" (2019, p.24).

Confidential or Commercially Sensitive Information - exemptions

In FOIA, Section 41 (confidential information) is an absolute exemption and can be refused outright while Section 43 (commercial sensitivity) is a qualified exemption requiring a public interest test. However, neither can be used as a blanket exemption to cover all elements of a request. Use of commercial sensitivity should include a summary of the public interest balance test carried out, and simply stating there is a contractual obligation of confidentiality has not proven sufficient reason for non-disclosure when challenged at tribunal.

Contrary to our expectations, confidentiality or commercial sensitivity exemptions were used in only 17% (57 out of 345) of responses. More than half (53%) of the instances where these exemptions were used were in the P&D request and specifically in relation to the 'deductions' element. They were also engaged regularly in SA (45% of uses) but only very rarely in relation to CoI (2%). In relation to this exemption and across different P&D and SA requests, NHS Trusts were slightly more likely to use it than Local Authorities. 12% of reasons for NHS Trusts withholding information were either S.41 or S.43 compared with 9% of reasons given by Local Authorities.

Notably, whenever these exemptions were engaged, they were overwhelmingly (84%) categorised them as non-compliant due to frequent uses of blanket statements covering all aspects of the request and repeated conflation of confidentiality and commercial sensitivity. In only eight cases was the public interest test set out clearly. The remainder either made no mention of public interest or, as with University Hospital of South Manchester NHS Foundation Trust, simply but unlawfully stated '…it is not in the public interest to release the information'.[22]

3.3 Non-compliance as the norm

[20] FOI response email 21 June 2017

[22] FOI response email 4 July 2017

Although response rates appeared high (85%) our deeper analysis and categorisation of response behaviours has revealed widespread non-compliance with all aspects of the law, from response times to justifications (or lack of them) for information not disclosed. In particular the preponderance of disingenuous 'other reasons' evidences systematic flaws in how public bodies are interpreting the law, which have concerning implications for accountability. To challenge non-disclosure, a requester must go through a lengthy process, first of internal review; then to the Information Commissioner; to the First Tier Tribunal and potentially finally to Upper Tribunal, a process that could easily take more than two years to 'win'. By giving a technically incorrect 'other reason', authorities are drawing plaintiffs into a lengthy appeal process knowing they could win, at which point the authority could simply engage an exemption to justify withholding information thereby requiring a second (lengthy) round of appeals. In other words, some public bodies could be deliberately gaming the FOI system to evade accountability of their outsourced contracts.

Across all three requests NHS Trusts[23] consistently performed worse than Local Authorities and were more likely to not respond or to respond late than local authorities responding to the same request. This difference points to a potential systemic under- resourcing of FOI handling within the NHS but could also indicate the underfunding, and therefore lack of clear record keeping, of PFI monitoring. Whatever the matrix of institutional issues, these practices have significant implications in terms of undermining the accountability of outsourced public services and for the future of a healthy information regime.

4. Conclusion

This paper has presented compelling new evidence that the current FOI Act is not fit for purpose in the age of outsourcing. We found that FOIA facilitates a clear accountability gap with respect to outsourced public services – in this case under PFI contracts. Of foremost concern were the high levels of non-disclosure due either to refusal/partial refusal or non-response to our requests: in 42% of our requests no information whatsoever was provided, and only 24% resulted in full disclosure. Not only was it impossible to gain basic information such as the number and location of buildings or sites across all PFI schemes, but the over reliance of non-exemptions as reasons for withholding information suggests public authorities are employing tactics to avoid engaging with public interest arguments.

This reliance on non-exemptions obscures from regulatory oversight the way in which requests about outsourced contracts are dealt with. We also detected an environment marked by the fragmentation and de-centralisation of information. Information officers' responses presented a picture of confusion about the public sector's role and responsibility, and a lack of clarity about what information is public or held on behalf of the public.

Our findings evidence not only a clear need for the primary legislative reform but also but also for this to be reinforced by extending and strengthening the regulators remit to tackle many of the behaviours we have identified. Larger private companies involved in public contracts, including all SPVs responsible for PFI contracts, should be made directly subject to PIR, this would also have the benefit of significantly reducing significantly the burden on public bodies who currently deal with requests for information held on their behalf by private partners. For those many smaller companies and contracts the existing legislation around 'information held on behalf of' a public body must be strengthened and clarified so it can be used as a means of accessing information in the public interest rather than by public bodies as a means of frustrating efforts to access information.

While agreeing with the Information Commissioner that mandated data disclosure is no replacement for a robust FOI regime, we believe all PFI contracts should be placed in the public domain.

These reforms while essential to stemming the 'continued diminishment of [the informational] commons' (Roberts, 2001, p. 30), represent only the first stage in creating greater accountability by ensuring the law itself keeps pace with a radically shifting public sector. Our research has shown that in responding to requests for information about PFI schemes authorities have displayed a range of behaviours that would render a change in law meaningless unless the Information Commissioner exercises their powers to carry out investigations into systemic issues of concern alongside targeted enforcement.

References

AGYNIM-BOATENG, C., STAFFORD, A. & STAPLETON, P. 2017. The role of structure in manipulating PPP accountability. *Accounting, Auditing and Accountability Journal,* 30(1) 119-144

BATES, J. 2014. The strategic importance of information policy for the contemporary neoliberal state: The case of Open Government Data in the United Kingdom. *Government Information Quarterly,* 31**,** 388-395.

BOYNE, G., FARRELL, C., LAW, J., POWELL, M. & WALKER, R. M. 2003. *Evaluating Public Management Reforms: Principles and Practice,* Buckingham, Open University Press.

BROOKS, R. 2018. *Bean Counters: the triumph of the accountants and how they broke capitalism,* London, Atlantic Books.

COLE, J. 2017. Report of the Independent Inquiry into the Construction of Edinburgh Schools.

CUILLIER, D. 2010. Honey v. Vinegar: Testing Coompliance-Gaining Theories in the Context of Freedom of Information Laws. *Communication Law and Policy,* 15**,** 203-339.

DEMIRAG, I., DUBNICK, M. & KHADAROO, M. I. 2004. A Framework for Examining Accountability and Value for Money in the UK's Private Finance Initiative. *Journal of Corporate Citizenship* 15**,** 63-76.

EDWARDS, P., SHAOUL, J., STAFFORD, A. & ARBLASTER, L. 2004. Evaluating the Operation of PFI in Roads and Hospitals *Certified Accountants Education Trust* London: ACCA.

GRIMMELIKHUIJSEN, S., JOHN, P., MEIJER, A. & WORTHY, B. 2018. Do Freedom of Information Laws Increase Transparency of Government? A replication of a field experiment. *Journal of Behavioral Public Administration,* 1**,** 1-10.

HELLOWELL, M. & POLLOCK, A. 2009. Private finance, public deficits A report on the cost of PFI and its impact on health services in England. The Centre for International Public Health Policy.

HODGE, G. A. & COGHILL, K. 2007. Accountability int he Privatised State. *Governance: An International Journal of Policy, Administration and Institutions,* 20**,** 675-702.

HODKINSON, S. 2019. *Safe as Houses: Private greed, political negligence and housing policy after Grenfell,* Manchester, Manchester University Press.

HODKINSON, S. & ESSEN, C. 2015. Grounding accumulation by dispossession in everyday life: The unjust geographies of urban regeneration under the Private Finance Initiative. *International Journal of Law in the Built Environment,* 7**,** 72-91.

ICIC. Resolution Right of access to information and accountability of public services. The 10th International Conference of Information Commissioners, 2017 Manchester, UK.

ICO 2019. Information Commissioner's Office, Outsourcing Oversight? The case for reforming access to information law: Report of the Information Commissioner to Parliament. Her Majesty's Stationery Office.

PAC 2018. Public Accounts Committee HC 894, Private Finance Initiatives Forty-Sixth Report of Session 2017-19. House of Commons: House of Commons.

PALCIC, D., REEVES, E. & STAFFORD, A. 2018. Lifting the Lid: the Private Financing of Motorway PPPs in Ireland. *The Economic and Social Review.* 49 (2) 217-239

PARSONS, A. & RUMBUL, R. 2019. Freedom of Information in Local Government. mySociety.

POLLOCK, A. & PRICE, D. 2008. Has the NAO Audited Risk Transfer in Operational Private Finance Initiative Schemes? . *Public Money and Management,* 28**,** 173-178.

POLLOCK, A., SHAOUL, J. & VICKERS, N. 2002. Private finance and "value for money" in NHS hospitals: a policy in search of a rationale? *BMJ*

ROBERTS, A. 1998. Limited Access: Assessing the Health of Canada's Freedom of Information Laws. *In:* UNIVERSITY, Q. (ed.) *Freedom of Information Research Project.* School of Policy Studies: Queen's University.

ROBERTS, A. 2001. 'The Informational Commons at Risk' in *Recovering the Public Domain: Moving the Boundary Between the Market and the State* (eds) Drache, D & Higgott. London Routledge

ROBERTS, A. 2007. Future Challenges for the RTI Movement. *5th International Conference of Information Commissioners.* New Zealand.

RODRÍGUEZ, R. P. & ROSSEL, C. 2018. A field experiment on bureacratic discretionary bias under FOI laws. *Government Information Quarterly,* 35**,** 418-427.

RUANE, S. 2019. 'Access to data and NHS privatisation: reducing public accountability' in Evans et al., *Data in Society: Challenging Statistics in an Age of Globalisation* Bristol. Policy Press.

SASSE, T., GUERIN, B., NICKSON, S., O'BRIEN, M., POPE, T. & DAVIES, N. 2019. Government outsourcing: What has worked and what needs reform? Institute for Government.

SHAOUL, J., STAFFORD, A. & STAPLETON, P. 2010. Accountability for public expenditure under Building Schools for the Future. *Journal of Education Policy*. 25 (6) 749-756

SHAOUL, J., STAFFORD, A. & STAPLETON, P. 2012. Accountability and corporate governance of public private partnerships. *Critical Perspectives on Accounting,* 23**,** 213-229.

SHEPHERD, E., STEVENSON, A. & FLINN, A. 2010. Information governance, records management, and freedom of information: A study of local government authorities in England. *Government Information Quarterly,* 27**,** 337-345.

SNELL, R. 2001. Administrative Compliance - Evaluating the Effectiveness of Freedom of Information. *FoI Review,* 93**,** 26-32.

SPÁČ, P., VODA, P. & ZAGRAPAN, J. 2018. Does the freedom of information law increase transparency at the local level? Evidence from a field experiment. *Government Information Quarterly,* 35**,** 408-417.

VECCHI, V., HELLOWELL, M. & GATTI, S. 2012. Does the private sector receive an excessive return from investments in health care infrastructure projects? Evidence from the UK. *Health Policy (online)*

WALKER, D. & TIZARD, J. 2018. Out of Contract: Time to move on from the 'love in' with outsourcing and PFI. *In:* INSTITUTE, S. (ed.) *'What needs to change' Smith Institute talking points.* London: The Smith Institute.

WHITFIELD, D. 2016. The financial commodification of public infrastructure: The growth of offshore PFI/PPP secondary market infrastructure funds. *ESSU Research Report.* European Services Strategy Unit.

WHITFIELD, D. 2017. PFI/PPP Buyouts, Bailouts, Terminations and Major Problem Contracts in UK. *European Services Strategy Unit Research Report No.9.* European Services Strategy Unit.

WORTHY, B. 2010. More Open But Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government. *Governance: An International Journal of Policy, Administration and Institutions,* 23**,** 561-582.

WORTHY, B., PETER, J. & VANNONI, M. 2017. Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests in England. *Journal of Public Administration Research and Theory,* 27**,** 485-500.

WORTHY, B. 2017. 'The Politics of Freedom of Information: How and Why Governments Pass Laws That Threaten Their Power'. Manchester: MUP