Submission from the Campaign Against Arms Trade to the Justice Select Committee for its Inquiry: Post-Legislative Scrutiny of the Freedom of Information Act

1. The Campaign Against Arms Trade (CAAT) in the UK works to end the international arms trade, which has a devastating impact on human rights and security, and damages economic development. Established in 1974, CAAT receives around 80% of its funding from its individual supporters.

2. CAAT welcomes your Committee's Inquiry. While appreciating the pressure to reduce the burden placed on civil servants and other officials, the Freedom of Information Act (FoIA) has helped shed light on the arms trade, a controversial area of Government activity with major consequences both in the UK and overseas. CAAT, having taken into account the costs and time it has incurred in using the FoIA, believes it has brought great benefits to the organisation's work and the wider public.

3. Without the FoIA, much information about corruption and arms sales to Saudi Arabia, as well as the arming of the Libyan government prior to the Arab Spring, would not have come to light. The information shows the extent of previous misjudgements and, when comparatively recent, it helps to hold decision-makers to account and, hopefully, assists with the change of government practice.

The use CAAT has made of the Freedom of Information Act

4. The arms trade is generally secretive so the collection, collation and cataloguing of information about it has always been an important part of CAAT's work. The information resources at CAAT are consulted by, or on behalf of, MPs, journalists and academics, as well as by those campaigning to end the arms trade. It was hoped that the FoIA would herald a cultural change in Government departments with much greater openness about the arms trade than previously.

5. CAAT's first request was made in January 2005 when the FoIA came into force. Since then, CAAT has made FoI requests to a broad range of public authorities. CAAT has taken cases as far as the Information Tribunal, latterly the First-Tier Tribunal (Information Rights), referred to hereinafter as the Tribunal, including one where, for the first and so far only time, a Special Advocate was used.

6. In consequence, CAAT has an exceptionally deep knowledge of the operation of the FoIA. A sample of some of the FoI requests follow.
**Local authority and university investments**

7. For some years CAAT ran campaigns around local authority and university investments in arms companies. Prior to the FoIA, some of these bodies provided information about their investments, but after the FoIA, and the assistance of the Information Commissioner (hereinafter the Commissioner) who made it clear that such investment information should be made public, a UK-wide picture was possible.

**The UK’s arms sales to and military relationship with Saudi Arabia**

8. Many of CAAT’s FoI requests have concerned UK arms sales to Saudi Arabia, which were controversial from the start and even less transparent than the trade as a whole. The sales began in the 1960’s, but the really big deals were Al Yamamah in the mid-1980’s and the Eurofighter Typhoon in 2007. The contracts and UK government support for them have elements of continuation from one deal to another meaning even information from the 1960’s has relevance now.

9. CAAT liaised on these requests with Nicholas Gilby, who was researching the history of corruption in UK-Saudi arms deals. The requests were made to several authorities, including the Ministry of Defence (MoD), the Foreign and Commonwealth Office (FCO), the then Department of Trade and Industry (DTI) and the then Export Credits Guarantee Department (ECGD).

10. Some requests resulted in prompt disclosure. For instance, the Ministry of Defence Saudi Armed Forces Project (MODSAP) has responded each year, within days of the request being made, with information about staff numbers, locations and costs.

11. More were refused. In the latter cases, applications for internal review were made. The original decision was always upheld at this stage. The exemptions cited have usually been a combination of 27-Foreign Relations, 41-Information provided in confidence, and 43-Commercial interests.

12. In August 2005, CAAT took two cases - one where the MoD was asked for the Al Yamamah Memoranda of Understanding (MoU) and the other the ECGD for details of outstanding liabilities on on the Saudi arms deals - to the Commissioner. CAAT then waited for a security-cleared case officer. The first Commissioner ruling came in April 2007. It rejected CAAT’s complaints and appeals were made to the Tribunal.

13. The request to the ECGD was then immediately settled. The involvement of the Government's lawyers, the Treasury solicitors, seemed to change the ECGD's position and CAAT received the information requested.

14. The MoD case proceeded to an oral Tribunal hearing in March 2008 which lasted a week, much of it in closed sessions. The Tribunal joined three cases, in which Nicholas Gilby had made requests to the FCO, to CAAT’s. The MoD/FCO witnesses included the then UK ambassador to Saudi Arabia William Patey, while the then Liberal Democrat Treasury shadow Vince Cable MP was a witness for CAAT. The Tribunal ruled against CAAT on the MoD case, but found in Nicholas Gilby's favour to the extent that it ordered the disclosure of much of the material requested.
15. CAAT took another case to an Tribunal in 2009 when the ECGD was ordered to release some Saudi arms deal risk assessment papers. More recently, in 2011, CAAT went to an "on the papers" Tribunal hearing in a vain attempt to get the MoD to adhere to the precedent thought to have been established in Nicholas Gilby's case with the FCO.

UK Trade & Investment Defence and Security Organisation
16. An understanding of the Government's arms promotion agency, since April 2008 the UK Trade & Investment Defence and Security Organisation (UKTI DSO), has always been a focus of CAAT's work. CAAT has requested information including speeches of senior personnel, attendance at overseas and invitations to UK arms fairs, lists of meetings with representatives of specific countries, and ministerial arms promotion interventions.

17. The responses have been mixed. Some documents have been provided in a reasonably timely fashion. More substantive requests, such as for correspondence, lists of meetings and delegates to arms fairs, have taken much longer, over 80 working days on a number of occasions. Almost invariably limited information has been provided. In addition to the delays to many requests, responses to internal reviews have usually taken over 60 working days.

Jobs, the economy and the arms trade
18. CAAT also used the FoIA to discover the basis for the frequently-made claims, vital for justifying the arms trade, that it is good for jobs and the economy. In 2005, requests to the MoD and the DTI revealed that neither had conducted any studies into the economic impact of the Al Yamamah deals.

19. A parliamentary answer (Hansard, 26.10.09, Col 117/8W) referred to the Department for Business, Innovation and Skills' (BIS) "analysis" of the number of jobs sustained in the UK by Eurofighters ordered by the MoD. FoI requests revealed that the figures given had been calculated by asking three companies the number of jobs they and their supply chains believed they would lose if the order was cancelled. No independent analysis had been undertaken by BIS or external researchers.

The benefits of Freedom of Information
20. The FoIA has, as paragraph 219 of the Ministry of Justice memorandum acknowledges, “been instrumental in the release of a great deal of information which might otherwise have remained closed”. Some of the benefits of the information disclosed are described below.

The information obtained
21. Nicholas Gilby had originally requested 243 pages of historical FCO documents. As a result of the Tribunal ruling he received around 95% of this - every page, but with minor redactions. Over the following months a further 723 pages were declassified with little redaction by the FCO in connection with a backlog of five similar FoI requests. In 2011 the MoD declassified another 41 pages in the preparations for the "on the papers" Tribunal hearing.
22. The disclosed information has transformed understanding of the history of the UK's arms deals with Saudi Arabia, and the role of corruption in them. This complemented the public debate and judicial processes taking place at the time as a result of the ending of the Serious Fraud Office inquiry into corruption allegations regarding BAE Systems and Saudi Arabia. The released documents showed the SFO investigation covered just one small part of a long-standing pattern of misdemeanour in Anglo-Saudi arms deals.

23. On the financing of the Saudi arms deals the FoIA led to it becoming public knowledge that for many years UK taxpayers could have lost £1 billion if Saudi Arabia failed to pay for the arms. Risk assessment documents showed that members of the Government were worried about this, even as late as 2005 when the FoIA was coming into force.

24. From UKTI DSO, CAAT has received some information from a department that is clearly unwilling to place information about its activities in the public domain.

25. As well as the actual released documents, the hearings in Tribunal cases can themselves provide information. The cross-examination of Stephen Pollard of MODSAP in March 2008 threw light on a little-known MoD body employing over 200 civil and military personnel with a budget of just under £60 million paid for by Saudi Arabia.

26. Sometimes information received as a result of a FoI request informs debate years later. In 2011 the Bahrain government suppressed protest and committed widespread human rights violations. Saudi Arabian National Guard (SANG) troops entered Bahrain to guard critical infrastructure, freeing up the Bahraini security forces to intensify their repression. The MoD's answer to a FoI request made by Nicholas Gilby in 2006 about the British Military Mission to the SANG formed the basis of a front page article in *The Observer* on 28th May 2011 headlined “Saudi forces used to crush Arab spring trained by UK.”

**Establishing principles**

27. FoIA can also establish worthwhile points of principle. Nicholas Gilby's case was important because it established the precedent that where Government officials were involved in corruption, or turned a blind eye to it (as was the case with the Saudi arms deals in the 1960's and 1970's), there is a clear public interest in disclosure, even at risk of prejudice to foreign relations.

28. In the risk assessment Tribunal case the ECGD argued that to disclose the disputed information would prejudice the effective conduct of public affairs - exemption 36. In his evidence, Paul Radford, the head of ECGD's Credit Risk Analysis Division, claimed there would be a “catastrophic...freezing effect” and said “he did not know how the ECGD would manage, how it would conduct its affairs”. The Tribunal rightly dismissed this argument. This ought to make it much more difficult for public authorities to withhold information relating to how policy decisions are made.
Problems and weaknesses

Attitude of officials

29. Attitudes to officials charged with implementing the FoIA can be at odds with its spirit of openness. In addition to examples cited elsewhere, the March 2008 Tribunal heard a former UK diplomat suggest how the Saudis' opinion might have been sought: "In my experience what tends to happen is that the UK civil servants will say something like: 'There is this awful Tribunal in London that is threatening to release these documents, don't you think this will be a very bad idea?' to which the foreign government is likely to respond: 'Yes, that would be a bad idea, please report that to London.'" Earlier in the day, and unbeknownst to him, the Tribunal had been told that this was indeed what had happened.

30. Journalist Colin Freeman, searching through the ruined UK embassy in Tripoli, found a letter from the UK defence attaché warning the Libyans that CAAT had requested the names of overseas delegates to the 2009 DSEi arms fair. The letter asked if Khamis Gaddafi was “content for this information to be disclosed”, adding: “If you are not content, I would ask that you provide me with a formal statement with the reasons, as this will help strengthen the case against release.” (Sunday Telegraph, 25.9.11)

31. In a speech in May 2009, Richard Paniguian, the head of UKTI DSO, mentioned “high-level political interventions” made in connection with arms deals. When journalist Tom Baldwin asked UKTI DSO about this, with reference to Libya, “a spokesman for UKTI DSO initially denied that Mr Paniguian had made a formal speech at the event on 21st May and that the remarks attributed to him had been made up.” When the journalist revealed that CAAT had obtained a copy of the speech from UKTI DSO, through FoI, the official was forced to backtrack. (Times, 5.9.09)

Delay

32. Information is usually more useful, and sometimes only useful, if it is produced in a timely manner. If the public authority takes a long time, it is less likely that the information will be able to inform public debate.

33. CAAT understands that the lengthy delays at Commissioner stage are being reduced, but the waiting at the internal review stage is often still excessive and foot-dragging by the authorities seems to account for some of it. UKTI DSO is one department which appears to frustrate the provision of information through routine delays.

34. For example, a request was made on 4th August 2009 regarding “high-level political interventions” that the UKTI DSO stated that it had delivered in pursuit of arms deals to particular countries, including Libya. After one month with no response, CAAT had to email and telephone several times over the course of a week before the request was even acknowledged. It then took further emails, telephone calls and a request for an internal review before a reason for delay was given, 49 working days after the request had been submitted. After further delays CAAT made a complaint to the Commissioner, and the Commissioner instructed UKTI DSO to reply within 20 working days. A response was finally given 100 working days after the original request and 23 working days after the date of the Commissioner's letter.
35. Soon after the initial request, the release of al-Megrahi and allegations of possible trade deal links had become a matter of significant controversy. The final response detailed two meetings between Libyan and UK ministers in May 2009 where arms exports had been discussed.

36. Similarly, following a September 2010 request, information about Farnborough International was released in batches with holding emails sent in between. The first batch was received after 61 working days, the second after 80, the third after 140. The final batch arrived in January 2012, 351 working days after the request was made. This last response contained what seems to be the most sensitive information as it related to “Ministerial support for our major [arms selling] campaigns in Libya” and the invitation of a Libyan General to Farnborough International 2010, including meetings with Defence Minister Gerald Howarth and the Duke of York. The greater embarrassment of releasing this in the first half of 2011 is apparent.

Resistance to redaction
37. UKTI DSO has also made blanket refusals when only part of the information requested merited exemption. In one case, relating to meetings with Algerian officials about arms sales, the initial request was refused using sections 24, 26, 27 and 43. When an internal review requested that information that was was not considered exempt should be supplied, UKTI DSO upheld the original decision but, “to be helpful”, decided to provide some of the previously withheld information. There appears to be no reason why this should not have been provided in the first instance rather than after a total of 136 working days and setting a bar of an initial refusal.

Lack of adherence to precedent
38. Precedents are important to prevent old battles being fought again. Establishing a precedent at the Tribunal is a time-consuming process. If previous decisions are ignored, it wastes resources for all concerned.

39. CAAT made a request to the MoD for material similar to that the Tribunal ordered the FCO to release to Nicholas Gilby. Much of the material was withheld, including at least one document obtained from the FCO. CAAT argued at the internal review stage and later to the Commissioner that the precedent set in the Tribunal case should be followed.

40. The Commissioner sided with the MoD. CAAT and Nicholas Gilby decided, despite the amount of work involved, to the appeal to the Tribunal to preserve the precedent. The case was considered "on the papers" in 2011 and the Tribunal ruled in favour of the MoD. The judgment said that a reason for this was that the projected cost for the Tribunal did not permit it to examine the documents in the detailed way done in the FCO case.

Legal imbalance
41. Until the appeal to the Tribunal, the process is relatively simple for the requester and the cost, except in time, minimal. However, an oral hearing before a Tribunal brings the requester into a legal process where both the public authority and the Commissioner will have lawyers, even if on the same side of the case. At the Tribunal hearing in 2008 the FCO and MoD were represented by a leading QC plus a second
barrister, who himself became a QC the next year. CAAT's resources limited it to a junior barrister.

42. Any requester without legal assistance at the Tribunal will be at a definite disadvantage. This has huge cost implications for individual applicants or those from bodies without the resources to pay for lawyers. Qualified legal assistance is invaluable in reviewing and improving the requester's case, fighting for the requester's interests prior to the hearing (not least because they have a far better understanding of legal procedure and what is and is not possible), and, in the case of barristers, questioning witnesses in the hearings.

43. The requester is also at a major disadvantage if much of the Tribunal hearing takes place in closed sessions. CAAT and Nicholas Gilby were immensely fortunate when the Tribunal agreed to the appointment of Special Advocate Khawar Qureshi QC to represent their interests in the closed sessions of the March 2008 hearings.

The costs

44. It is argued that the FoIA costs the public sector too much, particularly through its use of employees' time. However, these public employees are accountable to UK citizens and greater transparency should help discourage the abuse of power.

45. It is hardly surprising that a small number of requests have disproportionately high costs for the authorities. Those requests going to Tribunal level, and using legal professionals, undoubtedly cost more. However, the FoI process is not without cost for the requester. To obtain information where there is resistance takes considerable time, stamina and skill.

46. At Tribunal level it can also take money as it may not be possible to find lawyers willing to act without charge, given the amount of work involved. Resources are always a consideration for CAAT before pursuing a case beyond the initial stages. In 2011 CAAT's decision to go to the Tribunal "on the papers" was made as the resources were not available to pursue a full oral hearing.

47. One problem with costs is that it is sometimes impossible to gauge the authority's approach to a request in advance. For example, CAAT thought a request to the ECGD for a list of countries on which it had exposure for a) civil and b) military projects at 31st December 2009 would be simple to answer. However, one or more countries were omitted from the list, with exemptions 27 and 43 cited, prompting an unanticipated internal review. The ECGD did not change its mind and CAAT remains perplexed by this.

48. Costs, on both sides, can rise unnecessarily where the authority is unhelpful. Not anticipating anything other than a quick response, in 2008 CAAT asked UKTI DSO for lists of the members of its Defence and Security Advisory Panels. However, the information was not forthcoming until the internal review stage and then only released after UKTI DSO, citing Section 40(2) had received permission to do so from each of the individuals concerned. However, the panel members all came from companies, trade associations and the like and CAAT had discovered the names of several from information given without hesitation to parliamentary committees or the media before
the lists were released. It would be most surprising if any of them had expected their membership of the Panels to remain a secret.

49. Conversely, costs can be reduced if the authority is helpful. In 2006 the National Audit Office’s Head of Corporate Affairs, Rob Prideaux, explained the NAO’s report terminology which enabled CAAT to frame an FoI request which elicited the information wanted with little cost to either party.

Looking forward

50. Although the FoIA has been in force for seven years, it is only three since the Tribunal ruled on the CAAT and Nicholas Gilby Saudi Arabia cases. These rulings informed subsequent requests. Commissioner and Tribunal judgments are also checked regularly, both for the information contained in them and as an indication of the two bodies’ thinking on cases. There is, however, the disappointment mentioned above that precedents are not always being followed.

51. The FoIA was a vital step towards increased accountability and allowing citizens, either directly or via pressure groups or the media, to question and sometimes end official activities considered undesirable.

52. CAAT thinks that the structure of the FoIA should be left unchanged while a culture of greater openness continues to embed itself, or, in some cases, enter into the thinking of officials. It has taken requesters such as CAAT much perseverance to get the information it has done. Any dilution of the FoIA would mean a substantial step back in terms of information provision, providing more loopholes and allowing more tactics which might assist obstructive departments. In particular, CAAT does not think any additional charges should be introduced.

53. There is a general trend towards openness and accountability. The FoIA has played its part in this, providing much needed information to assist rational and informed debate. It must not be watered down.

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