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Contracting-out and the Freedom of Information Act in the United Kingdom

1. Chapter 1: Introduction

This work aims to develop a better understanding of the relationship between contracting-out and the Freedom of Information Act 2000 (FOIA) in the United Kingdom (UK). It is concerned with the applicability of FOIA to private companies performing public services and the reasons that militate against the extension of the act to these companies. It suggests that the efforts to increase transparency among the public sector may be undermined by the increase of contracting-out in the delivery of public services and activities. Thus, the situation is characterised by two simultaneous processes: an increase of transparency-related regulations on the public sector and an increase of public expenditure flowing to the private sector, where some of those regulations do not apply.

Transparency has become a magical word in politics (Fine Licht, 2014) with a "*quasi-religious significance*" in modern governance theory (Hood, 2006). Despite its vague and imprecise content, transparency is a powerful concept frequently associated with positive values such as accountability, honesty and legitimacy. FOIA is usually hard to resist for politicians (Worthy, 2017) at least in an explicit manner, as it has become a widely accepted term in the political sphere and within the public sector reform literature. Internationally, there has been a "*global explosion"* of freedom of information laws, which are perceived to have a central role in resolving the accountability deficit of states (Ackerman & Sandoval-Ballesteros, 2006).

The classical approach saw transparency as a safeguard against government abuses and corruption, assuming that increased information improves decision-making and impacts positively on democracy as well as on public management (Meijer *et al.*, 2015). Conversely, critical perspectives understand these policies as a government attempt to manipulate information (Birkinshaw, 2010, pp. 24-26) or as a naïve attempt to simplify the complexities of government without a solid theoretical basis (Fenster M. , 2015). Moreover, it is suggested that the impossibility of a full visible state can lead the public to frustration eroding legitimacy instead of improving it (Fenster M. , 2010, p. 668). Notwithstanding the

contrasting views, the concept is appealing in terms of political discourse and it is assumed to bring short-term benefits to its advocates and signal commitment to highly accepted political values across the ideological spectrum.

Politicians adopt paradoxical behaviour regarding FOIA. On one hand, they commit to transparency reforms that increase the controls over the public sector as the Blair administration did with the approval of the FOIA and the Cameron-Clegg Coalition government advocated for its extension (The Coalition, 2010). On the other hand, they avoid those reforms by increasingly outsourcing public services, placing them under a blurred line characterised by the uncertainty of a legal regime that makes following taxpayers' money more complex. Accordingly, the Information Commissioner's Office (ICO) of the UK suggested politicians are less enthusiastic of FOIA when they are in the government and that with increased private participation "*accountability is escaping under the door*" (Syal, 2012). More broadly, this has been characterised as a paradoxical relationship between the state and the law: while creating and maintaining the law, the state also tries to escape from it (Fenster M. , 2015, p. 163). Consequently, the limited scope of FOIA makes the contracted-out services unaccountable to the public directly, creating an accountability gap. This gap is being increasingly highlighted in government reports and academic literature. While Ministers and Departments are still accountable to the public, they have resisted applying FOIA directly to contracted-out services. Thus, when private bodies exercise public functions under the cloak of private law and commercial confidentiality FOIA is not applicable in the same way as it is when services are performed by government bodies, which creates potential risks that need to be assessed as reduced information may lead to reduced accountability. Arguably, if contractors are expected to work within confidentiality, then contracting-out has the potential of eroding the classic accountability mechanisms, impacting on the quality of public services and democratic checks and balances (Birkinshaw, 2010, p. 26).

However, the Act was wise enough to contemplate this situation, establishing in its section 5 (s5) the possibility to extend the Act's coverage to include any person or organisation that *"is providing under a contract made with a public authority any service whose provision is a function of that authority"* (FOIA, 2000). Although the government has made multiple declarations in this direction (Morris, 2014), s5 of the Act was never used to designate a private contractor as a public authority (PA). Thus, information requests about contracts or private companies performing a public service need to be directed to the PA that outsourced

the service, allowing the government to act as the gatekeeper of information, controlling and editing what information is given. This is surprising in a context of multiple policy scandals and failures related to outsourced companies, where the lack of transparency was a central feature. While the literature recognises the fact that this power has not been used, it has not examined the reasons for it (Birkinshaw, 2010, p. 122; Wadham *et al.*, 2007, p. 48).

For the advocates of the extension of FOIA, the main assumption is that designation of private contractors as public authorities will benefit the administration, bringing further transparency and efficiency to contracting-out and helping to improve monitoring of outsourced public services. The ICO estimates *"that expenditure on outsourced public services accounts for about half of the £187 billion that the government (including the NHS and local government) spends on goods and services, with the local government outsourcing market alone said to be worth £30bn"* (ICO, 2015). Hence, if government has proposed to increase monitoring of taxpayers' money, contracting-out represents a significant share of the total government expenditure.

Furthermore, the public supports the extension of FOIA to outsourced services. According to a survey commissioned by the ICO, 75% of the respondents considered necessary that private providers were brought into the scope of the Act. The report considered that current arrangements were too complex to exercise the right to information (ICO, 2015). Similarly, an Independent Commission on Freedom of Information (ICFI) was appointed in 2015 by the Minister of the Cabinet Office and Paymaster General to review the first ten years since the Act came into force. The final report revealed there was substantial public support to extend the act to private companies performing public functions (Independent Commission on Freedom of Information, 2016).

Moreover, there have been multiple public calls from key actors to extend the scope of FOIA to private companies providing public services (Stone, 2016; Hope, 2016). The new Information Commissioner, Ms. Denham argued: "*Private contractors above a certain threshold for a contract or doing some specific types of work could be included under the FOI Act. The government could do more to include private bodies that are basically doing work on behalf of the public'* (Rosenbaum, 2016). The Commissioner issued a report arguing the Act should be extended to those contracts *over £5 million in value or continuing over 5 years or where the contractor solely derives its revenue from public sector contracts*" (ICO, 2015b, p. 6). Also, the Coalition government programme previously proposed to *"extend the*

scope of the Freedom of Information Act to provide greater transparency" (The Coalition, 2010). In the same sense, the ICFI suggested it was necessary to enhance transparency in contracting-out arrangements, but expressed some concerns regarding imposing additional burdens on small companies (Independent Commission on Freedom of Information, 2016).

Also, according to the Public Accounts Committee (PAC) of the House of Commons, high-profile policy scandals regarding outsourced services undermined the public trust in contracting-out: *"The public's trust in outsourcing has been undermined recently by the poor performance of G4S in supplying security guards for the Olympics, Capita's failure to deliver court translation services, issues with Atos's work capability assessments, misreporting of out of hours GP services by Serco, and most recently, the astonishing news that G4S and Serco had overcharged for years on electronic tagging contracts"* (Public Accounts Committee, 2014, p. 3). The Committee argued FOIA was an important part of the solution to the poor performance and cost and deadline overruns that have plagued government contracts with companies such as G4S, Serco and Atos. The Committee identified transparency as a key area to improve the delivery of contracted-out public services and advocated transparency instead of commercial sensitivity as the default position regarding FOIA requests. The Committee recommended exploring how the FOIA's scope could be extended to cover contracts with private providers (Public Accounts Committee, 2014, p. 6).

Finally, the Institute for Government argued contracting arrangements may appear as obscure to the public and that high-profile scandals in outsourced services have undermined public confidence in the private providers and in the government's capacity to manage contracts. The report also suggested that limited information is one of the causes of the public's low confidence in outsourcing (Institute for Government, 2015).

Hence, the designation of private providers as public authorities under s5 of FOIA would strengthen the control of contracts and enhance monitoring by the public. Thus, eventually it could lead to greater efficiency of government's contracts, helping to curb some of the typical situations of contractual incompleteness, cutting corners and quality shading that are reviewed by the literature. Furthermore, the designation could help to overcome the reported distrust in private contractors and avoid future scandals involving major private providers. Considering these remarks, the question is why the government has never applied section 5 to private companies performing a public function.

Different answers to this question are examined based on economic, political and legal theories. While costs are a relevant reason to maintain the limited extension of FOIA, there are signs of other less visible reasons that suggest that the current arrangements are also useful in avoiding political debate over the service. Government behaviour is ambiguous and contradictory. On one hand it wishes to extend transparency to re-legitimise outsourcing and improve efficiency but on the other hand it does not want to increase scrutiny over the contracting process, making it a contestable topic. Three hypotheses are developed to understand the motives that have prevented government from designating private providers as public authorities for the purposes of the Act. First, extending FOIA to private providers represents extraordinary costs for the government. Second, private contractors have been able to protect their interests in not having FOIA, particularly by invoking commercial confidentiality. Third, the government does not want to extend FOIA, as it would increase scrutiny over the contracting process and its outcomes and spark political contests, which the principal in the contract wants to avoid.

The rest of this work will proceed as follows: chapter two will review the main literature in law, economics and public policy related to the question. Chapter three will introduce and examine different evidence related to each hypothesis. Chapter four examines the use of the '*commercial interest'* exemption in two different areas of contracts: the Work Programme and privatised prisons, analysing the responses of the government and the decision notices of ICO. Finally, chapter five will introduce the conclusions.

2. Chapter 2: Literature review

The present chapter critically reviews three different and complementary perspectives that contain deep insights to explain why the scope of FOIA is not comprehensive of the private bodies working for the government. In order to provide a thorough explanation that reveals the complexities of the problem the chapter brings together a legal, an economic and a political perspective. Firstly, it examines the public-private legal divide and the implications that it has for the scope of FOIA. Secondly, from an economic perspective it reviews the transaction cost approach and the implications on monitoring, as well as the principal-agent theory and the possibility of agency drift. Finally, it analyzes the blame avoidance literature for a more political explanation. By bringing together three different approaches it expects to provide a more comprehensive explanation, combining different "*conceptual lenses"* (Allison, 1969, p. 689).

2.1. The public-private legal divide

The classic liberal approach draws a line separating the public and private sphere. Liberal theory is traditionally distrustful of the state but not of private actors: *"while classical liberal theory has always been suspicious of state power as posing a threat to individual liberty, this suspicion has not traditionally surrounded the exercise of private power"* (Yeung, 2006, p. 159). From this perspective, the law performs a function of safeguarding against the abuse of power coming from the state. Conversely, from a critical perspective the legal divide is a political strategy to maintain power (Walzer, 1984). Bentham and Madison are typical examples of this type of reasoning in the UK and the United States (US). The former elaborated the idea of a tribunal of public opinion as a keystone to prevent government abuse (Cutler, 1999), the latter warned about the "*farce"* and the "*tragedy"* of a popular government without popular information (Madison, 1822). Thus, the exercise of the public function as well as the use of public funds needs to be controlled. Conversely, "*bodies not exercising public or governmental functions are not under these 'public law' duties. This is what the substantive divide is supposed to be all about*" (Oliver, 1999, p. 92). Based on this perspective, the divide between public and private is essential (Fenster M. , 2015) and public

bodies are those that should be accountable while private bodies should be protected from public power.

However, the boundaries may be more flexible than they appear in theory. For instance, British courts have held "*private property is clothed with a public right"* when considering the situation of statutory monopolies (Oliver, 1999, p. 203). Conversely, competition law was initially designed for private bodies and then extended to public ones (Yeung, 2006). Furthermore, the division has become increasingly blurred after the reforms inspired in New Public Management (NPM) (Roberts, 2006, p. 152), which typically emphasize more private sector involvement in the delivery of public services and the use of contracts (Lane, 2000). As a consequence, the legal divide has become more "*indeterminate and unstable*" (Palmer, 2008, p. 599). Concerns have been raised regarding the accountability of contracted-out services, fearing it becomes an area of *"unaccountable discretionary power"* (Yeung, 2006, p. 129). Arguably, additional forms of accountability and democratic controls are needed (Oliver, 1999, p. 11), especially in a context where the government outsourcing market is dominated by some giant companies whose corporate structures are not transparent to the public (Johal et. Al, 2016) and that are not subject to the same democratic controls (Crouch, 2015). It is relevant to question the public-private legal divide as controls may apply differently to private contractors (Davies, 2008, pp. 231-258; Oliver, 1999, p. 266). Conversely, other scholars warned that the "*publicization"* of private providers has the potential to undermine the distinctive advantages of the private companies if increased burdens are placed on them (Sellers, 2003).

It was suggested that this "*conceptual muddle"* threatens the application of freedom of information laws, as these are built on the classic public-private distinction (Roberts, 2006, p. 161). Ideally, FOIA should cover all the public and private bodies that receive public funds or perform a public function, though most laws limit their scope to public bodies (Ackerman & Sandoval-Ballesteros, 2006, p. 99) which creates inconsistencies in the context described above. This "*incoherent state*" defies the classical political theory as it is plagued with complex, multi-layered and overlapping structures that increase the *"opacity of transparency*" (Fenster, 2006). Similarly, it has been argued government functions are *"shielded from the public through the use of private companies*" frustrating the purpose underlying the Act (Feiser, 1999, p. 24). Thus, many scholars have suggested the need to expand the "*province*" of FOIA (Aronson, 1997, p. 70). Despite information access

obligations can be built into contracts, the effects are different from the designation of private providers because the latter entitles the citizen directly with a right to request information to the provider that was designated as PA. However, this idea of expansion is far from being unanimous and has been criticised as a "*populist understanding of transparency"* that can undermine some of the basic advantages of outsourcing and the new models of governance (Fenster M. , 2010, pp. 648-50).

The described situation has created an "*accountability deficit"* because aspects of the contracting arrangements may be regarded as commercially sensitive and access to information may be restricted (Mulgan, 2005, p. 5). Schillemans & Busuioc give account of a wide trend in the literature that reveals the relationship between NPM and the gaps in public accountability (2014, p. 195). Contrastingly, some understand that contracting-out can enhance accountability by triggering standards reviews, enhancing performance monitoring and setting redress mechanisms (Domberger & Jensen, 1997, p. 76). Critics of outsourcing argue the increase in formal accountability through the contract is not passed to the public (Mulgan, 2005, p. 11) and that outsourcing implies reduced control of day-to-day actions of contractors (Mulgan, 1997). Moreover, it is suggested, contracting-out may be the "*return of government secrecy through the agency back door*" creating a *"legitimate mean of avoiding FOIA disclosure"* (O'Connell, 1985, p. 627) that negatively affects the "*ecology of transparency*" (Kreimer, 2008). It was suggested the line between public and private should be drawn more sharply to rectify the deficit (Davies, 2006, p. 128). A contrasting view rejects the idea of an accountability deficit and argues NPM reforms have improved accountability and transparency (Scott, 2000).

Even the most comprehensive FOIA can be frustrated if the exemptions are significant in number or extensively interpreted (Syrett, 2011, p. 273). The commercial interest exemption is especially relevant in the context of outsourcing as it can attenuate disclosure significantly (Crouch, 2015, p. 161). Arguably, private contractors would deem much information as commercially sensitive, restricting the flow of information and curtailing the accountability process (Davies, 2008, p. 218). Section 43 (s43) of the FOIA establishes the government is able to deny disclosure in cases of commercial interests involving: (1) trade secrets; (2) information the disclosure of which would be likely to prejudice the commercial interests of any person (including the PA holding it); and (3) when the duty to confirm or deny the existence of information is likely to prejudice the commercial interests (FOIA, 2000). A trade

secret is considered "*information of commercial value which is protected by the law of confidence"* (Wadham et. al, 2007, p. 133). Furthermore, commercial interests are frequently invoked and automatically considered whenever a PA receives a request concerning a private sector body (Wadham et. Al, 2007, p. 133). This exemption was coined in "*extremely broad terms"* which favours its use in outsourcing and public-private partnerships arrangements and the scope of application can be defined contractually by powerful contractors (Birkinshaw, 2010, pp. 168-169). While it is clear that the exemption is necessary to "*prevent unfair competitive advantages or disadvantages arising from access requests"* (Right2Info, 2017) it may also be abused by the government to avoid disclosure of embarrassing information.

To sum up: classic liberal theory is suspicious of public power and the possibility of abuse of power, thus it encourages strong accountability and transparency in the public sector. However, the legal divide is flexible and the boundaries are not clear. The reforms encouraging private participation in public services provision have created a "*conceptual muddle*" that makes accountability more complex and the application of FOIA to private companies providing public services unclear. Finally, the idea of a legal divide and the exemptions may be used as argumentative resources to refrain the extension of the Act, explaining why s 5 of FOIA has never been used on private providers.

2.2. The economic approach: the transaction cost theory

A second thread in the literature analyses the contracting-out phenomenon as an economic one, discussing the pros and cons of contracts compared to hierarchy. Several factors need to be taken into account when deciding whether to contract-out a public service as it implies the loss of residual control rights that are relevant to approve changes if the unexpected happens (Hart *et al.*, 1997). Moreover, contracting-out introduces the possibility of "*agency drift*" (Horn, 1995) which represents a challenge for the government, who will prefer the contractor focusing only in the contract. From this perspective the extension of FOIA (and the increase of political pressures and public scrutiny stemming from it) can either increase or reduce the likelihood of agency drift. It can increase agency drift as it gives campaigners and influence groups more leverage over the outsourced company. On the other hand, public scrutiny could help to monitor the contract and reduce agency drift.

The idea of transaction costs was first used by Coase to *"explain why resources were sometimes allocated by hierarchical directive within a firm rather than by individual market transactions"* (Horn, 1995, p. 37). This approach examines the advantages and disadvantages of providing a service internally through hierarchy or externally through contracts. According to it, there are additional costs to the price of the contract, e.g. planning, negotiating, directing and monitoring the delivery of the service. These are relevant when deciding whether to outsource a service and they vary depending the nature of the product or the service (Wilson, 1989, p. 358). This approach has been used to explain why legislators prefer to delegate some level of decision-making to bureaucracies instead of making high-detailed legislation (Horn, 1995). Arguably, parliaments delegate to reduce the decision-making costs (cost of striking a deal) however when they do, they increase the agency costs. Agency costs are the necessary costs to persuade the agent to implement the policy faithfully; they include choosing the agent and monitoring compliance, using sanctions and any non-compliance (Horn, 1995, p. 19). Similarly, when Ministers decide to outsource a service they are delegating to a private firm, facing analogous principal-agent problems. While they may reduce decision-making costs related with the provision of the service, they need to increase monitoring to avoid agency drift.

One possibility is that the designation under s5 reinforces monitoring of the contract, reducing agency drift. The principal-agent theory models a conflictive relationship between the principal and the agent and assumes they have different goals, thus the principal needs to control and the agent has incentives to deviate from the mandate (Schillemans & Busuioc, 2014). Agent deviations are a recurrent concern especially when contracting with the for-profit sector, as it has more incentives to deviate (Hart *et al.,* 1997) than the non-for-profit sector (Grout & Yong, 2003). Solutions to principal-agent problems frequently involve an increase in monitoring mechanisms (rewards and sanctions) and procedural controls. The latter, can involve constituents in the agency decision-making process as a manner to assuring compliance and reducing drift without needing to determine a substantive outcome (McCubbins *et al.*, 1987, p. 244). Sanctions are also considered an effective instrument to control the agent, though they have a political cost for the principal as they reveal the government's wrongdoing (McCubbins *et al.*, 1987, p. 252). Thus, procedural solutions may appear as a better alternative in controlling the agent. For instance, it is suggested that FOIA facilitates political intervention of the constituents in the policy of the agency (McCubbins *et al.*, 1987, p. 259). From this perspective the extension of FOIA to private providers can be

considered as a procedural mechanism to achieve greater compliance from these companies while reducing agency costs by facilitating "*fire alarm*" monitoring (McCubbins *et al.*, 1987, p. 273).

Hence, monitoring is essential to assure a good service and to avoid agency drift. Horn agrees that agency drift and monitoring costs can be reduced if constituents have more information and are incentivized to participate in decision-making (Horn, 1995, p. 20). The cost of monitoring can be reduced by leaving much of the task to the constituents. For instance, legislators prefer "*fire-alarm*" instead of "*police-patrol*" oversight as the former is perceived to be more effective. This kind of "*constituency monitoring*" includes a set of rules, procedures and practices with which "*citizens and interest groups access to information and to administrative decision-making processes*" (McCubbins & Schwartz, 1984, p. 166). Hence, the costs of monitoring are reduced and they are shared with citizens and interest groups. Thus, extending FOIA to private contractors theoretically has the potential to reduce agency drift by enabling a form of constituency monitoring. FOIA would reduce the participation costs that citizens face to get information, facilitating monitoring. Additionally, it would provide further incentives for compliance as companies would avoid being named and shamed. This would supplement the existing controls on private providers and help resolving the agency drift more cheaply (Horn, 1995). Consequently, FOIA could reveal itself to be a cheaper method of addressing agency costs by providing citizens with stronger instruments to monitor outsourced services.

On the other hand, designation under s5 has the potential to increase agency drift by giving campaigners and pressure groups more leverage over the contractor. By facilitating access to information about the contract, FOIA makes the agent more ductile, therefore it increases the risk for agency drift. From this perspective, the extension of FOIA would increase the transaction costs of outsourcing, which may provide an additional explanation of the issue. Arguably, increased transparency can improve efficiency but it can also result in an "*explosion of the transaction costs"* (Meijer *et al.*, 2015, p.14). Moreover, FOIA could be understood as introducing "*contextual goals"* to the private supplier, i.e. *"descriptions of desired states of affairs other than the one the agency was brought into being to create"* (Wilson, 1989, p. 129). These goals create incentives to focus more on processes than outcomes and focus on the use of resources on multiple goals. Moreover, these goals and constrains make it easier for constituents to influence the agent away from the principal. Similarly, it has been suggested that "*non-commercial objectives*" are one of the differences

between private companies and state owned enterprises (SOE) and that the latter are more responsive to pressure groups as a consequence of these goals (Horn, 1995, p. 135). When contracting-out a service the government would be reducing public scrutiny, diminishing the potential for agency drift stemming from campaigners and pressure groups. Therefore, designation would increase public scrutiny, making the contract a contestable topic and increasing the potential for agency drift.

Another relevant point is the distribution of costs and benefits of a specific decision among the affected groups. Small groups with concentrated interests face lower organisation costs and have more incentives to monitor the task of government. Conversely, large groups with diffuse interests have higher participation costs and lower incentives to monitor the government (Horn, 1995, p. 31). Remarkably, when there is strong opposition from businesses to legislation that affects them; legislators have an incentive to endow the affected private party with participation rights in the decision-making process (Horn, 1995, p. 32). Similarly, s5(3) of FOIA, establishes that before designating a private company as a PA, the Secretary of State or the Minister for Cabinet Office is required to consult the affected party. Furthermore, when discussing the role of public companies Horn argues, "*less transparency reduces political uncertainty*" and political opposition against transfers to those companies (Horn, 1995, p. 159). Thus, the extension of FOIA to private providers would make an increased amount of contractual information more accessible. Thus, private companies and the government would have incentives to withhold transparency from outsourcing, as it would increase uncertainty and opposition. If *"low visibility will be an important hurdle to political opposition"* (Horn, 1995, p. 159) the absence of FOIA would be an additional (and ironically, invisible) hurdle to opposition that insulates the service from political conflict.

To sum up: designation under s5 of FOIA can reinforce monitoring of contracts, thus reducing the possibility of agency drift. Conversely, it could increase agency drift because it allows more participation and leverage to campaigners and pressure groups. Finally, while the costs of the extension would be concentrated on private firms, the benefits would be diffused. The expansion of FOIA to private suppliers represents a burden for the powerful groups and has no concentrated beneficiary. This could provide a simple though powerful explanation for the restriction of the Act, as it would increase conflict and opposition among businesses.

2.3. Blame avoidance theories

A final approach to the question can be found in the theories of political blame, which suggest blame avoidance may be a key reason for politicians using contracts. This literature, as those reviewed previously, provides a framework to examine the reasons that prevent the government from using s5 of FOIA on private companies. According to these theories the introduction of private contractors in the accountability process helps to spread the blame in cases of policy failure as it increases the complexity and lack of clarity of accountability. Thus, politicians could use contracting-out as a strategy *"to insulate themselves from citizens' criticism of service failures"* (James *et al.*, 2016, p. 4). If the government seeks to avoid blame for eventual policy failures and contracting-out is perceived by the government to be an effective mechanism to do so, among other reasons because it is "protected" by a private-law regime, then –at least theoretically- there are incentives for the government to oppose to the expansion of FOIA to private providers as it could reveal the mismanagement of contracts, among other embarrassing situations.

According to James *et al.* (2016), the government adopts blame avoidance strategies regardless of whether they really work. The government has more incentives to avoid blame than to claim success because of the "*negativity bias"* that makes constituents place more attention on failures than successes (James *et al.*, 2016, p. 5). Similarly, an empirical study regarding transparency and decision-making revealed that "*the public may not reward government efforts to increase transparency"* with enhanced trust or acceptance of the decisions (Fine Licht, 2014, p. 44). While the government expects to increase its legitimacy by making more information accessible, the real effect of the policy may prove that the contrary happens (Worthy, 2010). Hence, it is not clear "*whether FOI has increased the public's trust in government and Parliament"* (Birkinshaw, 2010, p. 2). This resembles some of the effects and the risks pointed out by some scholars when examining the use of targets in the UK government and the "*asymmetry in the political capital accruing from public targets"* (Boswell, 2015). Moreover, the negativity bias may explain why *"good performance produced by government agencies is less credible to citizens than the same information coming from more independent sources"* (James *et al.*, 2016, p. 6).

Furthermore, complex accountability generated by outsourcing can help in spreading the blame. Reduced information or secrecy can help to reduce the blame as citizens need a

minimum level of information in order to assign fault. While the explosion of information and communication technologies have made *"virtually impossible for political leaders to limit criticism by monopolising information"* (Heclo, 1999), complex or reduced information, and unclear institutional settings may be effective in hindering criticism and mitigating blame. Arguably, outsourcing and the complexities of governing by contracts may not secure better public services but they are able to "*spread the blame when things go wrong*" (Hood, 2011, p. 12). Similarly, it is claimed that a dispersed executive power is less likely to be punished by voters (James *et al.*, 2016, p. 8). Moreover, it has been suggested, *"blame and its avoidance a key concern of politicians using contracts"* (James *et al.*, 2016, p. 10). These practices are not infrequent among government, and they often extend to government contractors. Moreover, it is argued institutional dispersion is connected with inferior blame assignment and that the difficulty in identifying the responsible actors and institutions could impact on the level of protest (Hood, 2011, p. 86). However, evidence is far from being conclusive as *"the assumption that delegation can shield the delegator from blame may simply not be valid in all cultural or institutional settings"* (Hood, 2011, p. 74).

Hood introduces a framework to distinguish different strategies aimed at avoiding blame. *"Agency strategies"* try to deflect blame from the outset, i.e., by designing an institutional architecture that delegates blame-attracting activities and keeps credit earning activities (Hood, 2011, p. 19). Contracting-out suits this description to the extent it is a form of delegation of state activities characterised by the participation of private providers. As it makes impossible to have the day-to-day control of operations, it also delegates risk in case of failure. The blame games described by Hood (2011) are more easily played inside a context of multiple players, with unclear accountability regimes, where it is easier to spread blame in cases of bad performance of the service, mismanagement, delays and other failures in the contract. Considering the negativity bias commented previously and the fact that it can affect politicians' chances of re-election, they have strong incentives to avoid blame and support institutional arrangements with lower blame-risks. Accordingly, it has been suggested that contracting-out may act as an "*agency strategy*" to avoid blame from failures: "*blame avoidance shapes the conduct of officeholders, the architecture of organizations, and their operating routines and policies*" (Hood, 2011, p. 4). According to Hood, privatization, agencification, and outsourcing of public service provision *"can offer the apparent prospect of shifting blame away from politicians and central bureaucrats to private or independent operators"* (Hood, 2011, p. 68). While traditional economics literature frames the issue as

direct control against delegation, blame avoidance theory suggests that avoiding the blame may be as relevant as efficiency when deciding whether to outsource a public service (Hood, 2011, p. 72).

Hence, blame theories provide a different answer to the question under consideration. According to this approach, contracting-out has the potential to reduce the blame-risk by reducing the level of information available to the public and creating unclear accountability schemes that help to spread the blame. Tentatively, it could be argued that the inapplicability of FOIA in the private sector gives the government more resources to avoid blame if a contract proves to fail. Conversely, the extension of FOIA would increase the availability of information on the outsourced public service, increasing the blame-risk for government and the possibility of being exposed to criticism. This would act as a deterrent to designation of private companies in the terms of s5 of the Act.

3. Chapter 3: Three different approaches to the question

This chapter provides three testable hypotheses to answer the question. First, extending FOIA to private providers represents extraordinary costs for the government. Second, private contractors have been able to protect their interests in not having FOIA, particularly by invoking commercial confidentiality. Third, the government does not want to extend FOIA, as it would increase scrutiny over the contracting process and its outcomes and spark political contests, which the principal in the contract wants to avoid. The first section analyses the cost argument, its implications and inconsistencies. The second section examines the influence of private providers and whether their position towards transparency has changed and why. The third section examines the possibility that the government itself is the actor limiting the extension of FOIA to private providers. Within the chapter, different documentary sources are examined to test the three hypotheses: official reports from the Public Accounts Committee (PAC) of the House of Commons, official impact assessments commissioned by government departments, independent consultations, newspapers reports about big outsourcing companies and government documents online (Burnham *et al.,* 2008). By doing so, it intends to provide supporting evidence to each of the explanations generated above by using a wide range of documentary material. In some cases the evidence introduced here is indirect, which is consistent with the idea that the government is blocking the expansion of FOIA (as stated in the hypothesis) but the main form of resistance will be silent as FOIA is hard to resist (Worthy, 2017).

3.1. FOIA is not extended because it is too costly

The first answer to the question is that it is too costly to extend the Act to private contractors and the government wants to avoid additional costs in contracts. Difficulties have been reported when trying to measure the cost of FOIA as there is no clear standard methodology and it is regarded as a political issue (Worthy *et al.*, 2011). However, an impact assessment commissioned by the Ministry of Justice (MoJ) that examined the extension of FOIA to companies wholly owned by more than one PA concluded that the cost of the extension would *"be passed onto consumers of the services those companies provide"* (Ministry of Justice, 2011, p. 9). The assessment identified transitional costs (training, development of

processes and internal review processes) and ongoing costs (receiving and responding to requests). The transitional costs were estimated in approximately £2,000 per organisation; however the on-going costs were estimated in £4,000, £29,000 or £245,000 per organisation per year for low, medium and high volumes of requests respectively (Ministry of Justice, 2011, pp. 8-9).

An independent review of FOIA estimated the total cost for central government was £24.4 million, £11.1 million to the wider public sector and £8 million to local authorities, all of them per year and not including the implementation costs (Frontier Economics, 2006). The average cost of officials' time for a request was £255 (7,5 hours per request at a cost of £34 per hour). Another study concluded the average cost per request was £293 (Colquhoun, 2010). Some requests cost more than £1,000, involving more than 50 hours of work. Moreover, the internal review process and the ICO appeal process are substantial drivers of costs. Internal reviews cost £1,208 on average and there is no additional fee to cover the cost. These costs were estimated for 34,000 requests annually at 2006 prices. However, according to Cabinet Office Statistics, during 2016 there were 45,415 requests only in central government. Moreover, there are over 100,000 bodies under FOIA, thus the number of requests is substantially larger and the costs much higher (Cabinet Office National Statistics, 2017). Each request involves searching, reading, consulting, considering the application of exemptions and whether to disclose or not the information as well as drafting the response. Additionally, the requester can ask for an internal review process, complain to the ICO and appeal to the Information Tribunal. All these activities represent significant costs.

When consulted by the MoJ, some respondents mentioned that the extension would represent extraordinary costs. The Confederation of British Industries (CBI) argued *"designating private sector organisations as public authorities for FOI purposes would increase their costs and these costs would be factored into existing and future contracts – thus increasing costs to public authorities and the public"* (Ministry of Justice, 2009, p. 11). Hence, designation would impact in the price of contracts, undermining the alleged efficiency of the private sector. Moreover, designation represents additional costs to the ICO and the Information Tribunal since they would have to ensure compliance of a wider range of bodies. Considering the economic cost as well as other factors the Ministry concluded that "*no general expansion of FOI in relation to contractors*" was appropriate (Ministry of Justice, 2009, pág. 12). This explanation is coincident with the observation that there is a natural

trade-off between transparency and efficiency (Mulgan, 1997). From this perspective, the government privilege efficiency over transparency. The cost argument provides a simple and powerful explanation to the question of the scope of FOIA; however there are some inconsistencies in the position held by the government that are difficult to explain from this perspective.

Firstly, it is inconsistent that the cost argument was considered when discussing the costs of implementation in the private sector but it was differently weighted when it was introduced to the public service. The costs described above are also present when dealing with FOIA in the public sector; however it is possible that from the perspective of the legal divide examined previously, the cost of political accountability in the public sector is naturalised, while it is perceived as unfamiliar to the private sector, which main concern is commercial.

Secondly, it is inconsistent that the government rejects extending FOIA to the private sector due to its costs but agrees to extend the Act to the voluntary sector without considering the economic impact. The consultation conducted by the MoJ concluded the benefits of bringing the sector under the Act outweighed the negative impact (MoJ, 2009). However, it is not clear how it would be different from the for-profit sector and what the criteria that lead to different conclusions were. The consultation fails to explain why in one case the costs outweigh the benefits and in the other it is the opposite. Furthermore, the theory suggests that non-for-profits have fewer incentives to cut corners and reduce the quality of the services provided (Grout & Yong, 2003) which makes even more relevant the question of why the government would increase controls in the sector that has fewer incentives to reduce quality and at the same time it would restrict the extension of the same controls to the sector that has stronger incentives to reduce quality.

Thirdly, it is inconsistent that the government rejects extending the Act to private companies providing public services arguing it would increase the cost of contracts while at the same time it recommends the introduction of information access obligations into contracts. These obligations are introduced so that the government can comply with FOIA, assuring contractually that it can acquire information from the provider by regulating how to treat the information requests related with the contract, e.g. how many days it has, what the cost is, which information is confidential. These obligations have a similar cost to the designation of private companies, as they establish that the contractor has to do the same activities to search

and produce the information, only that the source of the obligation would be contractual, not statutory. Thus, the costs argument fails to provide a coherent explanation of why this happens, as the cost is still present. For instance, the standardization of the Private Finance Initiative (PFI) contracts, which provides guidance in key issues that arise in PFI contracts, includes a chapter with recommended drafting for FOIA provisions. Recommended drafting includes the contractor's obligations to facilitate, archive and retain information, provide copies, assist in responding and considering the application of exemptions listed in FOIA (HM Treasury, 2007, pp. 228-229). Hence, if the guidelines are followed they will have an impact on the costs, adding the "*cost of FOIA"* to the contract and making it more expensive. Therefore, it is inconsistent with the idea that the government refuses to expand FOIA scope on the exclusive basis of costs. Instead, it suggests there may be other reasons to prevent the extension of the Act.

On the other hand, it is frequently argued that FOIA can increase efficiency, improve decision-making and discourage extravagant spending e.g. reducing MPs spending's after the scandal (Meijer *et al.,* 2015, págs. 12-15). Consequently, *"Extending the FOIA is intended to increase the efficiency, accountability and openness of companies wholly owned by more than one public authority, which will benefit society"* (Ministry of Justice, 2011, pág. 2). Although there is a strong case to believe that FOIA would reduce the costs of contract monitoring and prevent agency drift, the evidence is far from being conclusive and the benefits that FOIA would theoretically produce are contingent, with no empirical evidence. Thus, the costs of implementing FOIA may be a sensible reason to halt the extension of the Act. Moreover, the cost argument provides a simple and direct explanation to the question raised. However, the previous inconsistencies suggest there may be other reasons blocking the expansion of FOIA to private companies providing public services. Hence, it is necessary to further examine the issue adopting other "*conceptual lenses*" that provide complementary explanations.

3.2. The business sector is blocking the extension of FOIA

A second explanation considers the power of private companies as the key factor in answering the question. This is consistent with the idea reviewed previously that small groups with concentrated interests face lower organisational costs and have more incentives to

monitor the task of government while large groups with diffuse interests have higher participation costs and lower incentives (Horn, 1995, p. 31). Accordingly, designation under s5 represents a burden for the powerful groups while it has no concentrated beneficiary. For instance, the CBI had expressed that the extension of the Act would discourage "*private organisations from providing public sector services"*, represent *"commercial and competitive disadvantages to businesses"* and *"damage to the delivery of private sector"* (Ministry of Justice, 2009, p. 8). The consultation revealed business opposition to the extension of the Act at that time. The difference in resources to oppose the designation provides a parsimonious explanation of the inconsistency highlighted in the previous section, regarding why the consultation led by the MoJ (2009) rejected the designation of private companies but supported the designation of the voluntary sector when this is the one with fewer incentives to reduce the quality of the service. From this perspective, the for-profit sector has more resources to oppose the extension of the Act, than the groups that support the expansion. The argumentative resources, i.e. the legal divide and the commercial confidentiality are especially relevant to oppose to the extension of the Act.

The public-private legal divide as well as the commercial interest exemption can be understood as argumentative resources employed by the private companies to prevent designation and avoid disclosure. Evidence shows that businesses argued that their functions were not of a public nature and that the duty to respond was of the PA (Ministry of Justice, 2009, p. 7). Others responded that the idea of public nature was unclear, which reflects some of the ideas analyzed in Chapter 2, Section 1. Moreover, CBI´s rejected the extension of FOIA using commercial sensitivity and competition as the principal two arguments against it (Dudman, 2012). Furthermore, it has been suggested that "*In the United Kingdom, an array of newly privatized utilities – in electricity, water, rail, and telecommunications – persuaded the Blair government to abandon its early proposal that they should be covered by the new Freedom of Information Act, arguing that they would otherwise be at a competitive disadvantage to other firms entering the power market*" (Roberts, 2006, pág. 157). Additionally, a study about FOIA on local government revealed the pressures from businesses to local government to avoid disclosure: *"businesses instinctively asked for non-release on the grounds of commercial confidence and, in one case, threatened to sue"* (Worthy *et al.,* 2011, p. 25). Allegedly, the pressures from the industry to restrict the extension of FOIA in Scotland made Ministers backtrack regarding the extension of the Act (Sunday Herald, 2011). Comparably, several agricultural lobbyists asked Congress to be

exempted from FOIA requests in the US (Thielman, 2016). Although evidence is not systematic, the idea that businesses use argumentative resources to prevent the expansion of FOIA and to protect their information is consistent with the idea that the commercial interests exemption [s43(2)] was coined in extremely broad terms (Birkinshaw, 2010), providing the opportunities to abuse the exemption.

However, the second explanation needs to address the fact that businesses have changed their position towards transparency, after scandals with outsourced services went public on the news (Plimmer & Moules, 2013). CBI called for more transparency in government outsourcing, acknowledged the impact of high-profile failures in public trust and recognised "*they operate in an industry which rightly demands close public scrutiny"* (Green, 2014). Similarly, the BBC reported CBI Director declaring, *"the industry has pledged to meet a higher bar on transparency"* (BBC, 2014). The organisation published a report in which it stated a set of principles on the transparency of public services and committed to disclose information on public services run by private companies (CBI, 2013). Moreover, according to the consultation made in 2014 by the PAC, major private providers were happy with the extension of FOIA scope to their companies. For instance, consulted about his views on FOIA provisions, Mr. Alastair Lyons (Chairmen of SERCO) answered, *"we would be completely happy to co-operate with FOI being extended to our own contracts"* (Public Accounts Committee, 2014, p. Ev. 26). Similar responses were retrieved from the other witnesses: Ashley Almanza, Chief Executive, G4S; Paul Pindar, Chief Executive, Capita, and Ursula Morgenstern, Regional CEO UK and Ireland, Atos; which argued their companies would comply with FOIA provisions in contracts if they did not "*offend*" their clients.

This change can be explained as a strategic response of the business community to the additional pressures exerted upon them after the outsourcing scandals took place and impacted on the public trust. The fact that the business sector changed its position agreeing to increase transparency is also consistent with the idea that the sector has significant influence over the government, and it is difficult to regulate specific sectors with highly concentrated benefits unless extraordinary circumstances are present (Horn, 1995, p. 12). Within this explanation, the public scandals with major providers and the subsequent reduction of public trust in outsourcing would operate as the extraordinary circumstances that changed the sector´s position. This perspective can also clarify why the government rejects the idea of designating private companies under s5 of the Act, but it admits regulating it contractually. Accordingly, the latter would be more suitable for the private companies, as they would have

a wider margin to negotiate how to deem the information stemming from the contract, as it happens for instance in the PFI contracts and the definition of commercially sensitive information (HM Treasury, 2007, p. 227).

From this perspective, the position of private companies regarding the expansion is the relevant factor to answer the question. However, the opposition of contractors to the extension of the Act has changed and is far from being conclusive, as there is evidence the major contractors would agree to include FOIA provisions in their contracts with government, provided these do not offend their clients. This led the PAC to conclude that '*it appears that the barriers lie instead with government itself'* (Public Accounts Committee, 2014, p. 4) which will be analysed in the next section.

3.3. The barriers to the extension of FOIA lie inside the government

According to a third explanation, the government is the one blocking the extension of the Act, as it would increase scrutiny over the contracting process and its outcomes. This approach can be useful to explain why "*it appears that the barriers lie instead with government itself"* (Public Accounts Committee, 2014, p. 4). This perception was echoed by other members of the PAC: *"I was left with a clear view that the enemy of transparency was not the companies, but the Whitehall machine that was hiding behind commercial confidentiality, perhaps because it does not want to show its weak performance in managing contracts"* (Public Accounts Committee, 2014, p. Ev.30). Similarly, another member stated, *"providers are happier with openness than Departments and local government, which seem inclined to use commercial confidentiality as a cover for their own failings"* (Public Accounts Committee, 2014, p. 32). Finally, members of the PAC also declared that the companies would prefer publishing information to defend their performance, but the government wanted to "*politically*" control the message (Public Accounts Committee, 2014, p. ev.31). According to this approach, the government refuses to extend the act in order to block increased scrutiny into the service provision.

There is also evidence that the government makes an abusive use of the commercial interest exemption, invoking it in cases where the private provider does not raise the exemption itself or is willing to disclose information. This was made manifest in the case of Derry City

Council vs. the ICO, where the PA raised the exemption, instead of being raised by the third party. The Information Tribunal ruled that *"contract between a public authority and a third party contractor is not subject to exemptions primarily intended to protect third parties when the exemption arguments are not raised by the third party contractor itself but rather the public authority on behalf of the third party contractor*" (Right2Info, 2006). This would explain why in some cases, the government is even more protective of the contractors' information than the companies themselves. For instance, it has been argued that unnecessary governmental secrecy was exposed after the Medicines Control Agency (MCA) refused to disclose information about a drug, arguing the requested information was under the exemption of commercial confidentiality. However, when the Ombudsman´s office contacted the company they voluntarily released part of the information. Consequently, the Ombudsman suggested *"departments too often raise the drawbridge instinctively"* and *"assume automatically that no information can be released"* (Wadham *et al.,* 2007, p. 15). According to this explanation there are political incentives to cover up poor returns for government expenditures (Aronson, 1997).

Furthermore, a parliamentary report about the introduction of the Work Programme (WP) concluded there was '*little transparency over the financial affairs of companies which derive their income solely from government'* (Committe of Public Accounts, 2012, p. 6) and suggested, companies which depended on the public sector for the largest part of their income should expect increased scrutiny of their performance and profit. Equally, the Committee considered FOIA should be extended to private providers. The Committee noted that the contracts between the Department for Work and Pensions (DWP) and the prime contractors prevented disclosure of performance information (Committe of Public Accounts, 2012, p. 12). For instance, Mr. Andrew Dutton, Chief Executive of A4e, declared to the Committee he could not comment on how much A4e had got for the termination of a contract "*because I signed a confidentiality agreement with the Department, and the Department has effectively asked us to keep that information confidential'* (Committe of Public Accounts, 2012, p. Ev. 15). Similarly, Baroness Stedman-Scott (Chief Executive, Tomorrow's People) declared she was contractually prohibited from stating the performance of her company (Committe of Public Accounts, 2012, p. 2). The same was stated by Geraldine Blake, Chief Executive of Community Links. In this context is not odd that some members of the PAC declared that *"You are desperate to get information about how the Work programme is performing in your patch, and it is always hidden behind, 'You can't give it. It is commercially confidential'"*

(Public Accounts Committee, 2014, p. Ev.30). This echoes the idea that the barriers to disclosure lie within the government. Also, it is necessary to bear in mind that openness was especially relevant in the case of A4e, a prime contractor that derives 99% of its revenue in the UK from public sector contracts and that was investigated for alleged fraud (Stacey, 2012).

Finally, it was suggested that the unexpected resignation of Iain Duncan to the DWP (2016) was related to losing a court battle to suppress publication of potentially embarrassing DWP memos. Allegedly, the reports included concerns about the outcome of a review of the Universal Credit Scheme (UCS). The UCS was developed to simplify all welfare benefits into a single benefit, but it was regarded as a massive failure and suffered strong criticism from the public, the media and Parliament. The requests for information demanded copies of the Gateway Reviews have been carried out on UCS. The government refused to disclose the information, arguing it could affect how the policy was being made. However, the scheme had failed to hit the 12 million claimants target by 2017 as it had only 200,000 by 2016 (Fenton, 2016). Moreover, the PAC described the management of the Programme as *"extraordinarily poor"*, the Department's Universal Credit team as *"isolated and defensive"* with an institutional culture that "*only reported good news and denied the problems*" and a "*shocking absence of control over suppliers*" (Committee of Public Accounts, 2013, pp. 5-6). Furthermore, there are Parliament reports signalling that commercial confidentiality has deterred selected committees from inquiry as they expected the information disclosure would be denied on that basis (Liaison Committee, 2008, p. 21). This echoes the idea that government may *"collude in this in order to frustrate accountability to Parliament and the public"* (Davies, 2008, p. 221). Similarly, the Finance and Public Administration Committee (FPAC) of the Australian Senate argued *"Relevant [commercial] interests do not include a desire to avoid scrutiny or political embarrassment"* (Finance and Public Administration Committee, 1998).

Hence, commercial interests may also be seen as a shield against FOIA, acting as an obstacle to the collection of scandalous information and making unclear the accountability process, in order to spread the blame. Arguably, it has been warned that Ministers may be *"tempted to use commercial confidentiality as a means of concealing information about the contracting process*" (Davies, 2008, p. 216). Similarly, it has been suggested that there may be forms of "*principal drift*" that are inconsistent with the principal-agent approach. Instead, they argue

some principals –forums, more precisely- intentionally avoid performing their role as principals, "*failing to take accountability information seriously and failing to correct and redress the behaviour of agents"* (Schillemans & Busuioc, 2014, p. 205). They report cases where contracts were renewed despite a bad performance and suggest rational agents will not necessarily try to escape accountability, instead they may be interested in being accountable to gain legitimacy and public trust (Schillemans & Busuioc, 2014, p. 210). This is especially useful to the question of the present work, as it may support the idea that it is actually the government, not the private sector who is withholding the extension of FOIA.

The idea that barriers lie inside the government is useful to explain some of the inconsistencies pointed out above. Accordingly, this is why the government prefers to introduce singular access to information obligations in the contracts instead of designing companies under s5. By doing the former, it can act as the gatekeeper of information strategically selecting what information wants to release or withhold whereas, if the Act was extended it would imply entitling the public with the right to request information, thus the government would lose control over information. Furthermore, it would also be able to explain why despite the contractors' welcomed FOIA in contracts; the barriers appeared to be inside the government. Remarkably, the idea that the obstacles lay in government echoes the idea that there may be a principal drift signalling a passive position of the government when monitoring the contracts, while the agency is willing to be more accountable (Schillemans & Busuioc, 2014). This may explain why despite the advocacy efforts to extend the act and the policy scandals with outsourced firms, the government have never used the power to designate private providers as public authorities for the purposes of the Act.

4. Chapter 4: the practice FOIA in the Department for Work and Pensions, and in outsourced prisons and immigration removal centres.

The present chapter examines the relationship between FOIA and outsourcing in two different areas of government: the Department for Work and Pensions (DWP) and the prisons and Immigration Removal Centres (IRC). It tests how the government uses s43 of the Act (commercial interest exemption) when information related with outsourced services in those areas is requested and examines whether the reasons invoked to refuse disclosure are similar to the hypotheses introduced previously. To do so, it examines the decision notices issued by the ICO in cases where the government refused to disclose the information of outsourced services. Decision notices are issued by the ICO to oblige a PA to disclose information or to confirm a previous decision to withhold information (Syrett, 2011, p. 274). The examination of the decision notices is analytically interesting as it involves an evaluation of how the government uses the exemptions in the Act. Each time an exemption is invoked, a public interest test is executed to determine if public interest in disclosure is stronger than the interest in not disclosing the requested information. In order for the exemption to be engaged, the following three criteria should be met: a) likely harm; b) causal relationship; c) real risk, remarking that disclosure "*would be likely to prejudice*" (ICO, 2013, p. 3). As stated above, while FOIA does not apply directly to private providers, information about contracts can be sought from the principal (government) but not directly from the agent (contractor).

4.1. The Department for Work and Pensions

The DWP reveals as an interesting area to test the use of this exemption as the delivery of the Work Programme (WP) is outsourced to eighteen prime contractors divided in different geographic areas that subsequently subcontracted with smaller providers (Dar, 2016). The WP is the Government´s main welfare-to-work programme, designed to get long-term unemployed people to sustainable work and costing £2,8 billion between June 2011 and March 2016 (National Audit Office, 2014, p. 5). The WP was subject to strong criticism and intense public scrutiny as it failed to meet the proposed targets and prime contractors underperformed. Thus, it provides an interesting case to test whether the government uses the commercial interest exemption to cover failures. Hence, decision notices issued by the

Information Commissioner in cases that involved the commercial interest exemption were searched using the search engine in ICO's web page (https://search.ico.org.uk/ico/search/decisionnotice) (ICO, 2017) filtering by Department (DWP) and by section of the Act (s43). The results included 10 decision notices from 9/1/2012 to 30/3/2017. In six cases the Commissioner found the DWP erroneously invoked the commercial interest exemption, while in four it shared the opinion of the DWP. The main arguments are examined below.

4.1.1. Disclosure exposes government and contractors to reputational risk

In 50% of the cases the government used the commercial interest exemption to avoid disclosing information arguing it could derive in "*reputational risk*", "*reputational damage*" or it could give a "*false impression"*. In the reference FS50645849, the DWP refused to disclose an "*outcome report*" of a private supplier arguing the information could be *"taken out of context"* and create a "*perception of under-performance*" that could lead to "*unwarranted reputational damage*" to the company and the DWP (ICO, 2017, pp. 6-7). The Commissioner rejected the use of the exemption and ordered the disclosure of information, judging the relationship between reputational damage and commercial prejudice to be unclear. In the reference FS50463251, the DWP was asked for copies of the minutes and the agenda of a meeting with Atos, a private provider of services. DWP rejected the request arguing '*reputational risk*' was involved for Atos and that disclosure "*would give rise to items relating to the relationship between Atos and the DWP being taken out of context*" (ICO, 2013) however the Commissioner concluded that s43 of FOIA was not engaged.

Moreover, three cases involving the Mandatory Work Activity (MWA) are illustrative of how the government may use the commercial interest exemption to cover scandals and policy failures. The MWA was a work experience programme that forced job seekers to work for free in big international companies (as Poundland, Tesco, McDonalds) or otherwise reduce them their Job Seeker Allowance (JSA). The MWA was regarded as a scandalous failure by the public and declared unlawful by a Court of Appeal (Malik, 2011). There were several campaigns and websites boycotting the programme, arguing it was profiting from unpaid labour (Boycott Workfare, 2017). In the reference FS50441818, the DWP refused to disclose

the names of the companies where the workers were placed. According to the government, disclosure was likely to generate "*reputational damage to the contract providers and to the employers with whom job seekers are placed"* (ICO, 2012 b). The DWP was also concerned about the information being used in the campaign against the MWA and the reputation of the companies in which people were placed. Similarly, in the reference FS50438502, information about the names of the organisation that had provided work boost placements, work experience or other unpaid work in east London was required. The DWP refused arguing there were "*various campaigns aimed at harming the commercial interests of companies involved in the work programme as well as potentially undermining government policy*" (ICO, 2012f) and argued disclosure could lead to reputational damage to the private companies and the government. Finally, in the FS50438037 the DWP refused to disclose the names of organisations that provided work placements under the MWA arguing it generated reputational damage.

In the three cases the Commissioner concluded that the information was incorrectly withheld and that it had to be disclosed. The Commissioner specifically considered the argument of private companies receiving public funding as a public interest argument in favour of disclosure and argued "*It is in the public interest to be informed about how and where its money is being used by the private sector*" (ICO, 2012, p. 9). Accordingly, there is "*high public interest*" for information about public expenditure and reasons for disclosure are stronger where "*the third-party business information relates to government contracts"* as a public right to hold the government accountable exists (Right2Info, 2017). Furthermore, the Commissioner argued disclosure promoted transparency in the placement decisions of the contract providers. It is unclear what is the extension or the effect of the idea of reputational risk as used by the DWP and its relationship with the commercial interest exemption.

4.1.2. Disclosure may prejudice third parties

In five cases the government invoked the exemption on behalf of the outsourced company speculating about how disclosure would impact in the company involved, but without actually consulting it on the issue. In the reference FS50438502, the Commissioner considered it was not appropriate *"to take into account speculative arguments advanced by public authorities about how prejudice may occur to third parties"* (ICO, 2012). Similarly in

the reference FS50463251, the government argued that disclosure would weaken Atos bargaining position without submitting any evidence of concerns of prejudice being raised by Atos. The Commissioner considered it was not *"appropriate to take into account speculative arguments"* and that it "*would need evidence that the third party had actually raised concerns"* (ICO, 2013). Similar arguments were advanced in the references FS50645849 (ICO, 2017, p. 10), FS50441818 (ICO, 2013b, p. 7) and FS50438037 (ICO, 2012c, p. 6). In all the cases, the Commissioner followed the criteria established in Derry City Council vs. the ICO, where the Information Tribunal ruled that the exemptions that intended to protect third parties should be raised by those parties and not by the PA on behalf of the former (Right2Info, 2006). In all the cases the Commissioner concluded that the exemption was incorrectly invoked and that information had to be disclosed. This is coincident with the idea that frequently *"the assertion that disclosure of certain information will cause harm to the business is unfounded, unproven, or exaggerated"* (Right2Info, 2017). Interestingly, it echoes the idea that the barriers to disclosure are within the government and that in some cases the exemptions are used to cover policy scandals.

4.1.3. Disclosure and competition

On the other hand, in four cases the Commissioner concluded that the government had correctly used the commercial interest exemption. In the reference FS50593297, the requested information was related to the funding of the government's Work Programme in a specific contract package area. The DWP considered the public interest in accountability and transparency against the public interest of ensuring a '*competitive market environment'* and the Department's ability to secure '*best value for money for the taxpayer'* (ICO, 2016, p. 2). The DWP explained that *'providers were asked to offer a discount on a supplied maximum price'* and that as a result of it '*DWP generated millions of pounds in savings to the tax payer'* and that disclosure would make procurement less competitive and increase the cost for the government (ICO, 2016, p. 5). Moreover, the Commissioner claimed that the contractor had identified prior to the contract award that their entire proposal was a trade secret and disclosure would generate severe damage to their commercial interests. The Commissioner accepted that disclosure would undermine future tendering processes and reduce the number and type of contractors for future contracts, which ultimately would prejudice the DWP's

commercial interests. It also agreed that the release would prejudice the contractors' interests by giving an advantage to future competitors. The Commissioner conclusion echoed some of the arguments pointed out in the literature by stating that the release "*would likely discourage suppliers from participating in the government's employment programmes, undermining delivery of Welfare to Work policies"* (ICO, 2016, p. 7) and that it would undermine best value for money as suppliers would tender on the basis of published prices and not their best possible price. Finally, the Commissioner acknowledged the difficulty in striking a balance between both interests.

4.1.4. Disclosure, software programme information and intellectual rights

Furthermore, in three cases the DWP refused to releases copies of LiMA (Logical Integrated Medical Assessment), a software that is used to determine whether an applicant is capable of working and subsequently, whether that applicant is entitled to an incapacity benefit. In the reference FS50488018, the Commissioner considered the DWP correctly withheld technical information under s43(2). The DWP explained LiMA *"is an IT-based system designed to improve the legibility, consistency and accuracy of the medical reports submitted by Atos to the DWP*" (ICO, 2013b, p. 3). The DWP argued information was protected as it would reveal the "*decision-making 'map' in LiMA"* i.e., LiMA algorithms and *"detailed LiMA software programme information"* (ICO, 2013b, p. 4). The DWP invoked its property of the intellectual rights to the software as an argument and that "*disclosure of the LiMA software would be likely to place the DWP at a significant disadvantage when securing licencing arrangements with third parties and would be likely, therefore, to prejudice its own commercial interest"* (ICO, 2013b, p. 6). The Commissioner concluded s43(2) was engaged as the information requested demonstrated how LiMA software operates and disclosure would likely have detrimental effects on DWP's commercial interests. Similar arguments were advanced in the references FS50371026 (ICO, 2012d) and FS50459127 (ICO, 2013c).

4.1.5. FOIA in the Department for Work and Pensions: Discussion

The evidence examined suggests the government tends to use the exemption in a distorted way. In six cases out of ten, the Commissioner ruled that the exemption was incorrectly invoked. Furthermore, in 50% of the cases the government used the exemption to avoid disclosing information that could lead to "*reputational risk*", "*reputational damage*" or

giving a "*false impression"*. The idea of reputational risk is unclear, however it was used in cases related with big policy scandals and failures, suggesting the real motive may be to cover those failures. In five cases the government invoked the exemption on behalf of the third party, speculating about how it could impact on that party, but without actually consulting it on the issue. Accordingly it has been suggested that the authorities may find incentives to use this exemption as a way of concealing information from public scrutiny (Davies, 2008, p. 216) providing an argumentative shield against disclosure. Similarly, it has been reported that *"Often the argument against disclosure turns on a fear that public access to the information could cause embarrassment to the business implicated"* (Right2Info, 2017). On the other hand, the Commissioner considered the use of the exemption to be admissible when it involved licencing arrangements (LiMA software) and when it would be likely to undermine future tendering processes. Finally, the fact that some companies involved in the programme received substantial public funding was invoked by the Commissioner as an argument for the disclosure of the requested information, notwithstanding that the bodies that received the funding were private companies. Moreover, the evidence suggests the Commissioner plays a relevant role in narrowing the interpretation of the exemption, thus preventing the abuse of its use. The analysis suggests the government and the outsourced companies have reasons to block the extension of the act to private companies providing public services in order to avoid public embarrassment and increased public scrutiny.

4.2. Outsourced prisons and immigration removal centres

This section tests the use of the same exemption on prisons and IRC for diverse reasons. Firstly, prisons have incentives to restrict the use of FOIA as they are "*secretive places*" (Casarez, 1995, p. 303). Secondly, outsourcing prison services has been regarded as controversial (Garton, 2014) and introduces the problem of "*hidden delivery*" as "*only prisoners are in a position to judge the quality*" of the service, thus it is easier for contractors to reduce the quality of the service (Casarez, 1995, p. 257). Thirdly, unclear accountability of outsourced prisons may derive in blame games and the government may use it to *"shield what otherwise would have been public information from public scrutiny* (Casarez, 1995, p. 303). Finally, it has also been suggested that "*imprisonment is a function which the state*

should not delegate" (Garton, 2014, p. 1) which relates to the idea of a public-private legal divide. Similarly, the former Information Commissioner had expressed his concerns over the lack of accountability in police services claiming that *"The irony is that you may get greater efficiency but you could end up with less accountability"* (Syal, 2012). Thus, decision notices in cases that involved commercial interest exemption were searched using the search engine in ICO's web page (https://search.ico.org.uk/ico/search/decisionnotice) (ICO, 2017), using the term "prison" and filtering by section of the Act (s43). The results included 7 decision notices in total from 1/10/2012 to 27/9/2016. Reference FS50610692 which appeared in the result was not examined because it was not related to prisons. Reference FS50419938 was found by searching the terms "HMP Dovegate" and it was added to the list of cases under examination. The main arguments are examined below.

4.2.1. Disclosure of performance information and evaluation of the outsourced company

In two cases the government used the exemption to avoid disclosing information related with the performance of the outsourced company and the evaluation of the service. The two cases were related with the IRCs. IRCs are centres where people who have no legal right to be in the UK and refuse to leave voluntarily are held. These centres were under intense public debate as it had been argued that human rights were violated in the facilities of some IRCs. Particularly, Campsfield House was considered to have "*controversial public profile*" and was targeted by pressure groups demanding its closure (ICO, 2013d). In Campsfield House, a detainee was found dead after hanging himself in the bathroom and a large fire seriously injured two detainees (The Guardian, 2013). In the reference FS50496832, the Home Office (HO) refused to disclose a copy of a report on healthcare provision at Campsfield House IRC arguing disclosure would harm its own interests as well as the interests of the outsourced company operating the Campsfield House. Moreover, the HO argued disclosure would deter future private firms from bidding as they would fear "*untoward disclosure of information*" that may damage them commercially (ICO, 2013d, p. 9). Similarly, in the reference FS50533359, the HO refused to disclose performance and financial information of several IRCs arguing that revealing poor performance could damage the commercial interest of the contractor and that "*performance was commercially sensitive in its entirety*" (ICO, 2015c, p. 5).

In both cases the Commissioner ordered the disclosure of performance information and considered that performance information was not protected by the exemption. Moreover, the Commissioner considered these providers should acknowledge that "*information about their execution of any contract will potentially be accessible under that Act*" (ICO, 2013d, p. 9). Finally, it also considered the welfare of vulnerable individuals favouring disclosure and concluded the information had to be disclosed as the exemption was not involved. Allegedly, the government used the exemption to cover underperformance of the outsourced companies in the IRCs.

4.2.2. Disclosure of financial models and innovative business models

In three cases the government invoked the exemption arguing disclosure of financial models, innovative business models or information relevant to a live bidding process would prejudice the commercial interests of the provider and the government. In the reference FS50451356, the Commissioner agreed with the decision of the MoJ by which it refused to disclose information regarding '*proprietary financial models used in pilot Payment By Results (PBR) schemes at HM prisons*' (ICO, 2013c). While recognising that disclosure would enhance accountability and transparency, the Commissioner ruled that disclosure would have ended up prejudicing the MoJ and the companies' commercial interests as it was relevant to a live tendering process. Interestingly, the MoJ mentioned the innovative nature of Social Impact Bonds (SIB) and payment by result for prisons, and how this would impact in competitive advantages. The Commissioner also mentioned timing as a relevant element, as disclosure while tendering processes are on would be likely to prejudice commercial interests of both parties, but not after the bids were closed. In the reference FS50435637, the MoJ was asked for the complete contract of the Peterborough prison ONE project with G4s and St Giles Trust. A copy of the contract was provided, with redacted information withheld under s40(2) and s43(2) of FOIA. The Commissioner considered that disclosure would promote transparency and accountability (ICO , 2012e, p. 10) however; it also recognised disclosure of information referred to pricing/rates offered and accepted would be likely to prejudice commercial interest and give competitors an unfair advantage.

Similarly, in the reference FS50618039, NHS England was requested to disclose the bid submitted by a particular company in a procurement process to provide health services for

prisons in Yorkshire and Humberside (ICO, 2016c). The authority refused to disclose the information using the commercial interest exemption arguing disclosure would prejudice its own commercial interests, undermining its capacity to secure value for money and those of the bidder, undermining its capacity to compete successfully in future tenders. The PA provided a copy of a letter of Care UK (the provider) declaring the information was commercially sensitive and that it was preparing other bids at that time; and disclosure would prejudice it competitive advantage as well as the government´s ability to secure value for money. The Commissioner considered that disclosure could reveal an "innovative" approach to the service that would give Care UK a fair advantage. Furthermore, it considered financial models should not be disclosed as they would have a strong impact on the competitive advantage of the company; on the side of government, disclosure would distort the procurement process. However, it also considered that some parts of the bid contained information that was not commercially sensitive and should be disclosed, arguing public expenditure in favour of disclosure.

4.2.3. Other arguments advanced by the government

In the reference FS50419938, the MoJ was asked about the cost of the provision of Sky television to prisoners at HM Prison Dovegate. The MoJ answered it did not hold the information and that HMP was a private outsourced prison and as such it was outside the scope of the Act. The Commissioner considered that "*the fact of 'contracting-out' the service"* was not equivalent to the MoJ ceasing to be responsible for the prison. The MoJ provided a copy of the contract and asked the Commissioner not to disclose it, arguing there were "*commercial sensitivities*" (ICO, 2012g). The Commissioner concluded that it was probable that the MoJ did not hold the requested information, and argued that as the television provision was an "*additional service*" it may not be held by the MoJ whereas if the information requested had been that of an essential service, the MoJ would have been the relevant authority (ICO, 2012g).

Finally, in some cases the arguments considered are the same to the ones analysed in the DWP cases. In the reference FS50602479, the MoJ refused to disclose information related to batteries in prisons, arguing its business reputation could be damaged. The Commissioner concluded the exemption was not engaged. Moreover, in some cases the government invoked

the exemption on behalf of a third party without consulting it. As in previous cases, the Commissioner remarked that when claiming that commercial interests of a third party may be engaged, the PA needed to provide evidence that this was the view of the third party (following the criteria established in the case of Derry City Council). Finally, the Commissioner also considered that private providers that engage with PA's are aware of the existence of FOIA, therefore they must expect that information provided by them to the PA would be reasonably subject to public scrutiny (ICO, 2016b).

4.2.4. FOIA in prisons and immigration reclusion centres: Discussion

To sum up: seven decision notices were examined. In the references FS50496832 and FS50533359 the information was related to controversial outsourced services like the IRCs which had been criticised for bad performance and several public profile incidents with detainees. The government refused to disclose this information; however the Commissioner ordered the disclosure and remarked the exemption was not coined to cover bad performance. Conversely, in at least three cases the Commissioner concluded the information was correctly withheld and considered the time of the request, the innovative approach and the financial model information deserved protection under the exemption. Moreover, in the majority of the cases the Commissioner considered that outsourced companies should reasonably expect to be under more public scrutiny and invoked public funding as an argument for disclosure. Moreover, in the reference FS50496832, the detainees' vulnerability and their lack of voice to challenge their detention conditions were used as arguments to demand increased access to information. Finally, in various cases the Commissioner reminded the government that it was not appropriate to advance speculative arguments about how prejudice may occur to third parties without consulting those (Derry City Council criteria). As in some of the cases examined in section 4.1, the analysis reveals that the government uses commercial confidentiality to cover information related with underperformance of the private contractors and mismanagement of the contract.

5. Chapter 5: Conclusions

Holding governments accountable has always been a problematic issue. As political scandals and hunger for information grow, the demand for open government, enhanced transparency and accountability grow with it. Notwithstanding the UK government has become more accessible and information-friendly and passed relevant legislation as the FOIA 2000, there is a counter-trend that can undermine the effectiveness of the act. FOIA is not directly applicable to private providers which may undermine the objectives of the Act. One solution may be to apply s5, designating private companies providing a public service as a PA for the purposes of the Act, however the government has never designated a private provider as a PA, thus making it accountable directly to the taxpayer.

The present work examined possible arguments and explanations to the question of why the government has never designated private providers as public authorities for the purposes of FOIA, thus making contractors directly accountable to the taxpayers. Three different approaches to the issue were examined producing three possible answers. In the first place, designating private contractors as public authorities for the purposes of the Act implies a rise in the costs of delivering the service. The increase in the cost of the contract would be borne ultimately by the government and the taxpayer. Moreover, an increase on the price would undermine the initial thrust to outsource, i.e. drive more efficiency and improve value for money. The costs argument may be part of the explanation, however the evidence examined suggests there are inconsistencies in that explanation that lead to the idea that this may not be the whole story. A second explanation relies on the idea that private providers of public services exert a significant influence in the government to prevent it from extending the Act. As suggested by (Horn, 1995) the extension of FOIA would have concentrated (negative) effects on the business sector and dispersed benefits, which makes it a difficult scenario for government to approve the extension. Evidence suggesting the influence of the business sector is a significant factor was found, which makes the explanation feasible and parsimonious. However, this second explanation clashes with the fact that after the outsourcing scandals took place, the business sector changed its initial position towards transparency in outsourcing. The fact that the CBI and the major providers are happy to include FOIA provisions in contracts, leads to consider whether the barriers to the expansion lie within the government. Finally, a third explanation considers the extension of the Act has the potential to make the contracts a contestable topic, which would ultimately be

counterproductive for government. From this perspective the government is opposed to the extension (regardless it does not say it explicitly) because it wants to shield itself and the contractor from public exposure and embarrassment. Accordingly, evidence that the government used the commercial interest exemption to avoid "reputational risk" and criticism was found.

The evidence examined in Chapter 4 suggests the government tends to use the the commercial interest exemption established in s43 of the Act in a distorted way. In some cases the government invokes the exemption to cover information related with underperformance of contractors or mismanagement of contracts. The arguments used by the government to refuse disclosure of the information requested, suggest that the government may have incentives to block the extension of the act to private companies providing public services in order to avoid increased public scrutiny of the contracts as it would spark political contests, which the principal in the contract wants to avoid. However, in some cases the Information Commissioner understood the exemption was correctly used, protecting authentic and real commercial interests, protecting competition and value for money.

In this context, it is not surprising to see some actors claiming the solution is the extension of the bill to private companies. However, as it has been suggested above, this also entails a set of problems regarding competition, procurement and tendering. An "extension bill" has been introduced to Parliament, which explores this way of extending FOIA to government contracts. On the other hand, a more discrete but pragmatic solution is to improve the redaction of the contracts, defining specifically what information is held on behalf of a PA and including the obligation to disclose information when requested (ICO, 2015b). Moreover, according to an ICO report, publication of performance information should be the default position (transparency by design) obliging contractors to publish information proactively. Considering that the level of public expenditure "*on outsourced public services accounts for about half of the £187 billion that the government (including the NHS and local government) spends on goods and services"* (ICO, 2015) and the recent scandals that took place with some of the big providers of public services, the calls to extend FOIA to these providers are likely to continue. Thus, understanding the motives that have prevented government from designating private providers as public authorities for the purposes of the Act may reveal as an interesting way to clarify the debate.

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