Morgan Cole

focus on

freedom of information

inside this issue...

spring 2005

Welcome to the 2nd edition of 'Focus on Freedom of Information'. Since the FOIA came into force on January 1st our clients have indicated that a number of roadblocks exist which are preventing them from responding quickly to requests for information and, in some cases, do not allow them to respond within the 20 working day requirement. So what are the most common organisational roadblocks causing the delays?

- Not using your Publication Scheme to pro-actively publish material and enable you to demonstrate the material is reasonably accessible by other means.
- Failing to understand the difference between 'personal information' (Data Protection Act) and other information.
- Trying to answer the request before analysing what is being asked for and deciding whether the request is clear or the applicant should be asked to clarify.
- Trying to answer the request before deciding what information to retrieve.
- Starting to answer the request before estimating how long it is likely to take and whether the costs exemption may kick in.
- Not knowing where to look for the information, how to find it or being uncertain you have all of it.
- Forgetting to consult with third parties.
- Inappropriate tender or contractual clauses which fail to detail your FOIA responsibilities, leading to an extended dialogue with third parties.
- Colleagues not understanding the Act and its requirements.
- Colleagues wanting to apply an exemption when they have insufficient knowledge of the Act.
- Not leaving enough time to consider the exemptions and the public interest test.
- Forgetting that time can be extended when the public interest test is to be considered.
- Not leaving enough time to draft a refusal notice where information is to be withheld.
- Uncertainty as to who should make the decision whether to disclose or not.
- Treating the applicant at 'arms length' as an adversary rather than an individual when the FOIA obliges you to advise and assist.
- Forgetting the different requirements for environmental information.
- Failing to track the request as it passes through your process.
- Not investing in staff training.
- Not investing in systems for record keeping and managing requests.
- Forgetting to audit how you are doing and identifying your 'ROADBLOCKS!'

In this issue we provide guidance on how to overcome some of these roadblocks, to help you to comply with the FOIA.

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How pro-active should you be?

Our experience of managing FOIA requests is that organisations with a mature approach are managing the process better because they are pro-actively taking account of the Act before a request is made. Key signposts of a mature FOIA culture are:

- Using the Publication Scheme as intended by the Act by pro-actively putting new classes of material into the public domain and actively populating those classes with documents which represent all the functions of the organisation. Remember that publishing by way of the Publication Scheme enables you to claim the exemption 'information reasonably accessible by other means' (section 21).
- Determining the likely FOIA status of the material at the time it is generated: it is helpful to pro-actively consider the implications of the FOIA throughout the management of your information so that there are no shocks or surprises several years on:
  - If, by way of example, you are investigating a major incident you need to be taking both a short and long term view of how the FOIA status of the material may change as time moves on and the extent to which you can give any undertaking to those assisting any investigation as to the material not being published. The status of the evidence being sought needs to be carefully thought out from the outset. This means that the investigation will not be compromised but that you can be confident that you can fulfil your obligations to the public in terms of accountability as may be appropriate at the time a request is made.
  - If you are bringing in consultants to advise on a specific issue, there needs to be discussion and agreement as to the status of the work which they are carrying out so that there are no misunderstandings as to what is being generated.
  - If you are preparing for a major policy development it may be helpful to present the material in a way which separates out the factual and statistical material considered from the detail of the internal debate and discussion leading to the decision making.
  - If decision making is conducted by email then the authors of email correspondence need to be reminded that the standards of correspondence should be maintained as they would be in a more formal letter or Memorandum.

Pro-actively consider the implications of the FOIA throughout the management of your information so that there are no shocks or surprises several years on

The Office of Government Commerce in its guide on the FOIA and procurement has developed the idea of publishing a series of Working Assumptions which gives a preliminary assessment of the FOIA status of any document supplied during the whole history of the procurement process.

The Guidance makes it clear that it is only a provisional assessment as each case has to be considered on its merits. However, internally within the organisation, where it is anticipated that a number of requests will be made for similar documents in specific categories, it may well be worth the organisation developing its own bespoke set of Working Assumptions on documentation commonly sought so that staff have readily available guidance and there is consistency in decision-making. This may be a wider set of Assumptions than simply for documents created in the procurement process. However this kind of well thought out guidance which is specific to the organisation may be a helpful way forward for the more complex public body with a series of different functions where there is a heavy demand for access to the same kind of information.

Obviously in most circumstances it will be in the public interest to pro-actively publish material which is frequently requested but there may be some circumstances where the public interest requires material to be protected. The development of a set of common standards for the organisation may save a great deal of agonising each and every time a request is made.

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Frequently asked questions

Morgan Cole's FOI team answer a sample of questions asked by clients since the introduction of the Act.

Can I delete an email I have sent which I am not happy with? If I do not hold it then I cannot be made to disclose it. Are there penalties for deliberate deletion and what obligations are there to keep things?

Emails have the same status as any other written record e.g. a letter, telephone note or minutes. Every public body is expected to have an up to date policy on Records Management and material held either electronically or manually should be retained or disposed of in accordance with that policy.

This is a requirement of the Records Management Code issued under section 46 of the FOIA. If the management of a matter is conducted by means of an email process, and any email is a material record of the way decisions have been taken and made or as to how the matter has been progressed or conducted, then the anticipation would be that the email would be kept in the same way as a manual record would be held on file. If the content of any email is merely a short-term record which does not require retention then it can be deleted so long as it is in accordance with the Records Management policy. If an email is deleted which is material to the way a decision has been reached then the fact it no longer exists would not lead to a penalty under the FOIA per se, but it may lead to criticism that the public body cannot demonstrate a trail of a robust decision making process as gaps will be exposed.

Further, if material is not kept and it is clear it has been inappropriately deleted then it may lead to criticism from the Information Commissioner regarding compliance with the Section 46 Code. If an FOIA request is anticipated and any material is deliberately shredded to avoid that request then that is a criminal offence under the FOIA.

Does the responsibility of dealing with a request lie with the owner of the information or the holder?

Each and every public body has to respond to an FOIA request made to it in terms of the recorded information which it actually holds at the time the request (RFI) is made.

The legal responsibility to respond lies with the public body in receipt of the RFI. However, under the section 45 Code, it is recommended that it is good practice for the public body, which is in receipt of the request, to consult with any third party, which may be the author or subject of any of the information held by the public body, prior to the public body making a decision as to its release.

However, throughout the process the decision rests solely with the public body which has received the RFI. The body which is responsible under the FOIA is the body which has received the RFI in terms of the recorded information which it holds whatever its source or ownership may be. Obviously in certain circumstances it will be good practice for there to be liaison and consultation between the parties sharing information to ensure consistency in approach and to be certain that the public body releasing information is not vulnerable to legal challenge by a party with a commercial interest to protect.

What is a requester's remedy if information is refused ?

The Requester can make a complaint to the Information Commissioner who has wide statutory powers of investigation and enforcement. However, under the section 45 Code and in accordance with Information Commissioner Guidance, each public body is expected to have an internal complaints procedure to investigate any complaint that a request has been refused.

In accordance with section 50 of the FOIA, the Information Commissioner has indicated that he will not intervene until the internal complaint process has been completed. When he does intervene and investigate, then he can make an adjudication indicating that the information should be released which he can enforce by means of an enforcement notice. He must either notify the complainant that he has not made any decision as a result of the application to him and his grounds for so doing, or he must serve a decision notice which will indicate the steps which must be taken by the public body to comply and the time period to do so. There is a right of appeal to the Information Tribunal and from there, on a point of law, to the High Court.

Wilful refusal to comply with any Information Commissioner action will result in a referral to the Court as a contempt of Court which is imprisonable for a maximum of two years.

If I disclose this information then I am breaching the copyright of another body. Am I between a rock and a hard place?

A public body which discloses material subject to another party's copyright does not breach that copyright by releasing the information under the FOIA. The Act specifically releases the disclosure from the effect of the Act. However, the applicant in reproducing the material further to anyone else will remain subject to those rights of copyright.

Applying the public interest

One of the aspects of the FOIA that appears to have caused the most difficulty for public sector bodies is the public interest test. There are 23 exemptions to the release of information contained in the Act divided into 'absolute' and 'qualified' exemptions.

The public interest test only needs to be considered where a qualified exemption is to be relied upon. Once you have identified the potential qualified exemption, you need to consider whether the public interest in maintaining that exemption outweighs the public interest in disclosure. Even if you are satisfied that a qualified exemption exists, if there is a greater public interest in providing the information to the applicant, then that information must be released.

There is no legal definition of the public interest test set out in the Act; it is a concept that has been kept deliberately flexible. This enables you to regard all the circumstances of the case in ascertaining the interests in disclosure and the weight that attaches to those respective interests. The presumption inherent in the Act is that openness itself, that is, disclosure, is in the public interest and where the arguments are finely balanced, then the outcome must be disclosure.

"The important point to grasp is that the public interest does not have a fixed meaning and that FOIA is designed to shift the balance in favour of greater openness."

Information Commissioner Awareness Guidance No 3: The Public Interest Test (available at www.informationcommissioner.gov.uk)

Consequently, the balance of public interest may shift over time and as the information requested becomes older.

You can be challenged on your determination of where the public interest lies so you should be prepared to justify your reasoning to the Information Commissioner and the Courts. You need to have a procedure in place to objectively evaluate requests for information (RFI's), but each decision should be made on its own merits taking into account the different factors that may influence the decision making process. A practical step is to record the arguments for and against disclosure so that you can evidence and demonstrate an audit trail of the decision-making processes. Also, try to develop a policy approach to the implementation of the public interest test when RFI's are received.

The Information Commissioners Awareness Guidance No. 3 indicates that relevant factors in favour of disclosure could include:

- Furthering the understanding of and participation in public debate issues of the day.
- Promoting accountability and transparency by public authorities for decisions taken by them.
- Promoting accountability in the spending of public money. For instance, the public interest is likely to be served, in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money.
- Allowing individuals and companies to understand decisions made by public authorities affecting their lives/organisations.
- Bringing to light information affecting public health and safety.

Some relevant factors against the disclosure of information could include:

- Distinguishing between things which are of public interest from things which merely interest the public.
- Factors set out in the qualified exemptions themselves:
  - including situations where the information requested includes details of third parties (S.40) and;
  - if disclosure would affect the public authority's commercial interests (S.43).
- The impact of the European Convention on Human Rights, principally the right to a private life enshrined in Article 8.

Factors which should NOT be taken into account *

- Possible embarrassment of the public authority/other organisations.
- Possible loss of confidence in public authorities.
- The seniority of persons involved.
- The risk of the applicant misinterpreting the information.

test requires a fine balance

Ultimately, the legal interpretation of the public interest test will develop by decisions made by the Information Commissioner and the Courts.

*Scottish Ministers Code of Practice on the discharge of functions by Public Authorities under the Freedom of Information Scotland Act 2002 – these are likely to be equally relevant to UK legislation.

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The qualified exemptions where consideration of the public interest test is required

- National security (s.24). (This exemption should be read in conjunction with s.23 - *'information supplied by, or relating to, bodies dealing with security matters'*)
- Defence (s.26)
- International relations (s.27)
- Relations within the UK (s.28)
- The economy (s.29)
- Investigations and proceedings (s.30)
- Law enforcement (s.31)
- Audit functions (s.33)
- Formulation of government policy (s.35)
- Prejudice to effective conduct of public affairs (s.36)
- Communications with her Majesty (s.37)
- Health and safety (s.38)
- Some personal information (s.40)
- Legal professional privilege (s.42)
- Commercial interests (s.43)

Relationships between Publ

"But that's not what the Act was intended for!" is a common cry to be heard from those in the public sector tasked with handling requests for information under the FOIA. Many are struggling with the extra workload that compliance with the Act entails and find it irksome that some of the key users of the Act have turned out to be, not ordinary members of the public, but businesses hoping to use the information they obtain for their own commercial purposes.

Public sector bodies are already receiving requests from those hoping to gain evidence to support potential legal proceedings, particularly in relation to the fairness of procurement practices. Businesses are becoming aware that the Act can be used to obtain information about their competitors and other information that can be useful to them in potential or existing business relationships with public bodies. Some businesses have realised that a valid request can be made in a pseudonym and are making requests using Hotmail and other generic e-mail accounts and/or home postal addresses to avoid prejudicing their relationship, or prospective relationship with the recipient.

The fees regulations

That said, businesses are also discovering that the legislation does not always allow them to access everything they might wish to see. Many public bodies entered the Freedom of Information arena with good intentions and high ideals, but have found that the work involved in complying with requests has meant that they are more inclined to reject requests on procedural grounds than they would previously have thought. The fees regulations made under the Act allow requests to be rejected where the costs of retrieving and extracting the information required is over the 'appropriate limit' (£600 for central government departments, and £450 for other public bodies, based on a notional £25 per person per hour). Many requests, if not carefully worded, will be too broad and therefore will require the public body to consider large bodies of information. This often will bring the cost of fulfilling the request over the appropriate limit, and therefore liable to refusal. Prior to 1st January, many public bodies had considered that they might respond to requests that were over the appropriate limit on payment of their costs. However, many have found that the work involved in fulfilling these requests is so disruptive of their core functions that they have chosen not to do so.

While many businesses are now using the Act for their own ends, awareness is still not widespread. The fact that public bodies can now be compelled to disclose information supplied by or relating to businesses which may previously have been considered to be confidential, often comes as a surprise.

The s45 Code of Practice

The s45 Code of Practice made under the Act gives guidance as to when a third party, such as a supplier, should be consulted for its views as to whether an exemption may potentially apply to a piece of information, or as to where the public interest may lie in relation to a potential disclosure. A problem faced by those businesses that have supplied their information to the public sector is that the Code does not require public bodies to consult in every circumstance. Even where clearly there should be consultation, public sector bodies are failing to do so, sometimes in situations where the

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information released has a highly detrimental impact on the business concerned. There have also been cases where damaging information has been intentionally released without consultation by those with a political axe to grind or a grudge against the supplier concerned.

Another thorn in the private sector side has been the fact that public bodies often find it difficult to meet the deadline of 20 working days for fulfilment of requests, and consult at the last minute, sometimes demanding unreasonably short periods for a response (particularly when many businesses want someone at director level who may not be immediately available to review the documents), or worst still, not at all. Some businesses have considered litigating in these circumstances on grounds of breach of confidentiality, but as they are usually going to be suing a customer, and adverse publicity could result, many get no further than making their displeasure known. Many are horrified to discover that despite providing detailed responses to consultation, that their views are ignored, as ultimately it is solely the public body's decision as to what should be disclosed.

Commercially sensitive or confidential information

From the point of view of public bodies trying to consult with businesses, the ignorance of those businesses as to the provisions of the Act is causing delays, which leave the public body with no option other than to guess what may or may not be commercially sensitive or confidential. Many bodies find that on consulting with a business they will get a response that tells them that all the information should be withheld because it is commercially sensitive or confidential. This of course will often not be the case: the exemption in relation to confidential information is narrowly drawn, based on the strict common law definition of confidentiality rather than the layman's more widely drawn concept of the same, and the exemptions will not always apply to an entire document.

Some businesses have sought to prevent the disclosure of their information by sending stern letters to all the public sector bodies who might hold their information, stating that all information supplied by that body is commercially sensitive and confidential and should not be disclosed. This approach may perhaps make a public body think twice before disclosing that business's information, although some might say that it reveals either the sender's ignorance of the Act, or its disregard for the law. Some public bodies have privately admitted that because the Information Commissioner has said that he will not usually intervene until a complaint has been dealt with by the body's own internal procedures, they are likely to withhold information where they consider the risk of action from the business that is the subject of the request outweighs the risk of a complaint.

Businesses and their public sector associates

Some businesses have adopted a gentler approach, and have pre-empted consultations by sending the public bodies they deal with indications of the particular information held that they consider may qualify for an exemption. Ideally however, businesses and their public sector associates will have met to assess what information is held, and agreed the sensitivities of those documents in person. Such a meeting also has the potential benefit of building a relationship between the parties that may prove very useful to the business concerned when it needs to put its views over to an overstretched FOI lead on a deadline, and very useful to that FOI lead when he has to make a disclosure that may not be well received by the business concerned. Going forward, many businesses intend to agree terms in all their contracts with public bodies, that make consultation on potential disclosure a contractual obligation. From the public sector point of view, many feel that terms in all their contracts with private sector organisations should contain a clause which requires the timely provision of views in situations where that private sector body has been consulted.

Solutions to the challenges imposed by the legislation

The FOIA is in its infancy, and it is likely that as time goes on, both public bodies and businesses will become more accustomed to the regime. Certainly it would be fair to say that the Act has caused some friction in the relationships between the two sectors. However, clearly both sectors are in the process of coming up with solutions to the challenges imposed by the legislation that will help to make life easier for all concerned.

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How does FOI affect

Although the first few months post implementation of the FOIA have confirmed that this is not, after all, the 'millenium bug' that some expected it to be, the Act has made an impact on all public bodies and is here to stay! Organisations are now juggling requests for information from the press, politicians, potential procurers, unsuccessful tenderers, pressure groups, employees and interested 'citizens'.

Public bodies which have prepared appropriately in terms of:

- setting up appropriate processes and systems;
- organising comprehensive training programmes; and
- consulting with third parties who may be affected;

are far better placed to manage responses to requests for information (RFI's) now coming in and to do so within the tight 20 working day time limit.

Early experience of managing an RFI indicates that essential elements include:

- early analysis of the RFI;
- seeking clarification where the RFI is unclear;
- speedy retrieval of information;
- prompt consultation with third parties;
- clear lines of decision making at the appropriate level; and
- allowing sufficient time to draft any Refusal notice and to redact information which is exempt.

Procurement has already been identified as a particular area of difficulty in responding to requests because of the number of third parties who may be involved and who have commercial interests they want to try to protect. This requires a fine balance to be performed between the right of the public to be aware of how public funds are spent and the right of the public body to maintain the confidence of commercial providers if they are to do business in the market place.

One immediate problem is that many commercial organisations have been taken by surprise and have not anticipated that information they have supplied to a public body may be disclosed generally. The code of practice for section 45 of the Act recommends consultation with any third party prior to release of their information. However this has to be managed on the basis that it is made clear that the decision whether or not to disclose remains with the public body and it will need to have informed comment if any objection is to be considered.

Assisting the procurement process

In an effort to assist the procurement process, the Office of Government Commerce has developed a guidance "FOI (Civil Procurement) Policy and Guidance". This document represents 'the Government's initial view of the application of the FOIA to public procurement information'. Whilst it is primarily aimed at Government Departments it has application across the wider public sector. Following wide consultation, the Guidance has developed a series of helpful Working Assumptions which attempt to define the status of procurement documentation from an FOIA perspective throughout the lifecycle of a procurement exercise. The nature of the exemptions and the application of the public interest test means that the status of documentation may change once the appropriate procurement phase has come to an end. It may be helpful for individual public bodies to scrutinise the procurement information which is regularly created within their own processes and to develop a dedicated series of bespoke Working Assumptions which work for their own body. Obviously each RFI has to be considered on its individual merits when the RFI is made, but the development of a default disclosure position for complex contractual documentation will make the decision process quicker and more consistent.

The key exemptions

The key exemptions which fall for consideration are information provided by a third party subject to an enforceable duty of confidence (section 41- an absolute exemption) and information, the disclosure of which will breach a trade secret or prejudice the commercial interest of any party (section 43 – a public interest test exemption).

The section 45 code

The section 45 code of practice cautions public bodies against agreeing to blanket obligations of confidentiality. For the section 41 exemption to be relied on, the information must have the quality of confidence and the duty must have been created in circumstances where it has been accepted by the public body. The effect is

Procurement teams?

that procurement officers must be vigilant in ensuring that tenderers or contractors specify, with reasons, those elements of any information which is supplied under a duty of confidence. Some points to take on board are:

- Contractual conditions need to be amended as the former standard confidentiality clauses are too wide and are unlikely to protect the public body from Information Commissioner action if challenged.
- The clauses should be drafted to secure specific identification of confidential material supplied by the contractor including the period for which it is to be held in confidence.
- The clauses should seek to reserve for the public body the maximum discretion in determining whether information should be released.
- The clauses should place an obligation on the contractor to respond to any consultation as to the release of information within a minimum period of no longer than 5 working days.

Procurement officers should be cautious. Already template contractual clauses are emerging which are not compliant with, or which misinterpret the obligations under the Act. It is difficult to see, for example how a public body can justify a clause which throws onto the Contractor the cost for the public body maintaining an exemption in the contractor's interest, when the decision whether to rely on the exemption is entirely that of the public body.

The section 43 exemption

In terms of the section 43 exemption where the commercial information is considered to be sensitive to any party, there must be demonstrable evidence of prejudice to that interest and even then, the public interest test in maintaining the exemption as against disclosing it needs to be carefully applied. Bearing in mind that businesses move on in terms of their approach to contracts, their costing, price breakdowns etc, then the material they supply in any tender situation may not always fall for protection under section 43 because prejudice can no longer be demonstrated, or the expiry of time means that the balance under the public interest test swings in favour of disclosure.

When an RFI is received, careful analysis of what is being requested will pay dividends. Analysis may reveal that the RFI is too wide, in which case the Act permits the seeking of further clarification before the RFI is valid. A public body is only obliged to respond to a request if the work required is no more than two and a half days' worth of time (three and a half for a Government Department) in retrieving, locating, sorting and editing the information to be supplied. Again, early analysis can enable an appropriate estimate to be made of the time required to fulfil the request, otherwise the public body may find that it wastes considerable resource in retrieving information in response to an RFI with which it is not obliged to comply.

The final message is simple. The FOIA is here to stay and it grants significant rights 'to know' to the public at large which are now being utilised. A public body will only survive if it has well trained staff, organisational acceptance of the change to greater openness and access to specialist advice where more complex RFI's are involved especially in the field of procurement.

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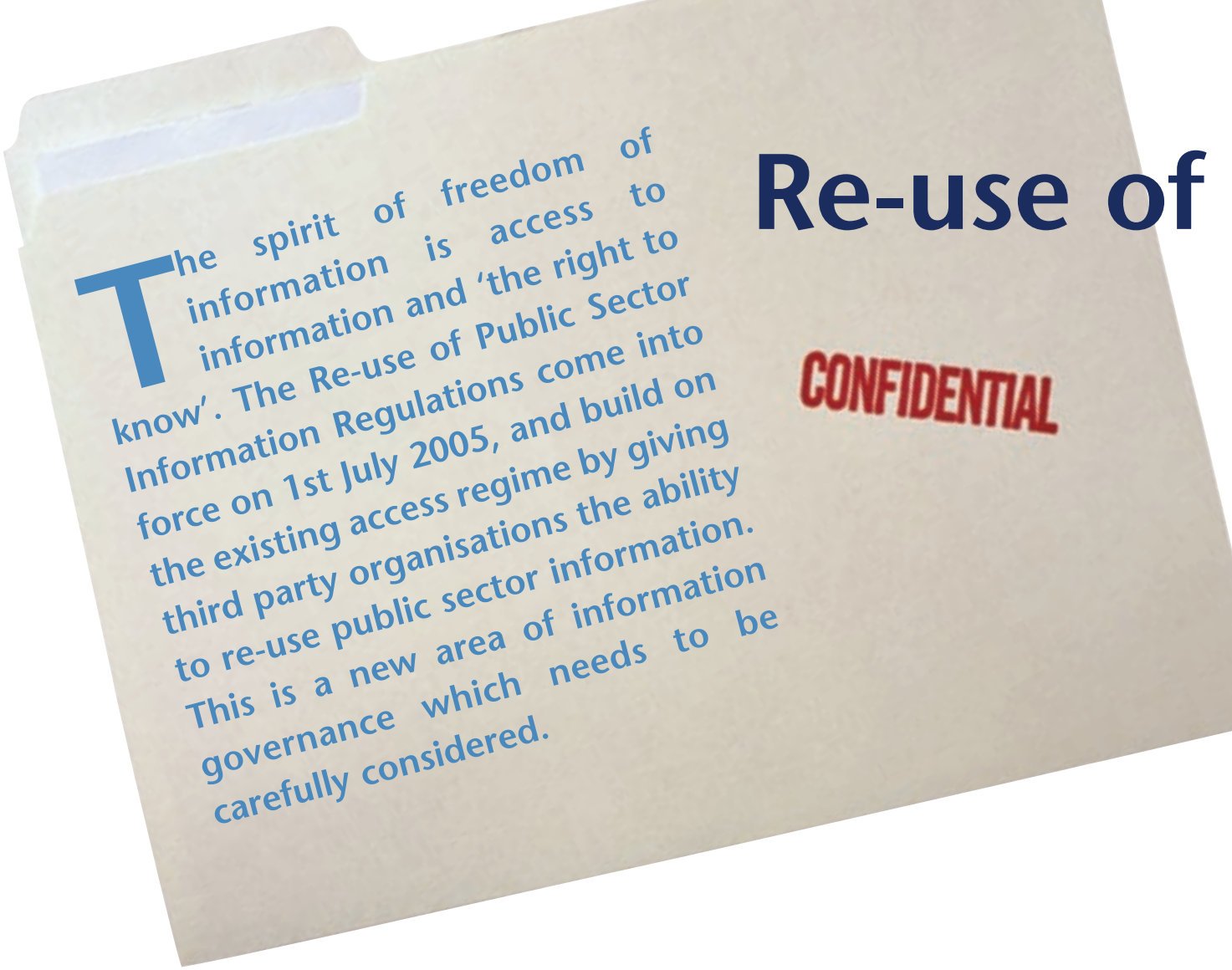
Re-use of



Background

The Regulations will implement an EU Directive on the Re-use of Public Sector Information (PSI) which became European law at the end of 2003.

The main aim of the Regulations is to help stimulate growth in industry, particularly in the information sector, by promoting the re-use of public sector information. The Regulations will sit alongside the access to information regime set out in the FOIA. They include provisions that will require action on behalf of public sector organisations and which will require processes to put in place to meet their obligations. The Regulations:

- establish processes for encouraging re-use;
- ensure transparency and fairness; and
- oblige public bodies to create lists of their assets available for re-use.

The Regulations refer to the re-use of 'documents'; a term which is given a broad definition to include the contents of databases, video and audio recordings. Re-use of documents means 'the use by a person of a document held by a public sector body for a purpose other than the initial purpose within that public sector body's public task for which the document was produced'. It does not include the transfer of documents from one public sector body to another for the purpose of either public body carrying out its public task or obtaining access to content of a document under the FOIA.

Significant untapped commercial value lies in the documents and data held by many public sector bodies. By providing processes for access to and re-use of that information the Regulations aim to act as a stimulus to the information and publishing industry in Europe by creating innovative value-added products and services. It also offers access to both professional and non-professional users in ways not necessarily offered by the public sector at present.

The Scope of the Regulations

Importantly, there is no obligation in the Regulations for a public sector body to permit re-use of documents held by it. However, if it does allow for re-use it must comply with the terms of the Regulations.

The Regulations set out a procedure for a public sector body to follow in dealing with any request for re-use made to it, including time limits within which to respond and the grounds on which refusal may be made. The Regulations apply to documents held by the public body unless specifically excluded.

Public Sector Regulations

Much of the procedure replicates that in the FOIA, for example:

- The request to re-use information must be made in writing (including by electronic means).
- The request must state the name and address for correspondence with the applicant.
- The request to re-use information should be responded to promptly and in any event within 20 days of receipt.
- The time limit to respond can be extended to such time as is reasonable in the circumstances for extensive or complex cases.

Format of documents provided for re-use

A document should be made available for re-use in a similar format to that in which it is held by the public body. The intention is to ensure that compliance with the regulations is as simple and cost-effective for the public body as possible. Provision however, of soft-copies of large databases could prove to be a bonanza for private enterprises if the public body has not considered and adequately implemented the Regulations.

There is an ability to impose terms and conditions on re-use (which shall be non-discriminatory) by way of a licence. The Regulations also place a prohibition on exclusive arrangements except in certain specific circumstances.

Where an organisation is already allowing re-use of any information, if it does not wish to provide access to that information on the far wider scale that these Regulations allow, it needs to carefully consider its position.

Charging

A charge can be made for allowing re-use. Where a charge is applicable this must be published and be fair and consistent. The Regulations will set out a formula to apply in relation to charging which allows for a 'reasonable return on investment'. It should be noted that any charge levied for a piece of information accessed under the FOIA should be offset from any charge made for its re-use.

Grounds for Refusal

Once an organisation has permitted the re-use of its information, a request for re-use may only be refused if:

- the activity of supplying the document is one which falls outside its public task;
- the document contains content in which relevant intellectual property rights are owned by a third party;
- the content of the document is exempt from access by virtue of the FOIA.

One or more of these reasons must be indicated to the applicant and if it is the second reason, further information about the holder of the intellectual property rights must be given. The applicant must be notified in writing of the reason for the refusal and informed of how to complain about the refusal.

Preparations

The recent public consultation considering the implementation closed on 18 March 2005 and a draft 'Guide to Best Practice' has been produced which aims to explain the effects of the Regulations. The guide can be accessed via the following link: www.hmso.gov.uk/psi/consultations/regulations/guide-to-best-practice-2004-12.pdf

Should the public body decide to allow re-use of information, it will have to consider carefully the following:

- Intellectual Property – a review of the valuable information held by the organisation in particular databases, what is currently licensed and what may require licensing.
- License terms - public bodies have an obligation to publish license terms whether in the form of a standard license or a copyright notice on the material.
- Details of charges – these must be published where applicable and must be fair and consistent.
- Assets lists – public bodies need to produce a list of material, both published and unpublished, which is available for re-use.
- Complaints procedures – bodies need to publish details of their complaints procedure and comply with the dispute resolution process set out in Regulations.
- Linkage with the FOIA – bodies need to be able to identify combined requests for access and re-use and respond in accordance with time limits.

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Environmental Information Reg

The right to request information about environmental issues under the EIR sits alongside the right to request information under the FOIA. If the request is for information which comes within the definition of 'environmental information' under the EIR then it is those Regulations which must be followed rather than the FOIA. This can cause confusion as the rights and the exemptions are broadly similar to those under the FOIA but there are subtle differences which can catch you out. Thus, by way of example, requests for access to environmental information do not have to be in writing and can be made orally. Likely to cause more confusion are the slight differences in the way the exemptions (referred to as 'exceptions'under EIR) operate. The differences are highlighted here.

What is the timescale for assessing the application of an exception?

The Regulations provide that environmental information which is specifically requested shall be made available as soon as possible, and not later than 20 working days after the date of receipt of the request.

The Regulations also provide that if the request is made for information to be in a particular format, then a public authority shall make it available in that format, unless it is reasonable for the information to be made available in a different format, or if the information is already publicly available in an easily accessible format.

If the information is not made available in the form or format requested, the public authority shall explain the reason for its decision as soon as possible, and no later than 20 working days after the date of receipt of the request for information, and shall provide the explanation in writing if the applicant so requests.

However, the Regulations differ from the FOIA in allowing timescales to be extended. This is because, unlike under the FOIA, all the information requested by the applicant has to be provided and there is no cost limit which comes into play when the work required is over the fees limit.

The Regulations therefore provide that the public authority may extend the 20 working day period to 40 working days if it reasonably believes that the 'complexity and volume of the information' requested means that it is impracticable to comply with the request within the earlier period or make a decision to refuse to do so. If the public authority believe that an extension is needed, the person requesting the information should be informed within the initial 20 working day period.

Therefore, the grounds for justifying the 40 working day timescale are that the complexity and volume of the information requested justifies the extension. It is not a ground to have the extended time period merely because the public authority cannot cope with workload.

It is the case therefore that any assessment of the applicability or otherwise of the exceptions must be made in the initial 20 working days period. Or if the complexity and volume of the information requires further time, the 40 working day period would apply for consideration of the exceptions.

What are the exceptions?

Unlike the FOIA, **the public interest test applies to all the exceptions**. A public authority may refuse to disclose environmental information which is requested if;

(1) an exception to disclosure applies, and;

gulations (EIR): the exemptions

(2) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Matters to be borne in mind at this point:

- A public authority shall, however, apply a presumption in favour of disclosure (this is specifically stated under the EIR but not the FOIA).
- If the information requested includes personal data, of which the applicant is not the data subject, then that personal data shall not be disclosed other than in accordance with Regulation 13 of the Regulations.

The exceptions under which environmental information may be withheld are listed in Regulation 12 sections (4) and (5). As noted above, all exceptions are subject to the public interest test.

Regulation 12 (4) provides that a public authority may refuse to disclose information to the extent that:

(a) it does not hold the information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority have complied with its duty to advise and assist under Regulation 9;

(d) the request related to material which is still in the course of completion, to unfinished documents or to incomplete data; or;

(e) the request involves the disclosure of internal communications.

Regulation 12 (5) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

(a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of the public authority to conduct an enquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of proceedings or that of any other public authority where such confidentiality is provided for by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect legitimate economic interest;

(f) the interests of the person who provided the information where that person:

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure, or;

(g) the protection of the environment to which the information relates.

Emissions information and disclosure

Note that the Regulations facilitate the ready disclosure of information about emissions. To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse disclosure of that information under an exception referred to in paragraphs 5(d) to (g) above.

The refusal process

The process for refusing information is similar to the FOIA regime. If a request for environmental information is refused by a public authority, the refusal shall be made in writing, and shall be made as soon as possible, and no later than 20 working days after the date of receipt of the request (subject to the extension of time limit discussed above).

The refusal shall specify the reasons not to disclose the information requested, and shall include any exception relied upon, and the matters the public authority considered in reaching its decision with respect to the public interest test.

If the public authority uses the exception that the information has not been compiled as yet, then an estimated time in which the information will be finished or completed will have to be given to the applicant.

Any refusal should inform the applicant that he/she may make representations to the public authority under Regulation 11, and it should also inform the applicant of the enforcement and appeal provisions of the Act.

Under Regulation 11, an applicant may make representations to the public authority if it appears to the applicant that the public authority has failed to comply with a requirement of the Regulations in relation to the request.

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Information relating to litigation claims

Since January 1st public bodies have, as expected, been receiving requests for information (RFI's) under the Freedom of Information Act from individuals who appear to be contemplating litigation (usually against the public body concerned) or from their solicitors.

Typical requests include those for information relating to:

- accident book entries recording falls within one particular set of premises within a two year period;
- infection control meetings, policies and minutes;
- the availability of training or protective equipment within the workplace during a particular period of time;
- reports and statements obtained in connection with investigations into bullying and harassment allegations (often in circumstances where the investigation found no case to answer);
- allegedly defective equipment;
- procurement decision-making made with a view to challenging the fairness of the public body's process or to finding out the identity of other competitors.

Although requests such as these may cause alarm when received by public bodies, they do not typically require the disclosure of information that could not previously have been obtained within arrangements for pre-action disclosure under the Civil Procedure Rules. The new challenge is primarily one of timing and resources (FOIA requests must be dealt with within 20 working days whereas responses to Letters of Claim under CPR should be made within 3 months and there is scope for the parties to agree extensions to the time table).

Significantly however, some potential litigants appear to be using the FOIA to request information from public bodies in order to establish the strength of a potential claim against a public or private sector third party.

The making of such requests to public bodies clearly highlights the importance of consultation with third parties if good relationships with partner bodies are to be preserved. Consultation with interested third parties, which is advocated in the Section 45 Code of Practice has the added advantage of assisting the recipient of the request to form a considered view about the applicability of any exemption and also provides an opportunity to notify the third party about the request, enabling it to prepare for any adverse consequences, such as bad publicity or litigation.

Some examples:

- The Health and Safety Executive has been receiving RFI's for information on investigation reports into workplace accidents that have taken place in private and public sector premises. The HSE is no longer able to decline to supply information to claimants on the basis that the information held is not relevant to the applicant's immediate claim.
- A public body has received a request for information about the procurement of certain equipment from a company claiming to be the sole licensed distributor of that equipment. The applicant may have been exploring the possibility of suing the manufacturer or the rival supplier.

The volume of requests received from potential litigants has been perhaps less than might have been expected. This may be because potential claimants and solicitors are reasonably satisfied with arrangements under Civil Procedure Rules for pre-action disclosure but may equally be explained by the fact that awareness of the Act among Claimants and their lawyers is at present patchy.

The Act is certainly proving useful to potential litigants seeking information to enable them to establish whether they have the makings of a claim before even seeking legal advice. However, when dealing with requests for information public bodies are not entitled to take account of the fact that disclosure could assist individuals making litigation claims against the public body itself. Public bodies should take comfort from the fact that providing prospective litigants with information at the earliest opportunity may also have the effect of deterring litigants in certain circumstances from taking legal action.

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Just how can an FOI lawyer help?

It's a question often playing on the minds of FOI leads. Of course, an 'FOI lawyer' will know the Act inside out having spent considerable time poring over each section. However, it's not just a thorough knowledge of the Act which is important but its application within far reaching (and often unique) Information Governance systems. So, just what can an 'FOI lawyer' do for you?

Naturally, there is a need to ensure that staff groups most affected by the Act are aware of the implications to their role. Seminars, in-depth workshops, advisory notes and detailed guides form a regular part of an early package of advice. By understanding the Act's interaction with the complex statutory framework in which you operate and common law duties such as those of confidentiality, accurate legal advice can be given in a conveniently holistic form. Not surprisingly, our FOI training includes material suited to the FOI leads but we also offer courses developed specifically for staff groups such as the executive board, procurement, estates, human resources and IT.

Training is, perhaps, an obvious form of assistance but beyond that rather controlled environment is one which has quite different, unique demands – the day to day response to requests for information and the successful management of affected systems and processes. So what has the Morgan Cole FOI team been involved with? Here's a sample of the project work and advice given in the last year:

- exploring the use of specific IT systems for managing the FOI process;
- drafting FOI policies and operational procedures;
- producing model templates for correspondence and demonstrating the appropriate use of the statutory exemptions and refusal notices;
- determining the status of Board papers and discussions including 'confidential' issues;
- advising on the status of raw data and rights of access;
- providing guidance on records management and effective systems;
- creating a policy and toolkit for managing the exemptions;
- producing a flowchart of the enforcement process;
- providing guidance on the status of unstructured data;
- auditing information (such as contracts) and monitoring responses;
- contributing chapters to respected FOI publications and staff communiqués;
- participating in FOI implementation boards to provide 'on the spot' legal guidance;
- preparing and advising on internal presentation material for staff groups;
- developing 'toolkits' and other useful reference material such as 'Default Disclosure Positions' for Procurement staff;
- advising on processes for information audit;
- drafting clauses for procurement staff to use in commercial contracts;
- negotiating with contractors to achieve FOI compliant confidentiality clauses in supply agreements; and
- reviewing the compliance of software packages with model specifications.

As you can tell, our team has been busy and remain so. Queries continue to come in via our established telephone and email advice lines with the required legal response often being provided within 24 hours. The team continues to provide training and advice on complex areas including the exemptions, public interest and commercial confidentiality.

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Focused, dedicated legal advice

Morgan Cole is renowned for its expertise in the Freedom of Information Act and associated information governance legislation. A dedicated team has existed since 2002 which focuses on the implications of the FOIA and the obligations that public sector organisations face in complying with the legislation.

Uniquely, the team comprises lawyers from across the practice areas combining their particular expertise and experience of the FOIA with other team members who focus on the detailed provisions of the Act. Lawyers with specialties ranging from employment law, property transactions and commercial services through to dispute resolution and regulatory matters work together to provide clients with a full-spectrum approach to knowledge development, legal guidance and implementation that is necessary for such far-reaching legislation.

Whether clients need the briefest of advice over the telephone, specialised training or comprehensive and detailed audits of sensitive contract confidentiality provisions, our experienced team has the expertise that means the advice can be received directly and to the highest quality.

Training dates

An update on the FOI Exemptions 21st June (Cardiff) and 29th June (Reading)

Exemptions training is an essential requirement for anyone directly involved in decision-making on whether and how much information should be released in response to any request. Our training focuses on in-depth analysis of the most commonly used exemptions, how to analyse the public interest test and how to draft Refusal Notices using genuine requests received by clients.

The cost of attending this event is just £190 plus VAT which will be payable by invoice.

To register or request details of our Autumn training programme email: foi@morgan-cole.com

Further copies

If you would like to receive further copies of this newsletter, or would like to receive future newsletters and information relating to Morgan Cole's information governance services, please subscribe to our information service by emailing Celeste Ainge: celeste.ainge@morgan-cole.com

Feedback

Your feedback, comments and suggestions on this publication are very welcome and should be addressed to Celeste Ainge at **celeste.ainge@morgan-cole.com**

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