

FOI in the Isle of Man — FOIA upgraded?

Paul Gibbons, aka FOIMan, provides an in-depth account of some of the important innovations in the Isle of Man Freedom of Information Act

Whatever the Independent Commission on Freedom of Information concludes, the existence of the Commission demonstrates that the UK government feels a need to regain control over the forces unleashed when the Freedom of Information Act ('FOIA') came into force in 2005.

The government will no doubt pull back from some of the more extreme suggestions made in the Commission's consultation paper issued last October, especially given the adverse media reaction since. If it could travel back in time to the late 1990s though, it might be tempted to follow the example of one of our neighbours.

On a nearby island, one nation's government has closely observed the FOI legislation of the British Islands and has carefully drafted its new openness law with the benefit of experiences of the UK and others. That nation is the Isle of Man, and its 2015 Freedom of Information Act has just started to take effect.

The Isle of Man

The Isle of Man is an independent nation. It shares our monarch, who enjoys the title of Lord of Mann, and is represented on the Island by the Lieutenant Governor. The UK government provides for its defence and represents its interests abroad. The people who live there can buy produce with Manx pounds or with sterling, a point seized on by Alex Salmond during the Scottish independence referendum campaign to demonstrate that Scotland too could be independent and retain the use of the pound.

The Isle of Man's independence is not merely a constitutional nicety, but a reflection of its unique history. It has most in common with the Hebridean islands off the coast of Scotland, and indeed they were governed from the Isle of Man for a long period. Viking settlement and rule commencing in the tenth century has had a strong influence on its constitution and culture, perhaps most significantly in Tynwald, its historic parliament with origins far older than the UK's.

Manx legislation tends to mirror UK law, but its government can and does

pick and choose what will work on the Island. In some cases they have little choice – for example, in 2002 they adopted a Data Protection Act which is virtually identical to the UK Act, enabling them to exchange personal data with authorities and businesses across the UK and Europe. Practical and economic necessities often dictate how closely the Isle of Man parallels the UK and elsewhere.

This was not the case with its Freedom of Information legislation, however, where draftsmen enjoyed much more freedom. Whilst there was a clear intention to enhance openness on the Island, those preparing the legislation were keen to learn from experience elsewhere. They were particularly concerned about how the burden of FOI could be better managed in a country with a public service that, whilst proportionately large for its population, is still very small compared to its neighbours' governments.

The Freedom of Information Act 2015

The Isle of Man's Freedom of Information Act ('FOI(IoM)') is very closely modelled on FOIA and the Scottish FOI Act ('FOI(S)A'). Requests for information have to be answered promptly, and in any case, 20 working days after receipt. Applicants may specify the format in which they would like the information to be provided. There is emphasis throughout the Act and its accompanying Code of Practice on providing advice and assistance to those making requests. Public authorities are encouraged to adopt a publication scheme, though unlike the UK, this is not mandatory.

There are however some differences in the way the Act is drafted. It is these innovations that I am particularly interested to examine here.

An Act with purpose

Significantly, FOI(IoM) includes a purposive clause. Regulators and courts have acknowledged that the UK Act's purpose is implicit in its title, but the Isle of Man's law makes it explicit.

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It is in this section of the Act that we find the most significant, and perhaps controversial, of the legislation's checks on the burden that FOI might bring.

Section 3 of the FOI (IoM) states that:

'The purpose of this Act is to enable persons who are resident in the Island to obtain access to information held by public authorities in accordance with the principles that – the information should be available to the public to promote the public interest; and exceptions to the right of access are necessary to maintain a balance with rights to privacy, effective government, and value for the taxpayer.'

Aside from the novelty of a section explaining why the Act exists, one phrase stands out: 'persons who are resident in the Island'.

Even if the UK government had been minded to restrict usage of FOIA's rights to those living there, it would have brought limited advantage. Not so in the Isle of Man which, with its population of 85,000, immediately curtails the volume of requests that might have to be answered with the inclusion of the provision.

Indeed, during the Act's passage, the Island's Acting Attorney General explained that this feature was specifically designed to prevent Manx public authorities being caught up in requests of the type often sent to UK public bodies. The Attorney General stated that the Act: 'seeks to limit exposure to the potential

endless commercial and other requests, which, it seems, many public authorities in the UK are routinely subject to. We want to try and avoid, for example, companies who gather and sell information. So by limiting the scope of the Act to Isle of Man residents we can then, hopefully, focus our limited resources on requests for information from those who are directly affected by a public authority's decisions.'

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form specified by the Chief Secretary of the Isle of Man government (the office equivalent to the UK Civil Service's Cabinet Secretary). It is therefore clear when a request is made under FOI(IoM).

The form is made available on the Isle of Man government website as a web form, but it appears that requests made via post or email will be accepted as long as applicants use the mandated form.

The requirement to use a standard form would, presumably though, prevent Manx residents from submitting requests through WhatDoTheyKnow or an equivalent service.

Other restrictions

This limitation is not the only attempt made to manage the impact of the legislation.

The right of access is to information created on or after 11th October 2011 (the beginning of the current Chief Minister's term of office). This does not necessarily mean that information created before this date will not be available.

The Act highlights the continuing role of the non-statutory Code of Practice on Access to Government Information which was first issued in 1996. Requests for information pre-dating 2011 will continue to be handled under that Code (and it is possible that requests from outside the Island may be considered under the Code as well).

Practical refusal reasons

FOI(IoM) distinguishes between the application of exemptions and 'practical refusal reasons' described at section 11. These include the invalidity of a request on the grounds described above, but also several other reasons familiar to UK practitioners.

Requests can be refused if authorities do not hold information, but also if they: 'cannot, after taking reasonable steps to do so, find the information that the applicant has requested.'

Examples of what would constitute 'reasonable steps' are set out in the Code of Practice issued under section 60 of FOI(IoM). Section 61 makes clear that conformity with the Code will be taken as compliance with any requirement in the Act. This means that as long as the Code's recommendations are followed, an authority can place a limit on the extent of their search for information. How far this differs in practice from the approach taken in the UK in cases such as *Chagos Refugees Group v IC & Foreign Office* (EA/2011/0300, 4th September 2012, para 70) remains to be seen.

Many things in FOI(IoM) are spelt out in more detail than in the UK Act, presumably in an attempt to avoid drawn out appeals. Section 8(3) makes it clear that public authorities are not under an obligation to create new information. It does so in

terms which, if applied restrictively, might rule out many requests which would be considered routinely under the UK Act.

It is likely, however, that the intention behind the drafting is to follow the approach of the UK Information Commissioner, whose guidance suggests that it is the complexity of the operation involved in collating the requested information that indicates whether information is held or whether its collation constitutes the creation of new information.

The Act spells out that requests can be refused not just if they are vexatious, but also if they are 'malicious, frivolous, misconceived or lacking in substance'. Again, how much difference this will make to interpretation of the provision is unclear at present. Its drafting, together with the guidance provided in the Code of Practice, is clearly influenced by *Information Commissioner v Dransfield* ([2012] UKUT 440 (AAC)) and indeed the UK Commissioner's revised guidance following this decision (copy available at www.pdpjournals.com/docs/88499).

At present, public authorities in the Isle of Man cannot refuse requests on cost grounds, nor can they charge a fee for requests. The legislation provides for Ministers to bring regulations forward to introduce such provisions, but this has not yet been done. It may be that the protections described above will prove sufficient safeguard against any potential burden that FOI may bring.

Exemptions

One of the virtues of the Isle of Man Act is its clarity. This is most visible in the drafting of the exemptions. In the UK Act, it is necessary to refer to section 2 in conjunction with the exemptions in Part II in order to establish which are absolute, and which are qualified, and therefore subject to a public interest test. The Isle of Man's legislation tackles this by separating out the different kinds of exemption. Part 3 of FOI(IoM) lists the absolute exemptions, and Part 4,

the qualified exemptions.

This division requires some exemptions to be split between the two Parts. In line with the UK's approach to communications with the Royal Household since 2010's Constitutional Reform and Governance Act, there is one section providing absolute protection for communications with the monarch, her two closest heirs, and the Lieutenant Governor. A separate section in Part 4 provides a qualified exemption for communications with the rest of the Royal Household, and in relation to honours.

The exemption for personal information is similarly split in two. The first of these exemptions in Part 3 follows FOI(S)A in that it provides that personal census information and a deceased person's health record can be refused. In all other respects it provides protection for personal data to the same extent as is provided in section 40 of the UK Act.

The Isle of Man is not a member of the European Union, and this means that it was never required to adopt regulations giving access to environmental information. The Manx Act caters for information which in the UK, Scotland and Ireland would be covered by Environmental Information Regulation exceptions through a qualified exemption protecting 'research and natural resources'.

In the UK, the ability for public authorities to extend the deadline to consider the public interest in disclosure of information subject to qualified exemptions has caused controversy, with some public bodies extending the deadline indefinitely. In both statutes, there is no time limit on these extensions beyond a requirement to respond 'as soon as is reasonable in the circumstances', but the Manx legislation does at least expand on what can be taken into account in determining what is 'reasonable'.

Appeal mechanisms

In common with the UK Act, there is no reference to internal review within the legislation, but the Code of Practice encourages the adoption of a complaints procedure and a standard form has been developed. Another incentive to public authorities to adopt such a procedure is that, again as with the UK's legislation, the Isle of Man's Information Commissioner can refuse to consider complaints where the applicant has failed to exhaust the authority's own procedures.

The Commissioner's powers are broadly the same as those of the UK and Scottish Commissioners, and when he does consider a complaint, he has the ability to order disclosure through a decision notice. One innovation in the Manx Act is an emphasis on alternative dispute resolution. Whilst it is not clear how this will work in practice, the fact that the Commissioner is encouraged to consider other ways to resolve complaints is an indicator of the intent to avoid expensive legal challenges as far as possible.

Similarly indicative of this intent is that, as with the Scottish regime, there is limited scope for appeal beyond the Information Commissioner. The Commissioner's decisions can only be appealed to the Island's High Court on a point of law. The Act also mandates the establishment of an 'advice panel' made up of legal representatives who the Commissioner may consult in reaching his more difficult decisions, again designed to ensure that the correct answer is reached first time.

Despite its controversy in the UK Act, the Isle of Man has retained the ability for government to overturn decisions of the Commissioner. The Chief Minister, having consulted the Council of Ministers and the Attorney General, can veto the disclosure of government information. It seems unlikely that this power would be used regularly, if at all, by Manx ministers, but its retention illustrates the cautiousness of the Island's government of the

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unintended consequences of freedom of information.

Conclusion

Late adopters have the advantage of learning from the experience of others. The Isle of Man's government has looked at the experience of their neighbours and drafted its FOI legislation to avoid what they see as potential problems. Given the size and resources of the Island, it is perhaps not unreasonable for their government to take a cautious approach to imposing new obligations on their public services.

In light of the current scrutiny of FOIA, is there anything that the UK government could learn from the Isle of Man's new legislation?

Many of the innovations described would have limited impact on the way FOIA is applied in practice. The enhanced status of the supporting Code of Practice strikes me as an interesting concept, though it is easy to see how governments might abuse such an approach.

The emphasis on seeking to avoid lengthy legal disputes would also be attractive to the UK government, which is already considering the possibility of fees for appeals to the Tribunals. It may be that the measures described will work well to avoid such costly arguments in the Isle of Man due to the established culture where, reportedly, most residents feel able to approach politicians and government informally. Whether they would work so well elsewhere is questionable.

The Isle of Man's new FOI legislation is designed to extend what the government sees as an existing culture of openness. Its impact will only gradually be seen, as initially only the Cabinet Office and the Department of Environment, Food and Agriculture are subject to the new law.

The lessons learnt from this pilot implementation will be applied when

the Act is extended to other government departments in January 2017, and eventually to local authorities in January 2018. By then, the Isle of Man will be a full member of the club of nations that have adopted their own, individually tailored, freedom of information laws.

I would like to thank to the Isle of Man government's FOI Team for its assistance with this article.

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