

Freedom of Information: cutting the cost

Paul Gibbons, aka FOIMan, provides guidance on how public authorities can better manage operations to reduce the administrative burden of FOIA

Paul Gibbons is leading a Workshop on 'Managing the Burden of FOI' at the 12th Annual Freedom of Information Conference being held in London on 12th and 13th May 2016. See the website www.pdpconferences.com for further details.

It is a charge often levied at the Freedom of Information Act ('FOIA') that FOI is an expensive luxury, especially during a time of austerity. Responding to FOI requests costs public authorities in time spent processing requests, logging and engaging in correspondence. Then there is the need to establish whether information is 'held'. Several members of staff in multiple departments may have to spend time retrieving information. Documents need to be read through to ensure that anything that ought to be withheld from disclosure is identified. The valuable time of chief executives or Ministers may be spent considering their 'reasonable opinion'.

So it was not a surprise that one of the questions that the Independent Commission on Freedom of Information was asked to examine was 'the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information.'

In its evidence to the FOI Commission, Liverpool City Council reported a 76% rise in requests between 2010 and 2014, which it estimated as costing an extra £150,000 a year. It compared this with a 58% cut that it had seen in central government funding during the same period.

FOI practitioners often struggle to get cooperation in answering requests, and not always because of any inherent secretiveness that some feel pervades the public sector. It is a tough job to convince colleagues that their priorities — perhaps caring for the sick or elderly, or negotiating multi-billion pound contracts — should be dropped down the pecking order so that they can spend time on FOI requests. Take, for example, Gateshead NHS Foundation Trust, who told the FOI Commission:

'Like other NHS organisations, we are operating in a very difficult financial landscape resulting from an unprecedented increase in demand for our healthcare services combined with rising costs of providing care and flat funding. To be able to continue to provide outstanding healthcare to all our patients, sustainable both clinically

and financially, we must make best use of our resources. The FOI regime in its current form is at odds with this objective.'

Whenever there is an opportunity for public authorities to comment on FOI, its cost or burden becomes a focus. The FOI Commission provided such an opportunity, and its establishment raised the possibility that government might make changes to address these concerns.

Independent FOI Commission recommendations

The Commission's brief, and the Call for Evidence which followed, indicated that it would look at both cost concerns and the options for addressing them in depth. Those options identified by the Commission and the public bodies that responded to the Call for Evidence were as follows:

- introducing a fee for making FOI requests;
- lowering the cost limit for requests; and
- expanding the range of activities that can be taken into account when estimating the cost of complying with requests.

The Commission ruled out charging for requests. There had been a significant media campaign which focussed on this possibility in particular, and this, together with media responses to the Call for Evidence, appears to have swayed them. The report states that 'while we recognise that requests under the Act do impose a financial burden on hard-pressed public authorities, in our view this is justified by the general public interest in accountability and transparency of public bodies.'

The Commission felt unable to make any formal recommendations on the cost limit or on expanding the range of activities that can be taken into account. However, it was sympathetic to the idea of increasing the limit rather than decreasing it. It understood the difficulties of extending the range of activities that can be considered in making estimates of cost, but suggested that the government look at the pos-

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sibility of including redaction.

Overall then, not much solace for the public authorities that had hoped that the Commission might recommend amendments to make their lives easier. They would not have been reassured by the government's immediate response that they would not make any 'legal changes' to the Act.

Where does that leave us?

The outcome of the Commission at this stage is very much 'as you were'. The government may decide, on reflection, and after sounding out MPs, to make some minimal changes. However, at this point in time, it looks like nothing at all will be done by Parliament to address concerns over the burden that FOI is perceived to impose. This is great news for campaigners and supporters of FOI in its present form, but this still leaves a question mark for practitioners over what can be done to manage that ever increasing volume of FOI requests.

There might still be some scope for the government to assist. The Commission recommended a (long overdue) revision of the section 45 Code of Practice, which Matthew Hancock, the Cabinet Minister, has committed to doing.

As well as providing up-to-date guidance on the use of section 14, the government could use the opportunity to set out clearly the limits of a 'reasonable search'. The

Information Commissioner's evidence to the Commission suggested that putting the guidance on section 14 on a 'statutory basis' might encourage public authorities to use it more often. And if there was practical guidance on the limits of searches

which had to be taken into account by regulator and courts, then that could again help practitioners to set boundaries on the work that FOI requires.

All of this is in the future though, and we don't know what the Code will actually say. What can practitioners do now to manage that burden? How can we cut the cost of FOI using the tools that are already available?

Cutting the cost

The good news is that we already have a range of options, which if applied effectively have the potential to limit if not reduce the cost of compliance.

The list of options that the Act itself offers include:

- charging for requests;
- refusing requests on cost grounds and limits on searching;
- stating that information is not held;
- using section 14 to refuse burdensome requests;
- making information available in publication schemes; and
- stating that

information that is 'otherwise accessible'.

In addition, in my experience as both a practitioner and as an applicant, there are things that public authori-

ties could do more efficiently which would reduce the administrative burden of FOI. Here, we will examine the options, both statutory and administrative, in turn.

I. Charging for requests

It is often forgotten that FOIA and associated Regulations currently allow public authorities to charge for requested information. Although a flat fee is not permitted, public authorities may recover costs for things like photocopying and postage. Very few authorities do this — the view is taken that, in most cases, it would cost more to process payments than could be recovered. Another limit on the use of this provision is that most requests are made electronically and information requested would usually be released through the same route, at little cost to the authority.

However, it can still be a useful provision, particularly for small authorities like schools and parish councils. This is particularly the case where circumstances require unusual or expensive methods to provide requested information.

In FS50598413, the Commissioner agreed with Wark Parish Council that a charge of £29.75 for photocopying was justified as the council had to arrange for the County Record Office to use specialist scanning equipment to copy the requested information. Under normal circumstances, the Commissioner has indicated that a fee of 15p per sheet is appropriate for photocopying (FS50307318).

Of course, charging in these circumstances is unlikely to save authorities much, if anything. However, if it is clear that a public body does charge for information in some circumstances, it is possible that this will have a deterrent effect on some requesters. Some NHS institutions routinely mention the possibility of a charge for photocopying in their guidance for applicants. The extent to which this prevents potential applicants from making requests is unclear, but presumably it will have that effect on some, despite the fact that it is rare for charges to be made in practice.

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“The use of section 14 to refuse burdensome requests has been growing since the Dransfield decision, and whilst controversial with requesters and campaign groups, it does offer another option to practitioners where a request would require a great deal of time and resources but can't be refused on cost grounds.”
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Making it clear that there will be a cost for provision of information in certain formats allows an authority to recoup costs in some circumstances, but may also discourage some potential applicants from making requests in the first place.

2. Refusing requests on cost grounds

Where a public authority estimates that complying with an FOI request would cost more than £450 (or £600 for central government bodies), they are able to refuse the request. They can only take into account the cost of identifying whether information is held, locating it, retrieving it and extracting it. Staff time can be taken into account at the rate of £25 an hour.

Usually this is interpreted to mean that if it was estimated that it would take more than 18 hours of staff time (24 hours in central government), then requests can be refused. What is often forgotten is that other costs can be taken into account — the Information Commissioner gives examples such as the cost of retrieving files from commercial storage facilities and the cost of specialist software that might be needed to retrieve information.

Remember that, in effect, only a reasonable search is required, as outlined in *Chagos Refugees Group v IC & Foreign and Commonwealth Office* (EA/2011/0300) where it was stated (at paragraph 70) that 'a search should be conducted intelligently and reasonably...this does not mean it should be an exhaustive search conducted in unlikely places: those who request information under FOIA will prefer a good search, delivering most relevant information, to a hypothetical exhaustive search delivering none, because of the cost limit.'

In another case, (*Quinn v Information Commissioner and the Home Office* (EA/2006/0010, 15th November 2006)), it was established that if an authority begins a search, and during the course of this realises that it has already exceeded the appropriate limit, it can stop searching. Section 12 is there to help public authorities manage the burden of FOI and should be used. In particular, they are only

required to undertake reasonable searches — not exhaustive ones.

3. Information is not held

FOI only requires public authorities to provide information that they hold. If the information is not held, it need not be created. Whilst the difference between creating information and extracting it can be a narrow one, it is perfectly clear that some activities can be ruled out.

During a recent conversation with a member of staff at a public authority, I was informed that their organisation had recently received an FOI request for the amount of desk space allocated for a particular group of stakeholders. They complained that they had then been told to spend time measuring all the desks in the building so that the request could be answered. FOI only requires the disclosure of recorded information, so this activity was unnecessary. The answer to the request should have been that the information was not held. If colleagues are asked to carry out these kinds of activities, it is hardly surprising that they come to resent FOI.

Practitioners should ensure that colleagues are not undertaking unnecessary tasks in order to answer FOI requests.

4. Can section 14 be used to refuse burdensome requests?

Section 14 FOIA allows public authorities to refuse requests that are vexatious.

The famous *Dransfield* Upper Tribunal decision (*AD v Information Commissioner and Devon County Council* [2013] UKUT 0550, AAC), now to some extent ratified by the Court of Appeal, identified the burden placed on public authorities as being a factor that could be taken into account when deciding whether a request is vexatious.

Judge Wikeley made it clear that the normal way to deal with concerns about cost was to rely on section 12 and the appropriate limit. However,

in some cases the expensive part of handling a request is the reading and redaction of documents — neither of which can currently be taken into account for section 12 purposes. In these cases, Wikeley suggested that it would be appropriate to refuse requests as vexatious where they impose a manifestly unreasonable burden on the authority. This could be the case even when the request itself is otherwise justified and reasonable — as was the case in *DfE v IC and Mclnerney* (EA/2013/0270, 2nd July 2014).

This use of section 14 has been growing, and whilst controversial with requesters and campaign groups, it does offer another option to practitioners where a request would require a great deal of time and resources but can't be refused on cost grounds. In deciding whether the burden is manifestly unreasonable, the size and resources of the authority are likely to be relevant as well, so it may be part of the answer for besieged parish councils.

The Information Commissioner's guidance (copy at www.pdpjournals.com/docs/88531) is clear that applying section 14 in these situations requires the authority to 'provide...clear evidence to substantiate its claim that the request is grossly oppressive'. In a recent decision (FS50571757), the Commissioner rejected the Home Office's case that reviewing 160 Operational Policy Instructions imposed such a burden.

However, in a previous case, *Salford City Council* was allowed to apply section 14 where it would have been required to read and redact 448 documents comprising 2715 pages (*Salford City Council v IC & Tiekey Accounts* (EA/2012/0047, 30th October 2012)). It will become clearer over time the circumstances in which it will be appropriate to apply section 14 in relation purely to the burden of the request.

Section 14 will only be an option for practitioners where a very significant burden would be imposed in handling a request, but it does nonetheless add to the arsenal of tools which may be used to manage the impact of FOI.

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5. Publication schemes

Frequently perceived as relics of an out of touch government that has failed to keep pace with the advent of the world wide web and search engines, the poor publication scheme has received bad press in the past. However, publication schemes are undergoing a rebirth of sorts, with suggestions that they can play a part in meeting Re-use of Public Sector Information Regulations requirements. On top of that, they offer another answer to the question of what can be done to manage the cost of FOI.

Provided that costs are reasonable and transparent, public authorities are allowed to charge for information as long as the charge is set out in their publication scheme. If there are reports or documents that authorities are regularly asked for, it makes sense to include them in the publication scheme, and if appropriate, with a charge outlined.

In *Davis v ICO and Health and Social Care Information Centre* (EA/2012/0175), the Health and Social Care Information Centre was able to charge £1550 for a report it was asked for on this basis. The Commissioner and the First-Tier Tribunal agreed that it was able to do so because the costing mechanism had been set out in the publication scheme.

Practitioners should always consider whether information that is regularly requested could be included in their publication scheme. In addition, they should consult colleagues on whether certain reports and datasets should be charged for.

6. Is the information reasonably accessible?

Section 21 FOIA allows public authorities to refuse requests if the information is reasonably accessible to the requester. This is the case even where a charge has to be made for the information. This is a provision that is too often ignored. Firstly,

by publishing information more extensively, public authorities can cut down on time spent answering specific requests. Whilst there is little evidence that publishing information cuts down on request volumes, it certainly does make it easier to answer requests. 'Publish more' should be the mantra of practitioners.

Secondly, this can be used where other organisations publish information. In the higher education sector, requests for statistical information are among the most common requests. Much of this information is published by the Higher Education Statistics Agency every year, which means such requests can often be refused, even though those reports are only available for a cost. Time spent analysing what information is disclosed to other agencies, and for what purpose, could save practitioners and their colleagues much time and expense in the long run.

Furthermore, if the practitioner has a schedule of dates when certain information will be published during the year, then it will facilitate the refusal of requests using the exemption for future publication at section 22.

7. Improved administration of requests

It is a regular criticism of public authorities in Commissioner and Tribunal decisions and elsewhere that public authorities' poor records management hinders FOI compliance. Taking action to improve information management across the authority would undoubtedly help many public bodies to fulfil their obligations more efficiently.

There are many other aspects of FOI administration that practitioners should consider reviewing if they wish to cut the cost and effort involved in answering requests. Methods for logging and tracking request handling could be improved, perhaps through the adoption of new technology. Wasteful practices could be cut out. As an FOI applicant to government departments recently, I was surprised at how varied and inefficient the responses seemed.

In particular, many insisted on using template letters attached to an email. Templates are a good idea, but there is no reason why they can't just be applied to email responses.

Cumbersome and byzantine FOI procedures can result in exacerbating frustrations with openness requirements. Practitioners should consider whether their procedures — particularly when it comes to the approval of responses — could be improved. Do all responses need to be approved by a senior manager, or can the practitioner or other staff tasked with answering requests be trusted to make that judgment? Empowering staff could remove logjams in the FOI process.

When I recently asked all government departments for details of their public relations spending, some of the answers provided information that was not necessary to answer my question. One department trawled round its executive agencies to obtain information from them, when I'd only asked for information about the government department itself. Practitioners should ensure that they understand the question asked so that they and colleagues are not wasting time looking for information that hasn't been asked for.

Conclusion

Practitioners and their employers may be frustrated that the FOI Commission has not led to an overhaul of FOIA to address the financial burden that compliance presents. However, there are steps that they can take to better manage that burden. It is a matter of making smarter use of provisions that already exist and are working.

I will be exploring these options further during my Workshop at the 12th Annual FOI Conference in London on 13th May 2016. I look forward to the possibility of meeting you then.

Paul Gibbons

FOI Man

paul@foiman.com
