Lies, damn lies, and FOI statistics

Paul Gibbons, aka FOIMan, discusses the value in FOI statistics, including the current limitations

*O*ne of my guilty pleasures as an FOI Officer was compiling statistics on the number of requests that had been received during the previous year. It allowed me to take a step back and think about what had been achieved (and to have fun experimenting with different graphical illustrations of the year's trends). More importantly perhaps, the resulting report provided my line manager with evidence of my workload, and on one occasion at least, unlocked additional resources in the form of a new member of staff to support the processing of requests.

Statistics perform a range of functions. For the Information Commissioner, they provide a way to measure when intervention may be required — one of the prerequisites for a public body being added to the quarterly monitoring list is that they are meeting the 20 working day deadline less than 85% of the time.

For public bodies, statistics provide a way to assess the impact of FOI and might lead to the allocation of additional resources. As demonstrated by some of the public authorities that responded to the FOI Commission's call for evidence, they in many cases might be used to demonstrate the burden that FOI imposes. For journalists and the public, statistics often provide proof of existing convictions that public authorities are not taking FOI seriously enough.

One problem for anyone wanting to get an overview of a public authority's performance in the area of FOI is that there is no requirement to publish statistics. We know about certain parts of the public sector, but others are a mystery. How can the Information Commissioner, for example, make consistent assessments as to which public bodies should be monitored when not all bodies publish such data? This is one reason why the Independent FOI Commission recommended a statutory duty to publish statistics.

What data are available?

In Scotland, it is much easier to gain a comprehensive picture of public authorities' FOI performance. Since 2013, the Scottish Information Commissioner has been collecting data from all public authorities and now makes the collated data available via an online portal.

The self-reported data includes the number of requests made under FOIA, the Environmental Information Regulations ('EIRs') and data protection subject access. It also includes statistics on how many requests were refused and why, and details of reviews requested.

The UK government publishes quarterly and annual statistics on FOI within central government. (Reports going back to 2010 can be found on the gov.uk website and the reports going back to 2005 can be found on the UK government web archive). These reports include similar detail to the Scottish data but go back all the way to January 2005. This is the most comprehensive dataset on UK FOI performance.

JISC, the further and higher education technology services body, has collated statistics on universities' FOI experience over the last decade. It includes data along the same lines, but also data on types of requester. The annual reports can be found on the JISC website with dashboards showing the results and trends over time.

Traditionally the data were collected via a survey to higher education bodies, but in recent years the survey has been supplemented by a tool to assist universities and other public bodies to log and manage their requests. The tool additionally makes it easier for organisations to submit their statistics to JISC. Submission is voluntary so the data are far from complete, but they do provide a picture of FOI trends in the university sector.

There are no other routine data collection exercises. From time-to-time, other parts of the public sector are the subject of academic research which provides some limited insight into numbers of FOI requests and performance in answering them. For example, the UCL Constitution Unit estimated that in 2006, local authorities in England, Wales and Northern Ireland received 72,361 requests. The fact that such figures have to be estimated illustrates the limits of data collection in the UK.

Individual public authorities and sometimes groups of authorities publish FOI performance statistics, and such figures are regularly the subject of FOI requests. However, even when these figures are published, they often present difficulties for the unwary researcher.

What is a request?

A common feature of all the published statistics is a health warning about how the statistics should be used. The Office of the Scottish Information Commissioner states on its data portal.

"There are currently no prescribed or agreed standards for what or how to collect FOI and EIR data so you are advised not to use it to directly compare one authority with another at this stage. This is something we'll be working on with authorities so that the data is more comparable in future."

This sums up the biggest problem with relying on FOI datasets — there is little consistency in what is recorded and what is not. The Ministry of Justice (and now the Cabinet Office) have provided guidance to government departments on which requests to log as we'll see, but even then they provide caveats as to the consistency of monitoring across government. In the early days of FOI law, there was considerable variance in practice even in central government. The government's 2014 Annual Report notes:

"The initial surge in requests when the Act was introduced in 2005 was driven partly by the inclusion at that time of routine as well as non-routine

requests. For example, some bodies included in their statistics simple phone call requests for pre-existing information."

Knowing what to record as an FOI request is a challenge for all practitioners. Back in 2005, I recall several animated discussions with senior colleagues as to what should be counted as an FOI request. The problem is that FOIA itself defines requests so broadly. A request is strictly speaking just something which:

- is in writing;

- states the name of the applicant and an address for correspondence; and

- describes the information requested.

This of course describes significant proportions of the correspondence received by public authorities every day. In practice, it is necessary for them to more strictly define what will be handled formally as an FOI request, and therefore what will be captured in statistics. Since 2005, FOI Officers have become used to distinguishing between 'routine' or 'business as usual' correspondence and 'non-routine' or 'FOI' requests.

Achieving consistency

So what should be monitored? The government has used the following definition since 2005:

A request that:

- meets the criteria in section 8 FOIA, and if the request falls

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under the Environmental Information Regulations ('EIRs'), it includes requests made in any form or context including oral requests; and

- is not a request for information that is not already reasonably accessible to the applicant by other means; and

- results in the release of one or more documents (in any media) or inclusion of extracts of documents in the information released; or

- results in information being withheld under an exemption or exception from the right of access (either FOIA or the EIRs); or

- is not processed because the department estimates the cost of complying would exceed the appropriate limit in accordance with section 12 FOIA; or

- is not processed because the department is relying on the provisions of section 14 FOIA; or

- where a search is made for information sought in it (the request) and it is found that none is held.

I generally summarise this as any circumstance where the request is novel or contentious, or where the information is likely to be withheld.

One obvious omission here, which as a practitioner I was inclined to plug, are requests that cite FOI or the EIRs.

Another question is whether FOI and EIRs figures should be reported separately or together. Given the limited number of EIRs requests received by public bodies I worked for, my own inclination was always to combine these. However, the reports referred to above count them separately. There are good arguments either way, and the relevance of EIRs to a public authority (i.e. the volume of requests it receives relating to the environment) will probably dictate the approach taken.

Tribunal decisions (notably *Fitzsimmons v IC & DCMS*, EA/2007/0124) have established that every question in a submitted email or letter is a separate request. Thankfully, most

authorities — and all of the reports described above — count requests at the correspondence level, but no doubt there are some who log each question (anecdotally I know this was done by some FOI Officers in the early days of the Act's implementation).

Even in the event that a standard for inclusion of requests in FOI statistics could be agreed, we still have to consider how other figures will be reported. When do we judge that a request has been answered on time, for example? The obvious answer is that we take the standard 20 working days deadline.

As is so often the case though, the obvious answer only takes us so far. Do we record requests where the limit has been extended to consider the public interest as being late, or do we separately report such figures? The government does the latter — the percentage answered within 20 working days, and the total of those and the ones answered after a 'permitted extension' (rather confusingly, it describes these as 'in time').

Some public authorities can take longer to answer requests — schools, the National Archives, armed forces overseas, for instance — so how should that be reported? Then there are the oddities of the deadline. Technically 'working days' excludes all bank holidays across the UK, but do all English public bodies ignore this for the purposes of monitoring? Perhaps they ignore this fact until it proves convenient! At present, different practitioners will take varying approaches to this.

Other practical issues may arise. If a request is withdrawn, should it be counted as though it had received a response? I believed that this was the case, and I took the same approach to requests where clarification had been sought from the applicant.

Particularly where the statistics have been collated by a central body, like JISC or the Ministry of Justice, the deadline for reporting might result in some requests remaining unresolved at the time of reporting. In the government statistics, there is a 'still being processed' column. If a permitted charge is made for requests (e.g. for photocopying), and the fee has not yet been paid, the request will be in limbo and this can be difficult to express in the reported figures. In the latter case, the government excludes such (very few) requests from most of its calculations.

Some public authorities will report on numbers received and answered in a given month, and this can provide a misleading picture given that the two figures don't necessarily relate to the same requests.

Data on refusals has to reflect situations where requests were partially or fully refused. Figures on exemptions applied have to be reported separately, as often public bodies will have applied more than one exemption in the response to a single request.

It can be seen that there are many questions to be considered by practitioners when deciding what and how to monitor. Even where the government has published guidance on monitoring, as in its 2009 summary guidance on publishing FOI data, this has not been followed consistently as most practitioners are unaware of it. There will therefore be significant variation in how FOI Officers record data on FOI requests.

What do the available statistics tell us?

Given all the variables, it might be considered dangerous to base any conclusions on the published FOI statistics. However, there are some clear trends evident.

All the main datasets show a similar picture, and one that most commentators have noted over the last decade. There has been a significant rise in the volume of FOI requests. The quarterly central government statistics covering July to September 2015 reported a 28% rise in request volumes since the first quarter of 2006. JISC report an average number of just 2.8 requests per month being received by universities in 2005, which had risen to 17.7 by 2015 (the rest of the public sector may reasonably wonder why the higher education sector is so voluble in its complaints about FOI!). Nonetheless, the figures demonstrate the same major upward rise in requests over

that period. What's perhaps more notable though is that these datasets appear to show a reverse in this trend over the last year or two.

The 2014 Annual Report from the government reported the first annual decline in request numbers from the previous year. The report for 2015 shows a modest 1% increase, though monitored bodies outside the main government departments saw a small but continued decline in request numbers. Tantalisingly, the JISC figures also show a decline from 2014 to 2015. We might reasonably ask – has the volume of FOI requests reached its peak? It is too soon to say, but it is something that researchers and others interested in FOI will be keeping an eye on over the coming years.

Despite some obvious outliers (in some cases picked up by the Information Commissioner for quarterly monitoring), compliance with deadlines has been pretty consistent across the government and in the higher education sector. Bodies included in the government's figures have on average answered requests within 20 working days around 85-90% of the time for the last decade. Universities similarly have pretty consistently answered requests on time over 90% of the time.

Somewhere around 50-60% of requests appear to result in the provision of all the information requested. Universities report similar statistics to central government when it comes to refusing requests, which is perhaps surprising, though one explanation might be that personal data often appears in even the most innocuous of documents.

The same exemptions are reported as most widely used in all the reports — personal data (section 40), accessible through other means (section 21), future publication (section 22), and commercial interests (section 43). Refusal on cost grounds (section12) is pretty common, but the use of the vexatious provision (section 14) remains much less so.

Conclusion

The monitoring of FOI requests is an important and valuable task for practitioners. It can make the case for additional resources, and demonstrate that a public body is making efforts to comply with its obligations.

Deciding what to report is a significant challenge. Awareness of existing standards is low, so FOI Officers decide this for themselves most of the time. Often they will have had no training in producing or interpreting statistics.

This in turn presents a problem for researchers. If public bodies are not recording FOI requests consistently, how can they be sure that they are comparing like-with-like? At the moment they can't, and the bodies that do currently collate sector-wide statistics are right to include caveats in their reports.

If the Cabinet Office does decide to implement — probably on a non-statutory basis — the FOI Commission's recommendation to require public authorities to publish statistics, the most useful outcome will be standardised instructions to public authorities as to what and how those figures should be compiled. Guidance of this kind, which would most likely be included in the revised section 45 Code of Practice, would help practitioners and researchers alike.

Documents referred to in this article:

Government's FOI statistics going back to 2010
www.pdpjournals.com/docs/88541

FOI statistics prior to 2010
www.pdpjournals.com/docs/88542

JISC Annual Reports
www.pdpjournals.com/docs/88543

The Office of the Scottish Information Commissioner's data portal www.pdpjournals.com/docs/88540

The Ministry of Justice guidance to government departments www.pdpjournals.com/docs/88544

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