

The fall and rise of the publication scheme

Paul Gibbons, aka FOIMan, discusses the publication scheme — ‘the lost duty’

Whenever conversation turns to freedom of information, it tends to revolve around only one of the duties to which public authorities are subject — the duty to respond to FOI requests. That’s the aspect that causes controversy with the public when authorities withhold information. It’s also the provision that many public employees and elected officials complain about, either because they are concerned at the cost of answering requests, or because of worries over the harm that disclosure will cause. An outside observer might reasonably conclude that the Act only obliged public bodies to answer requests for information.

But there is another duty that public authorities are subject to under FOI. They have to make information available through a publication scheme.

Now before you rush to turn the page, please bear with me. I think publication schemes are underrated, and I’m going to attempt to demonstrate their value and why I think they are only becoming more important over the next few pages.

I understand the antipathy. Just four years ago, I submitted evidence to the Justice Select Committee when it was undertaking its post-legislative scrutiny of the legislation, and one of my recommendations was that publication schemes should be scrapped.

I argued, as many have done before and since, that they only existed because the government at the time of the Act’s passage through Parliament did not understand the way that the internet worked. Ministers had assumed that it would be necessary for some sort of physical document to be made available to tell people what they could access without making an FOI request. This failed to take into account the fact that most public authorities, even then, had websites where they made information available. The argument that many, including myself, have made is that public sector websites make publication schemes redundant.

Since then, I’ve changed my mind. Now, I see publication schemes as an essential part of FOI for both the public and for public authorities. Not only do

they make it easier for people to find available information, but as we’ll see, they also provide a tool for public bodies to help manage their FOI obligations, reducing its impact on resources. Publication schemes also play a significant role in meeting other legal requirements.

What the Act says about publication schemes

The requirement to adopt a publication scheme is set out in Part I of the Act, at section 19. That section requires that public authorities ‘adopt and maintain a scheme’, publish information in line with their scheme, and keep it under review. Publication schemes must specify the classes of information that they publish, making clear how they will be published, and must state whether or not they are subject to charges.

Authorities are also expected to regularly review their schemes with ‘regard to the public interest’ in ‘allowing public access to information held by the authority’ and ‘in the publication of reasons for decisions made by the authority’. This is one aspect that I would argue is regularly ignored.

Section 19 goes on to indicate the Commissioner’s powers to review and approve schemes. Amendments made by the Protection of Freedoms Act in 2012 added the responsibility to list datasets that have been disclosed under FOI in authorities’ publication schemes unless it is not appropriate to do so.

Section 20 of the Act enables the Information Commissioner to adopt a model publication scheme for particular classes of public authority. The Commissioner has to give 6 months’ notice if she wishes to withdraw approval for the scheme.

Optimistic beginnings

The myth that publication schemes came about simply as a result of a misunderstanding by ministers is persistent but incorrect. Looking back at the beginnings of FOI very quickly demolishes this misconception.

A few years ago, I made an FOI request for the papers belonging to

the advisory group that was set up by the then Lord Chancellor's Department (now the Ministry of Justice) to assist in the preparations for FOI (ironically, the papers had originally been on the department's website but were then removed). The minutes of the group, which included civil servants, but also representatives of the Information Commissioner's Office, various parts of the public sector, together with the Campaign for FOI and even journalists, make fascinating reading and provide an insight into the focus of preparations for FOI.

When reading these papers together with other documents relating to FOI's origins, the first thing that strikes one is that publication schemes were initially a key part of the government's vision of how FOI would work. Far from being an accident, they were in fact seen as crucial to delivering the change in culture that the new (New) Labour government was keen to achieve.

'Your Right To Know' was the White Paper that set out their plans for the legislation back in 1998. It states:

"Experience overseas consistently shows the importance of changing the culture through requiring active disclosure, so that public authorities get used to making information publicly available in the normal course of their activities. This helps to ensure that FOI does

not simply become a potentially confrontational arrangement under which nothing is released unless someone specifically asks for it.

"We believe it is important that further impetus is given to the pro-active release of information."

The consultation document accompanying the draft Bill commented that:

"These schemes will be much more than a list of what is already published. Authorities will be expected to consider the public interest in making information accessible and in the publication of reasons for their decision making."

In November 2001, the Lord Chancellor, Lord Irvine, announced that publication schemes would be the first aspect of FOI to be brought into force, with a staggered timetable for adoption starting with central government in November 2002, continuing with local government in February 2003, and so on until remaining public authorities had to have their schemes in place in June 2004. The discussions of the advisory group quickly came to focus on publication schemes and what public bodies were doing to prepare to meet this impending new duty.

Amongst these preparations, a number of pilot publication schemes were established to see what lessons could be learnt. The advisory group minutes record the lessons learnt, along with the reactions of those holding authorities' feet to the fire.

Maurice Frankel of the Campaign for FOI was concerned that some of the pilot schemes did little more than list the information already available through the

public bodies' websites. There were calls for the Information Commissioner's Office ('ICO') to clarify in its guidance that schemes should push the boundaries of what was public — not simply confirm existing practice.

The ICO consulted public authorities on their views of how schemes should work. What should constitute a 'class'? Should it be possible to reserve the right to exempt certain

information within a class? The responses informed their first guidance on publication schemes published in 2002.

There was excitement about promoting publication schemes. The minutes of the advisory group meeting of 16th October 2002 even record an attempt, reported by the ICO, to persuade the producers of Radio 4's *The Archers* to get characters to refer to their model publication scheme for local councils. If it happened, it is probably fair to say that this did not capture the public imagination to quite the extent of recent *Archers*' plotlines.

Where did it all go wrong?

Given the government's lofty aims and the enthusiasm of those contributing to the advisory group, we might reasonably ask why publication schemes came to be seen as an unnecessary extra requirement — and one that is regularly flouted. The answer I think was reflected in Maurice Frankel's prescient criticisms of the pilot schemes.

Once the right to know came into force on 1st January 2005, and arguably in advance of that, the attention of public bodies came to be focussed on how to meet the requirement to answer requests. With rapidly increasing volumes of requests, not to mention all the other work public bodies have to carry out beyond FOI, public authorities and FOI Officers had to prioritise. It became easier to pay lip service to publication schemes and to do the bare minimum. Keeping them up-to-date and even pushing the boundaries of what was made public was not a priority.

The publication scheme came to be seen as a rather old-fashioned way to pin down what was being published through an organisation's website rather than an active process of challenging itself to be more open. One later academic study of freedom of information in local government observed that of the local government officials questioned, "most concurred with the view ex-

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pressed by one authority that, in effect, its website represented its publication scheme.” (‘Local Government, Freedom of Information and Participation’, *Freedom of Information, Local Government and Accountability*, p.47)

Model publication schemes

Much has been made of the fact that the ICO struggled to cope in the face of thousands of complaints once the right to make requests began in 2005. Before that though, every publication scheme had to be approved by the ICO, inevitably placing a huge strain on the Commissioner’s staff. Despite this, deadlines for publication schemes were widely met.

However, this experience does seem to have had an impact on the ICO. The advisory group minutes record that they had originally intended to start reviewing schemes sector by sector fairly soon after the right to request information came into force. This would allow new requirements for schemes to reflect lessons learnt from the arrival of the right to know. In the event, publication schemes approved by the Commissioner between 2002 and 2004 were in place until 2009.

Perhaps in the light of this experience, when the ICO did review publication schemes in 2009, it came up with a clever plan. Instead of getting every authority to submit new schemes, the Commissioner took advantage of his powers under section 20 FOIA and adopted a model publication scheme, mandating it

for the whole public sector. Every public authority now had to adopt the Commissioner’s scheme and would need special permission to depart from it. In taking this action, the ICO did away with the need for a labour-intensive programme of approvals and simplified matters for everyone without the need for any legislative change.

The Commissioner’s model publication scheme consists of 7 classes:

- who we are and what we do;
- what we spend and how we spend it;
- what our priorities are and how we are doing;
- how we make decisions;
- our policies and procedures;
- lists and registers; and
- the services we offer.

The ICO recognises that different kinds of public authority will have different kinds of information. Therefore ‘definition documents’ are published for each part of the public sector indicating what information ought to be published under each heading.

The rise of the publication scheme

Thus far we’ve looked at the gradual decline in the publication scheme’s status within the UK’s FOI regime. That, however, was just the start of the story. Now, the publication scheme’s fortunes are on the rise.

Publication schemes received a boost from the formation of the coalition government in 2010. The Protection of Freedoms Act 2012, a cobbling together of wish lists from the two parties in government, included amendments of FOIA. These meant that public authorities not only had to provide datasets in a re-usable form, but also to include disclosed datasets in their publication schemes. Far from being abolished as the second decade of FOI dawned, publication schemes were being given a new role in promoting re-use of information.

Most recently, the Independent Commission on FOI recommended that the ICO should do more to enforce publication schemes and pro-active publication more generally. It made a recommendation to government that the ICO should be better funded primarily in order to facilitate this.

Other recent developments include the widening of re-use requirements across the public sector, and the growth of local government transparency. A well-maintained publication scheme could do a lot to assist public authorities in meeting the new requirements.

Re-use of public sector information regulations

Both the original Re-use Regulations of 2005 and the recent 2015 version have required public authorities to make available a list of information that is available for re-use and explain any conditions. Given that re-use requirements only apply to information that has been published or disclosed through FOIA, it makes perfect sense to use publication schemes to meet this obligation. Using the publication scheme to indicate information available for re-use avoids the necessity of creating and maintaining a separate document.

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**“The
 Commissioner’s
 guidance
 on the model
 publication
 scheme
 confirms
 that it is her
 view that a
 compliant
 FOI publica-
 tion scheme
 guide listing
 charges will
 meet this
 definition.
 If you want
 to charge
 for environ-
 mental
 information,
 put it in your
 publication
 scheme.”**
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Other transparency obligations

Now that public authorities are increasingly subject to other transparency requirements, publication schemes can have a role in supporting those requirements. Information that local authorities have to publish under the Local Government Transparency Code can be listed in the convenient structure of the publication scheme. 'How we make decisions' in the model scheme is the perfect place to promote availability of minutes and papers of council meetings. Similarly, details of how the public can access accounting information under audit rules can be outlined under 'What we spend and how we spend it'.

Publication schemes and environmental information

Whilst not a new development, the Environmental Information Regulations 2004 ('EIRs') provide a further role for publication schemes.

Regulation 4 requires authorities to 'progressively make the [environmental] information available to the public by electronic means which are easily accessible'. A better definition of a publication scheme would be hard to find. In other words, inclusion of environmental information in a publication scheme is likely to ensure that a public body can comply with Regulation 4. Note though that the requirement is to 'progressively' make information available – echoing the requirement at section 19(3) FOIA that is so often ignored.

There has often been confusion over what can be charged for under the EIRs. The ICO has made it clear that both staff time and disbursements can be reflected in charges levied. However, the effect of Regulation 8(1) and 8(8) is that an authority will only be able to charge in any circumstance if it has made 'a schedule of its charges' available. The Commissioner's guidance on the model publication scheme (www.pdpjournals.com/docs/88631) confirms that it is her view that a compliant FOI publication scheme guide listing charges will meet this definition.

Basically, if you want to charge for environmental information, put it in your publication scheme.

Managing the burden

Along with this litany of legal requirements that they can help an authority to meet, publication schemes continue to have a role in helping public bodies to manage FOI.

In my previous article on the subject of ways to manage the burden of FOI (see Volume 12, Issue 4, pages 3-6), I included them as one of those very useful tools. It is worth reiterating that argument here in more detail.

Firstly, as has often been argued, making information pro-actively available may reduce the number of FOI requests. This may well be true in some cases, but there is also a risk that it will provoke more requests from those wanting to dig behind published information. At the very least though, it can make it easier to answer the requests that do come in.

Secondly, public authorities can charge for information in publication schemes. If they intend to do so, authorities are required to publish a schedule of the documents that are only available at charge, indicating what that charge will be, and ensuring that charges are justified, transparent and kept to a minimum. In one celebrated case (*Davis v Information Commissioner and Health and Social Care Information Centre*, EA/2012/0175, 24th January 2013), a charge of £1550 for a bespoke report was viewed as legitimate by the FTT because it had been listed in the authority's publication scheme guide.

Thirdly, inclusion of information in a publication scheme will allow an authority to refuse requests for that information under the exemption at section 21. In most cases, if the applicant expresses a wish to receive such information in a particular format, they won't be entitled to this if the information is 'reasonably accessible' in the format it is published in. This can help authorities to avoid the expense and inconvenience involved in providing information in a particular format as would normally be required in these circumstances under section 11.

Conclusion

Far from being a fossil of a pre-digital age, publication schemes are an essential part of FOI. The original intention was for publication schemes to play an important part in changing the culture of public authorities. This aim was overtaken somewhat by other priorities — not least the other duty to respond to information requests. Nonetheless, they can still perform that important function.

Indeed, that function has been given more urgency by other legislation that have provided new roles for publication schemes. There is more need than ever for public bodies to list in one place the information that they make available, at what cost, and whether it can be re-used.

Finally, in addition to all of this, publication schemes can help FOI Officers and their employers to better manage the impact of FOI and other legislation. This is not a redundant duty, but an essential tool that should no longer be overlooked.

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