
A Practical Guide to the UK Freedom of Information Act 2000

by Sarah Holsen and Jim Amos

October 2004



The **Constitution** Unit

ISBN: 1 903903 35 1

First Published October 2004

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Published by The Constitution Unit
School of Public Policy, UCL
29–30 Tavistock Square
London
WC1H 9QU

Phone: 020 7679 4977

Fax: 020 7679 4978

constitution@ucl.ac.uk

www.ucl.ac.uk/constitution-unit/

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Preface

Three months after the Freedom of Information Act¹ (FoI Act) was passed by Parliament, The Constitution Unit published the first edition of *A Practical Guide to the Freedom of Information Act 2000*. Now, three months before the right to individual access (“right to know”) goes into effect, the Unit has produced a revised edition which is as succinct and easy to use as the original but contains updated material, including case studies and references to recently published, more detailed official advice.

This guide serves as an introduction to implementation and operation of the FoI Act, focusing specifically on its core principles and features, how public authorities should prepare for implementation and what FoI practitioners should do when they receive requests for information. The guide is designed for people who are responsible for or otherwise involved in their authority’s plans to implement and operate the FoI Act. It will be useful to those who need a good overall understanding of the issues and opportunities of FoI, as well as those who want a general introduction to later study of particular areas. It can also be used as an aid in authorities’ access to information training and awareness programmes.

One of the most helpful aspects of this updated edition of the guide is the use of references to other guidance throughout the text. The Information Commissioner’s Office (ICO) and the Department for Constitutional Affairs (DCA) are both developing a range of detailed official advice about how to implement, operate and interpret the Act. This makes the guide compatible with and complementary to this official advice, while providing a more concise and focused view of the key issues that authorities will face.

The revised edition of this guide follows closely on the heels of the Local Government Association’s (LGA) publication of *Delivering Freedom of Information: A Practical Guide to the Freedom of Information Act 2000*, written by Jim Amos. Much of the information is the same in both guides. However, the LGA’s guide was produced specifically to address issues that local authorities will face with the implementation of FoI. Therefore, we recommend that local authorities purchase the LGA guide. Copies can be purchased from LGconnect, LGA Information Centre on 020 7664 3131, fax 020 7664 3030, email info@lga.gov.uk. The LGA website is <http://www.lga.gov.uk>.

We welcome feedback about how this guide can be improved and made more useful. We will update it from time to time taking into account the feedback received, as well as the development of official advice and case law.

¹ This guide is specifically about the UK FoI Act. There is a separate FoI Act for Scotland—Freedom of Information (Scotland) Act 2002—which is very similar to the FoI Act and is enforced by the Scottish Information Commissioner. All references to ‘the Act’ in this guide are to the UK Act, unless otherwise stated.



Introduction

The FoI Act implements one of several policies designed to modernise government and to ensure that decision-making by public officials is open and transparent. The Act should also have an impact upon the way public authorities manage their information and records as well as the way they handle requests for information following implementation in January 2005.

There are a number of reasons the FoI Act is important and demands special attention and training. It will become the central vehicle for policies, processes, and training about openness for the following main reasons:

- The overarching principle is that all information held by an authority is accessible, unless one of the exemptions in the FoI Act applies.
- The Act applies to all written requests for information, whether or not the Act is mentioned by the applicant.
- Over time, the Act is likely to attract greater public awareness of the opportunities and rights of access to information than does the current patchwork of legislation, regulations and policies. This is likely to lead to more requests for information, including some that are contentious.
- In this “Age of the Internet”, and with the implementation of various e-government initiatives, it is expected that information will be published more regularly than before and made available electronically on a more frequent basis. This will, in turn, fuel an increase in the public’s expectations for readily available information.

The Act provides new opportunities for public authorities to engage more fully with their stakeholders and to routinely publish the information they need and want, thereby enhancing their reputation for openness and trustworthiness. However, there are also risks to reputation and to budgets. First, an authority’s performance when publishing information and responding to requests will be easy to compare with that of others. Second, if the state of the records does not allow information to be readily found, the costs of finding that information will be borne by the authority. Finally, if information is refused without justification, the authority will incur additional costs when the applicant makes a complaint or appeals. Thus, a well prepared authority that has planned for implementation by training staff and organising its records management system should be able to enhance its reputation with the public and avoid waste of resources.

The Act can be approached by public authorities in two main ways:

- As yet another piece of legislation to be implemented;
- As an opportunity to review how the authority relates to its stakeholders and make a step change in the quality of its engagement with them with the aim of improving participation and trust and securing business benefit.

Both approaches are necessary. This guide highlights some of the factors that will enable an authority to comply with the Act cost-effectively in a way which will provide greater benefits than minimal compliance.

The FoI Act is being implemented in stages. The requirements for all authorities to operate publication schemes were implemented in phases, the last of which ended on 30 June 2004. Full implementation of all provisions, including the right of individual access, will come into force on 1 January 2005. The Act will apply to all information held at the time a request is made. Therefore it is important that public authorities plan thoroughly for implementation.



How the Freedom of Information Act relates to other legislation

The FoI Act as a framework

The FoI Act constitutes a framework within which all requests for information can be considered. The following aspects of the Act support this view:

- All written requests are FoI Act requests (section 8).
- If other legislation or an EU regulation prohibits the provision of information, that prohibition is upheld by the Act (section 44).
- If other legislation requires information to be provided, that legislation is upheld by the Act (section 78).
- If other legislation or an EU regulation provides discretion not to disclose information, that discretion must be exercised according to the terms of the FoI Act. This will often be subject to the public interest test (section 2).

Authorities also need to consider access rights under the following legislation:

- The Data Protection Act 1998 (DP Act), which addresses requests for personal data;
- The Environmental Information Regulations 1992 (EIRs), amended in 1998, which pertain to requests for environmental information (Note: Revised EIRs will also be in force from January 2005);

Various other subject-specific legislation that applies to, for example, health and safety matters, local government, health and education bodies.

Personal information (The Data Protection Act 1998)

The Data Protection Act 1998² gives an individual the right to obtain a copy of any personal information held about him/her. This is known as the right of subject access. The DP Act also imposes other responsibilities upon those who collect and process personal information, known as data controllers. Data controllers have to comply with the eight data protection principles listed in Schedule 1 of the Data Protection Act.

Experience in other countries that have passed FoI legislation indicates that most requests for information are made by individuals for information about themselves (“subject access requests”). These requests are currently handled under the DP Act and this continues under the FoI Act. The FoI Act provides an absolute exemption for subject access requests. This means that the response to the request in such cases must still be decided under the DP Act.

The FoI Act amends the definition of personal data as far as subject access rights are concerned. Starting in January 2005 there will be a right of access to any information held by a public authority which identifies and relates to a living individual with the sole exception of unstructured manual records relating to personnel and staffing matters. Authorities are not obliged to respond to requests for unstructured manual data (information due to be brought into the scope of the Act for the first time) unless they are given a description of the data along with any information they need to locate the data. The fees that may be charged for this new class of data will be governed by the FoI Act rather than the £10 currently allowed under the Data Protection Act.

² The DP Act is available online at the Home Office’s website. Visit <http://www.hms0.gov.uk/acts/acts1998/19980029.htm>.

Section 40 of the FoI Act states that if someone requests information about himself/herself, this automatically becomes a “subject access request” under the DP Act. If someone requests information about another person, this request must be decided under the FoI Act in accordance with DP Act principles. In practice, this means that information should be disclosed unless deemed illegal or unfair to the data subject, or if an exemption in the DP Act would have applied had the request been made by the data subject.

Section 10 of the DP Act allows data subjects to issue notices to data controllers requesting that they cease processing their personal data or forbidding disclosure of personal information to a third party. One of the effects of section 40 of the FoI Act is that the public interest test must be applied before complying with such notices. The expected outcome of this provision is to prevent collusion between public authorities and data subjects. This could occur, for example, if an elected member issued a Section 10 Notice to a council requesting non-disclosure of information about wrongly claimed expenses.

The organisation primarily responsible for holding the information—the data controller—is also responsible for information processed by a third party, e.g. a pension provider or a contractor with whom a housing benefit administration has a contract.

Applicants are not expected to specify whether they think their request should be handled under the DP Act or the FoI Act. The authority which receives the request needs to determine the correct path. More information about the right to personal information can be found in the ICO’s Awareness Guidance Number 1³.

Environmental information (The Environmental Information Regulations—EIRs)

The Environmental Information Regulations 1992 (EIRs), amended in 1998, currently provide a right of public access to a wide range of environmental information held by public authorities. This includes any information which relates to the state of the land (including water, air, flora or fauna); any activities which adversely affect the environment (including light, noise, and other emissions and nuisances); and any measures which are designed to protect the environment.

These regulations are being revised in order to implement the United Nations Economic Commission for Europe’s (UNECE) convention on access to information and the new EU Directive on public access to environmental information.⁴ They will be brought into effect in January 2005 to coincide with implementation of the FoI Act, just ahead of the official deadline for revised EIRs implementation which is February 2005. Reference to the EU directive is made in section 74 of the FoI Act.

Environmental information is defined very broadly in the revised EIRs. In addition to information which obviously pertains to the environment (mentioned above), plans, programmes, cost-benefit and other economic analyses which relate to environmental information are subject to the regulations. Defined in this way, a large amount of the information held by public authorities could be considered to be environmental, e.g. information relating to roads, traffic, maintenance, land use planning, development control, buildings and estates.

The EIRs are actually aligned quite closely with the FoI Act. Requirements under the EIRs are similar for records management, publications schemes, advice and assistance, and the powers of the Information

³ All Awareness Guidance documents can be found on the ICO’s website at <http://www.informationcommissioner.gov.uk/eventual.aspx?id=77#Awareness%20Guidance>.

⁴ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), EU Directive 2003/4/EC of 28 January 2003.

Commissioner. The Commissioner’s general advice is that, given the similarity between the two pieces of legislation, it is best to adopt a unified approach to the Fol Act and the EIRs, while bearing in mind that there are some important differences. These are summarised in the table below.

The EIRs have fewer exemptions than the Fol Act and the public interest test will apply to all categories of exemption under the EIRs. This means that in some cases environmental information which is exempt under the Fol Act may have to be released under the EIRs because the regulations take precedence over domestic legislation.

If environmental information is made available in accordance with good practice under the processes established for implementing the Fol Act, an authority will normally find itself also in compliance with the revised EIRs. If an authority refuses to provide environmental information, it will need to be certain that the refusal is based upon EIR exemptions, that it has applied the EIR exemptions in a “restrictive way” and that it has applied the public interest test.

Table 1: Procedural differences between Fol Act requests and EIRs

Fol Act	EIRs
Request must be in writing.	Request need not be in writing.
Exemption where cost of compliance exceeds the “appropriate limit” as defined in the Fees Regulations.	No equivalent exemption. However, “reasonable” charges can be made.
Information held on behalf of another person is not included.	All information which is held is included, whether or not it is held on behalf of another person.
Some exemptions are not subject to the public interest test.	All exemptions are subject to the public interest test.
Information which would prejudice commercial interests can be withheld if the public interest in withholding it is greater than the public interest in release.	Where a request relates to information on emissions into the environment, it cannot normally be refused.



Overview of the FoI Act

Which authorities are covered?

The Act applies to all public authorities in England, Wales and Northern Ireland. It also applies to any company which is wholly owned by a public authority. In addition, over 400 bodies are individually named in the Act, including, for example, the Local Government Commission, the Audit Commission and the Local Government Ombudsmen in England and Wales. It has been estimated that the Act applies to over 100,000 public bodies from the largest central government departments to individual NHS general practitioners.

The EIRs apply to all of these public authorities as well as bodies under the control of any public authority which has public responsibilities or provides public services in relation to the environment. This includes, for example, contracted street cleaning services, waste disposal contractors, caterers, vehicle and building maintenance contractors and pest control companies.

The Secretary of State may also designate by order “any person” who appears to be exercising functions of a public nature or is providing services under contract to a public authority subject to the FoI Act (section 5) as a public authority.

Scottish authorities are not subject to the UK FoI Act. They are subject to the Freedom of Information (Scotland) Act 2002, which is very similar to the UK FoI Act and is enforced by the Scottish Information Commissioner. An easy-to-read chart detailing the differences between the UK Act and the Scottish Act is available at <http://www.itspublicknowledge.info/comparativetable.htm>.

Timing of implementation

The Act is being implemented in phases. While the requirements relating to publication schemes were implemented for different groups of authorities between November 2002 and June 2004, individual right to access will come into force on 1 January 2005.

Information made available in two ways

The Act specifies two ways in which information may be made available:

- In response to individual requests (general right of access);
- Through publication schemes approved by the Information Commissioner.

Codes of practice

Sections 45 and 46 of the Act provide for two codes of practice to be issued and periodically revised. The Lord Chancellor is currently responsible for both. They define good practice “desirable” for authorities to follow in the areas described. One of the Information Commissioner’s functions is to promote authorities’ observance of these codes’ provisions.

Access code (section 45)⁵

This code is required to cover the following matters:

⁵ The entire Code of Practice on the Discharge of Public Authorities’ Functions can be found at <http://www.foi.gov.uk/codepafunc.htm>.

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- Provision of advice and assistance to applicants;
 - Transfer of requests from one authority to another;
 - Consultation with anyone to whom the information relates or who is likely to be affected by disclosure;
 - Inclusion of terms relating to disclosure of information in public contracts;
 - Provision of a complaints procedure.

Records management code (section 46)⁶

This code sets out desirable practice ‘for the keeping, management and destruction of the records of public authorities’.

The code itself covers matters such as:

- Responsibility for the records management function;
- The requirement to have a policy statement relating to records management;
- The selection, training and development of staff and their responsibilities;
- Record creation, keeping, maintenance, closure and disposal arrangements;
- Advice about the management of electronic records.

General right of access

The right of access applies to “any person”. This could be an individual or a legal entity such as a company. The Act makes no distinction between a resident, local elector, UK citizen, or citizen of any other country. The requester does not have to give a reason for his/her request.

The right applies to any written request for information which is made to the authority, whether or not the writer makes mention of the FoI Act. A request can be in electronic form. It applies to information recorded in any form that is held by the authority at the time of the request. This includes information which is held by another body on behalf of the authority, e.g. a contractor.

Requests for environmental information do not have to be in writing and under the EIRs all information which is held by the authority, including information held on its behalf and on behalf of others, is potentially subject to the EIRs.

Publication schemes

Publication schemes are a central feature of the Act. They provide an opportunity for authorities to explain to the public and stakeholders how FoI works and applies in practice and proactively make a substantial amount of information available.

The Act requires each public authority to adopt and maintain a publication scheme, approved by the Information Commissioner. All authorities were required to have their schemes approved and operational by 30 June 2004. According to the Act, they must also periodically review their schemes.

Requests and responses

A request can be in electronic form. It must contain the following:

- Name of applicant and address for correspondence

⁶ The entire Code of Practice on the Management of Records can be found at <http://www.foi.gov.uk/codemanrec.htm>.

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- Description of the information requested

Under normal circumstances, public authorities have to respond to requests within 20 working days. If an exemption applies and the authority has to consider the balance of the public interest before deciding whether or not to release the information, a “reasonable” time within which to respond fully is allowed. However, the authority must let the applicant know within the 20 day period that an exemption applies and give an estimate of the date by which a decision will be made. More information about the response time allotted to authorities can be found in the ICO’s Awareness Guidance Number 11.

Advice, assistance and transfer of requests

Public authorities must provide advice and assistance to those who have requested information or who propose to do so. This should be an important element of an authority’s plan to engage more positively with the public in the context of the FoI Act. Guidance on complying with this duty is included in the Access Code (II, 5–15). If an authority has conformed to this code in providing advice and assistance, it will have complied with its legal duty as set out in section 16 of the Act.

The code requires the publication of procedures for dealing with requests. It specifies that public authorities help applicants frame requests and clearly describe the information they are requesting. It explains that appropriate assistance can include an outline of the different kinds of information that might meet the terms of the request as well as detailed catalogues and indexes if available.

If the disclosure of information is refused on cost grounds, the authority should indicate which information could be provided within the cost ceiling. (Note: Under the EIRs there is no provision for refusal on cost grounds.)

Advice and assistance may be an onerous obligation for some authorities. In order to meet it effectively, staff need to be well trained and given access to indexes of the authority’s information resources. It is recommended that authorities develop and publish procedures making clear to applicants how advice can be obtained and what they can expect from the request process. These may already be included in publication schemes.

Provisions relating to the transfer of requests are included in the Access Code (VI, 21–30). These are relevant when the authority does not hold the information requested but knows which authority does. More information about the transfer of information can be found in the ICO’s Awareness Guidance Number 12.

Refusals

A public authority must either provide the requested information or notify an applicant that the request has been refused within 20 working days of receipt of the request. The authority must disclose all information which is not exempt. In some cases, this will involve disclosing some of the information requested and withholding the remainder.

If the authority refuses to disclose any or all of the information requested, it must cite the relevant exemption and state the reason the exemption was applied. If the public interest test has been applied, an explanation of the decision should also be provided.

If the refusal is based on the cost of complying with the request or because the request is judged to be vexatious or repeated, the authority must notify the applicant of this and state the reasons.

When notifying an applicant of a refusal to supply information for any reason, the authority must give the applicant details of the complaints procedure. It must also provide information about the right to appeal to the Information Commissioner for a decision under section 50 of the Act.

Exemptions

There are 23 exemptions listed in Part II of the Act. Other conditions under which information may be withheld also exist. For example, if a request is considered vexatious or if the cost of finding and retrieving the information is above the “appropriate limit” as set out in the Fees Regulations, the authority may refuse to release the requested information.

There are two types of exemptions: “Absolute” and “Qualified”. A complete schedule of all the exemptions is provided in Appendix B. Those expected to be used most often are described below.

Absolute exemptions

If an absolute exemption applies there is no need to test the decision against the public interest as set out in section 2. The authority may simply refuse to provide the information citing the exemption and the reasons it applies. However, the fact that an absolute exemption applies does not mean that an authority should refuse to disclose the information in every case. It means that disclosure is not required under the FoI Act. In the event of an appeal against absolute exemptions, the Information Commissioner may rule on whether the exemption was claimed properly but not require release if it was.

There are eight exemptions which are wholly or partly “absolute”. These are defined in Part 1, section 2(3) of the Act. The following five are the exemptions expected to be used most often by authorities:

Information accessible to the applicant by other means (section 21)

Although this is an exemption, it does not mean that the information is withheld from the applicant. The exemption simply states that the authority does not have to respond to an individual request for information if the information is already available in the public domain. Instead, the authority can direct the applicant to the information, normally found in its publication scheme. The authority may need to advise and assist the applicant to access the published information. More information about this exemption can be found in the ICO’s Awareness Guidance Number 6.

Court records (section 32)

This includes information in documents served for the purposes of legal proceedings, filed with a court, or held by a person conducting an inquiry or arbitration. This exemption does not change the normal rules for obtaining court records. More information about this exemption can be found in the ICO’s Awareness Guidance Number 9.

Personal information about the person making the request (section 40)

This section acts as a gateway to the DP Act, which applies to such requests. The FoI Act exemption does not mean that the authority does not have to comply with the request; rather, it requires that a decision on disclosure be made under the provisions of the DP Act. As stated in the section on personal information on p 9, this subject is covered in more depth in the ICO’s Awareness Guidance Number 1.

Information provided in confidence (section 41)

This exemption applies if the release of information would amount to an actionable breach of confidence at the time the request is made. Applying this exemption requires that the authority understand how to apply the current common law test for a breach of confidence, which includes a public interest test.

The current Access Code states that a public authority should only accept information in confidence from third parties if it is “necessary” to obtain that information in connection with one or more of the authority’s functions (IX, 47). An authority would be vulnerable to criticism by the Information Commissioner if it agreed to receive information “in confidence” but was not justified in doing so. It would be prudent for an authority to plan to comply fully with the Access Code and require sound reasoning for accepting duties of confidence. More information about this exemption can be found in the ICO’s Awareness Guidance Number 2.

Prohibitions on disclosure (section 44)

This applies to information the disclosure of which is prohibited by any legislation or would be incompatible with any European Community communication or would be considered contempt of court.

Qualified exemptions

If an authority decides that one or more qualified exemptions applies in a particular case, it must release the information unless it concludes that, in all circumstances of the case, the public interest in withholding outweighs the public interest in disclosure. Following are the exemptions expected to be used most often by authorities. A description of the public interest test can be found on p 19.

Information intended for future publication (section 22)

This applies when the authority plans to publish the information in the future (generally in its publication scheme) until which time it is reasonable to withhold the information.

Investigations and proceedings conducted by public authorities (section 30)

This exemption covers information relevant to criminal investigations and proceedings and information obtained from confidential sources for criminal or civil proceedings.

Law enforcement (section 31)

Section 31 applies to a wider range of investigations and proceedings than those covered by section 30—information which would prejudice the prevention or detection of crime or affect the assessment or collection of any tax or duty, or which relates to regulatory and enforcement activity.

Prejudice to the effective conduct of public affairs (section 36)

This exemption can only be exercised by a “qualified person” defined as a Minister of the Crown or a body or person explicitly authorised by a Minister. For most authorities outside central government this exemption can be employed only after a Minister of the Crown has authorised the authority or an officer of the authority as a “qualified person” for the purposes of this section. Currently there is no information about the intentions of Ministers in this matter. Consultations are taking place on the subject of the nomination of “qualified persons” and a policy statement will be issued prior to implementation.

Health and safety (section 38)

This exemption applies to information which would or would be likely to endanger the physical or mental health or safety of an individual if disclosed.

Environmental information (section 39)

This section operates as a gateway to the revised EIRs. The revised EIRs will define a disclosure regime for environmental information that is marginally more open than that defined in the FoI Act. Access to environmental information is considered in more detail on p 10 of this guide.

Personal information concerning a third party (section 40)

In general, requests for another individual's personal information will be dealt with under the FoI Act. Disclosure should not be made if this would breach any of the data protection principles contained in the DP Act. Further details about requests for personal information can be found on p 9 of this guide and in the ICO's Awareness Guidance Number 1.

Legal professional privilege (section 42)

This exemption applies when a claim to legal professional privilege can be maintained in legal proceedings. While information relating to ongoing litigation will rarely be disclosed, there may be a public interest in disclosing general legal advice, e.g. about interpretation of a statute. More information about this exemption can be found in the ICO's Awareness Guidance Number 4.

Commercial interests (section 43)

This exemption applies to trade secrets and to information the disclosure of which 'would or would be likely to prejudice' the commercial interests of any person. This exemption is relevant to most commercially sensitive information held by local authorities. First, it must be established whether the information is a trade secret or whether prejudice would be caused. If either test is satisfied, the authority must then apply the public interest test.

Much of the commercial and contract information authorities hold will have been obtained from third parties. The Access Code (VII, 31–40) includes provisions for consultation with third parties when information which could cause them prejudice is requested. The release of such information has been highly contentious in other countries. Careful implementation of the Access Code combined with advice and information to third parties as described on p 26 will help ensure easier operation of the Act. More information about this exemption can be found in the ICO's Awareness Guidance Number 5.

Duty to confirm or deny

Most exemptions in the FoI Act include a provision under which the authority can refuse to confirm or deny that it holds the requested information. This provision applies if the simple act of informing the applicant that the authority holds the information would amount to disclosure of the information to which the exemption applies. For example, if someone were to request 'information relating to the director's breach of employment contract', the authority could refuse to confirm or deny that it exists.

In cases where this provision is included in exemptions subject to the public interest test, the test must be applied in deciding whether or not to 'confirm or deny' that the information requested is held.

The public interest test

If a qualified exemption applies to a request, the authority will have to release the information unless the balance of the public interest supports the maintenance of the exemption.

The public interest test in section 2 of the FoI Act provides that the authority must release the information unless, ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’. This requires the authority to make a judgement about the public interest.

In the Introduction to the Freedom of Information Act 2000, the Information Commissioner lists the following public interest factors that encourage the disclosure of information:

- Furthering the understanding of and participation in the public debate of issues of the day;
- Promoting accountability and transparency by public authorities for decisions taken by them;
- Promoting accountability and transparency in the spending of public money;
- Allowing individuals to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions;
- Bringing to light information affecting public safety.

Similar or identical factors can be found in other countries’ case law and some useful insights can be gained from looking at the ways the public interest test has been applied abroad. In his 1999 report, the Information Commissioner in Ireland weighed the public interest in a number of his decisions:

- In a case brought by a newspaper relating to the expenses paid to members of the Irish Parliament, he decided that the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy in relation to details of expense claims.
- In a case brought by vehicle suppliers to the Government, he decided that the public interest in terms of openness and accountability of disclosing tender prices outweighed the possible harm to those who drafted the tenders.
- In a ruling on a request for a list detailing companies in which jobs were at risk, he found that the public interest favoured withholding the information.
- More information about the public interest test can be found in the ICO’s Awareness Guidance Number 3 and in The Constitution Unit’s publication *Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000* by Meredith Cook.⁷

Complaints

The Access Code (XII, 52–63) specifies that each public authority should have a complaints procedure in place for dealing with complaints about its publication scheme, the way a request is handled or the outcome of a request. The Code also details the requirements for dealing with complaints. This process is designed to assist people who believe that their request has not been properly handled or are otherwise dissatisfied with the outcome of their request. These requirements include:

- When communicating any decision relating to a request, public authorities are obliged to notify the applicant of his/her rights of complaint.
- Any written reply from an applicant expressing dissatisfaction with an authority’s response to a request should be treated as a complaint. This even pertains to cases in which the applicant does not state his/her desire for the authority to review the decision.

⁷ *Balancing the Public Interest* and other publications produced by the Constitution Unit are available for purchase on the Unit’s web site. For more information, please go to <http://www.ucl.ac.uk/constitution-unit/foidp/publications.php>.

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- The review of the decision should be handled by a person who was not party to the original decision.
 - Complaints should be acknowledged and the complainant should be informed of the authority's target date for determining the complaint.
 - If a complaint is upheld and information must be disclosed, disclosure should take place as quickly as possible.
 - If a complaint is upheld indicating a failure to follow the proper procedures in considering a request, the authority should apologise for this lapse and indicate how the problem will be remedied.
 - If the outcome of a complaint is that the initial decision to withhold information is upheld, the applicant should be informed of his/her right to apply to the Information Commissioner and be given details of how to do this.
 - Each authority is required to publish its target times for determining complaints and information on how successful it has been in meeting those targets. A system to monitor complaints should be established in order to review and, if necessary, amend procedures for dealing with requests where such action is indicated by the outcomes of complaints. Overall the complaints system provides important feedback to assist an authority to monitor its performance and see what it needs to do to improve its level of service.

Charges

An authority will be able to charge a fee for dealing with requests for information. Fees will relate only to individual requests for information, however. They will not apply to charges which an authority can make for information provided in accordance with its publication scheme.

Any fees charged must be consistent with the FoI fees regulations, except where other legislation gives the authority the power to charge for disclosing the information. Requests made for environmental information, for example, will be subject to a different fees regime. Both FoI and EIRs fees regimes are permissive and do not require that fees are charged.

At the time of publication of this guide, the official FoI fees policy was still under review. A formal decision is expected to be announced in October 2004. Public authorities are encouraged to periodically check the DCA's website for updates on the policy and, in the mean time, develop their own policy allowing enough flexibility for revision in order to comply with the official decision once announced.

Role of the Information Commissioner and Tribunal

The Information Commissioner

The Commissioner is an independent officer who reports directly to Parliament. He plays the central role in ensuring compliance with the Act and giving the public information about the Act. His duties include:

- Promoting the observance of good practice by public authorities, requirements of the Act and provisions of the codes of practice;
- Providing information to the public about the Act;
- Considering complaints from applicants;
- Reporting annually to Parliament on the exercise of his functions under the Act.

His powers under the Act include:

- Serving a decision notice on an authority which, in his estimation, has failed to comply with the Act in a number of specified ways, including failure to communicate information as required by the Act. A decision notice must specify the steps which the authority must take to comply. This could include the release of information an authority had decided to withhold;
- Serving an information notice requiring a public authority to provide him with specific information;
- Serving an enforcement notice if he is satisfied that a public authority has failed to comply with any of the requirements of Part 1 of the Act;
- Approving and revoking publication schemes;
- Giving advice, issuing reports and, with the consent of any public authority, assessing whether that authority is following good practice. (With the consent of the Secretary of State, the Commissioner may charge a fee for services under this section of the Act.)

There will be cases in which an authority does not release the information requested and the applicant consequently exercises his/her right to file a complaint. Provided that the individual has exhausted the local complaints procedure, and with the exception of frivolous or vexatious complaints, the Commissioner will make a decision which could be to require or refuse disclosure. It is expected that both parties will be given the opportunity to agree on a preliminary decision notice leading to the withdrawal of the complaint. Decision notices issued by the Commissioner are binding and failure to comply is potentially punishable as a contempt of court unless there is a successful appeal to the Information Tribunal.

In most cases, upon receipt of a complaint the Commissioner will require the public authority to provide him with a copy of all internal documentation setting out the reasons for the refusal to disclose, copies of relevant internal procedures (for example, a schedule of charges to be made for responding to requests), and a copy of all the information which has been withheld. Authorities are encouraged to volunteer this information to the Commissioner to enable him to carry out a swift determination of complaints.

The Commissioner has the power to issue information notices placing authorities under a statutory duty to provide him with the relevant information. Although these can be appealed via the Tribunal, as with Decision Notices and Enforcement Notices non-compliance is potentially punishable as contempt of court.

The Information Tribunal

An Information Tribunal is set up by the Act, which also takes on the role formerly taken by the Data Protection Tribunal. An applicant or public authority may appeal to the Tribunal against a decision made by the Commissioner. There is no right of appeal for third parties. The Tribunal has the power to allow or

dismiss an appeal or to substitute a notice that could have been served by the Information Commissioner. There is a further right of appeal from the Tribunal to the High Court but this can only be made on points of law.

In conclusion, there are four tiers of appeal for dissatisfied applicants:

- The authority's internal complaints;
- The Information Commissioner;
- The Information Tribunal;
- The High Court (on a point of law).

Foundation for successful implementation and operation of the Act

Senior management commitment and policies

An organisation's effectiveness in complying with and gaining benefit from the Act depends heavily upon senior management's commitment and ongoing involvement with FoI request response procedures. There is considerable value in an organisation clarifying for its staff and stakeholders why implementing FoI positively has benefits for the authority. The FoI Act provides an opportunity for authorities to engage more fully with stakeholders and win greater support and understanding for their plans and policies.

This commitment can be reflected in the way responsibility for implementation is allocated, in the structure and budget for implementation, and in the attention given to communication with stakeholders. Each of the following items defines vital areas which need to be addressed as part of the overall FoI implementation plan.

Records management

Good records management is essential to the effective management of any organisation. The Lord Chancellor, as required by the FoI Act, issued the Records Management Code (section 46) and authorities are expected to comply with this code.

In essence, compliance requires an authority to know what information it holds, where it is held and how to access it in order to respond to a request. The code should also stimulate a review of policies for the retention, disposal and destruction of records.

The National Archives (formerly the Public Record Office) have published a number of model action plans for developing a records management compliant with the Records Management Code⁸. The National Archives also provide a detailed set of standards and guidance about all aspects of records management, including the management of electronic records. Information about records management can also be found in the ICO's Awareness Guidance Number 9.

Publication scheme—regular review and update

The Act requires an authority 'from time to time to review its publication scheme' (section 19). The Access Code (XII, 60) includes a requirement that authorities have procedures in place 'for monitoring complaints and for reviewing, and, if necessary, amending, procedures for dealing with requests...'

Since the initial schemes became operational, some authorities have become concerned about their ongoing management and development. In this context it is helpful to look again at the potential benefits to an authority of a positive approach to their schemes. These benefits are identified in three main areas:

- Savings in cost and time: authorities do not have to send an applicant information which is reasonably accessible in accordance with its approved publication scheme.
- Reputation: an authority which publishes the information its stakeholders want in a way that is clear and easy to access may expect to gain or enhance a deserved reputation for openness and professionalism.

⁸ For more information about the National Archives' model action plans for records management, please see <http://www.nationalarchives.gov.uk/policy/foi/>.

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- Avoidance of mistakes: a systematic management process can be applied to decide which information should be published. By comparison, individual requests must be addressed without delay so as to meet the timescale required by the Act, normally 20 working days. Requests may come at a time when there are other pressures on key staff or during periods of leave.

A review of an authority's publication scheme should address the following questions:

- Is it easy for people who want information to identify what is included in the scheme and to understand how to access it? If not, they will require help and assistance or may make otherwise unnecessary individual requests.
- Should more classes of information be added to the scheme before January 2005 with the aim of further reducing potential individual requests?
- Is a system in place for the regular review and updating of the publication scheme? Such a system will enable an authority to respond to changes in the pattern of requests or a surge of requests about a particular topic by placing the information requested in its publication scheme.

Organisation responsibilities

This should cover the nomination of the responsible senior officer, allocated staff, budget and terms of reference, including timescales. One important question to be considered is how the authority can ensure effective implementation during the first year of operation.

Recording and monitoring of requests

The only formal requirement in this area relates to the recording of complaints and their outcomes. This is outlined in section XII of the Access Code. However, it is in an authority's interests to record and track requests from the beginning because:

- Records which provide evidence of what was requested and when and how the request was handled are essential if an appeal is made to the Information Commissioner;
- An authority can monitor the relationship between the publication scheme and individual requests if reliable and useful statistics are collected;
- Aggregate information and examples of information released are evidence of the authority's increased openness and compliance with the legislation;
- Properly maintained records are vital to the proper handling of a complaint either within the authority's own process or through an appeal to the Information Commissioner. A complaint could relate to an alleged failure to comply with any aspect of the Act, including timescales, charges, adequacy of the advice and assistance, refusal to accept that the information is not held or refusal to provide the information.

When a complaint is received, the staff member considering the complaint needs basic information to enable him/her to assess it. Necessary data include who made the request, to whom and when the request was made, what content was requested, and what happened to the request. Information of this type is essential and should be recorded even before it is known whether or not a complaint will be made.

The vast majority of requests reflect the everyday business of the authority and will be easily satisfied. There is no need to add an expensive and bureaucratic process to respond to requests for leaflets, brochures and information intended for use by the public.

There are a number of possible criteria to use when deciding the policy on how requests should be recorded. These include:

Requests which the first line of the organisation are not able to satisfy and are passed to the specialist Fol resource⁹;

- Requests which mention the Fol Act, DP Act, EIRs, or any other legislation;
- Requests which have elements of “complexity”:
 - A large volume of information is requested;
 - A consultation is necessary;
 - More than a standard fee will be charged;
 - A refusal may need to be considered.

The DCA has developed monitoring recording requirements for central government departments. These can be found in Appendix E of DCA’s *Generic User Requirements Specification for IT Systems to Manage Freedom of Information and Environmental Information Regulations Enquiries*¹⁰.

Key processes

Authorities need to develop, implement and subject a number of processes related to Fol compliance to a regular review of their value and effectiveness. These include:

Handling of requests

The outline process chart provided on p 30 identifies the 10 main processes needed and the linkages between them. These are:

- Initial receipt of requests
- Advice and assistance
- Receipt by specialist Fol resource
- Easy/fast track process to release
- Complex—part A—preliminaries
- Complex—part B—collect and consult
- Complex—part C—review exemptions
- Public interest test process
- Refusal process
- Release process

Handling of complaints (p 19)

Feedback and updating of publication scheme (p 23)

Recording and monitoring of requests (p 24)

Stakeholder engagement

Processes for gaining a regularly updated understanding of stakeholders’ needs and wants are important to the effectiveness of an authority’s Fol compliance strategy. The application for approval of the publication scheme require details of ‘exercises, consultations and initiatives’ carried out in order to assess what information is of interest to the public.

⁹ An Fol resource is an employee who has been trained and assigned to deal with Fol requests. Though the person may have other duties, handling Fol requests is one of his/her specific tasks.

¹⁰ <http://www.dca.gov.uk/foi/map/gus-v4-appe.pdf>

An essential element of the correct handling of requests for information is understanding what stakeholders need, want, and are likely to request. This information will change over time and there may be sudden unpredicted demands. However, the ability to prepare, either by enhancing the publication scheme or by additional training of staff in key areas, will enhance the authority's ability to comply with the Act in a manageable and economical way.

An understanding of stakeholders' needs and wants will assist in gauging what people might request. It is recommended that senior managers within the authority draw up a list of questions they expect, including problematic ones and ones that will likely be refused. This list of questions could be used for a "dry run" of the systems and processes before implementation.

Advice to third parties

A significant portion of the information held by authorities will have been received from third parties or could affect those parties if released. Examples include information submitted in relation to contracts, development proposals and information held for licensing and regulatory purposes. In many cases, in line with the provisions of the Access Code it will be necessary to consult third parties before making a decision to release or withhold such information.

Many of the third parties potentially affected by the FoI Act, especially small companies, may not be aware of the Act's implications. It would be good practice to advise them on the most relevant aspects. These include:

- Making them aware that all the information they have provided and provide to the authority in the future will be subject to the Act;
- Advising them how to mark and bring to the authority's attention information provided to the authority which they believe would prejudice their interests if released;
- Cautioning them that simply marking information with words such as "commercial in confidence" only alerts the authority that an exemption could apply under the FoI Act. The authority will need to decide, for example, if a duty of confidence would apply or whether a release 'would or would be likely to prejudice' their interests;
- Informing them of the relevant terms of the code of practice when they propose a confidentiality agreement or that a duty of confidence should apply to particular information so that they make such claims in line with the requirements of the code;
- Recommending that they ensure that the authority has up-to-date contact details for the person at their organisation who will respond to requests for consultation made by the authority. They should also be informed that they will need to respond quickly or the authority will take its decision without their input.

Implications of the DP Act and information about staff

Requests for information may include those for personal information about public officials and staff, e.g. names, job functions and contact details relating to their job. It is sometimes thought that such information is exempt under the DP Act. This is incorrect. The focus of the DP Act is upon the prevention of damage or distress to an individual acting in a personal or private capacity. Information about an individual acting in an official or work capacity should not normally be withheld unless, for example, there is some risk to the individual concerned.

If this has not yet been done, it would be good practice to develop and make available to all staff a policy about the circumstances in which staff details will be released or withheld. This should include the process for staff to follow if they believe information about them should be withheld.

Guidance documents for staff, staff training and awareness

All the authority's staff who will handle requests from the public need guidance and training. Those who will receive the more complex requests (the central FoI resource, in particular) require more detailed guidance and training. However, awareness training should be given to all members of staff, especially senior officers and managers who need to have a reasonable level of awareness of the FoI Act in order to understand its implications and importance.

Training plans for staff and management should be considered in light of the fact that the Act is intended to bring about a substantial change of culture within public authorities and to achieve a much more positive attitude towards release of information to the public. Authorities can take advantage of the need for training to ensure compliance, to promote their policies, to engage more fully with the public and to further this culture change.

Guidance for the public

The Information Commissioner has a duty to promote the Act to the public. The Act applies to a very wide range of public authorities. Therefore, it is reasonable to expect that the public, press, business and campaigning groups will become familiar with its features and how to use it.

An authority may find it worthwhile to take an active role with its stakeholders to explain its policy and practice with regard to openness and to promote how they may most easily approach the authority for information. This could be a key element in a wider policy to engage more fully with stakeholders.

Networks and sources of advice

One of the biggest sources of help to FoI practitioners, especially in the first few months after implementation, will be other practitioners. Using networks to discuss cases, obtain and give advice and exchange information will improve authorities' effectiveness and efficiency in handling FoI requests. The DCA discusses the use of networks in more detail in its Model Action Plan¹¹, offers assistance in setting up national networks and encourages the establishment of local networks.

¹¹ <http://www.foi.gov.uk/map/modactplan.htm#part7>



Handling requests

The Act specifies the essential requirements relating to the handling of a request. These include:

- The request must be in writing and include sufficient contact information so that the authority can reply. Note that requests made under the EIRs do not need to be in writing. However, it would be good practice to seek written confirmation of each request in order to ensure that there is no misunderstanding;
- The timescale for response is normally 20 working days;
- When the applicant expresses a preference for the information to be communicated in one of a number of forms described in the Act, the authority is required to comply 'so far as is reasonably practicable' (section 11);
- A duty to provide advice and assistance (section 16).

The process chart on the following page illustrates the 10 main processes which are required to handle a normal range of requests from receipt to release of the information or refusal to disclose. It is assumed that related processes are available to handle subject access requests under the DP Act and those areas where there are differences between the FoI Act and the EIRs.

Notes relating to the process chart

1) Initial receipt of requests

Requests for information can be sent to any part of the organisation. Most authorities already encourage the public to approach a central help or information point when they are seeking information. The vast majority of requests will reflect the normal business of the authority. These are easily satisfied and there is no need to add any additional process or bureaucracy to handle these simple requests. Examples are requests for leaflets, or guidance on which department to approach.

People dealing with requests for information need to be trained to distinguish between different types of requests. They should be able to recognise the kind of FoI Act requests which should be directed to the FoI resource, which to the authority's FoI Act publication scheme and which to the advice and assistance unit. This training should also include how to recognise requests for environmental information that should be transferred to the FoI resource.

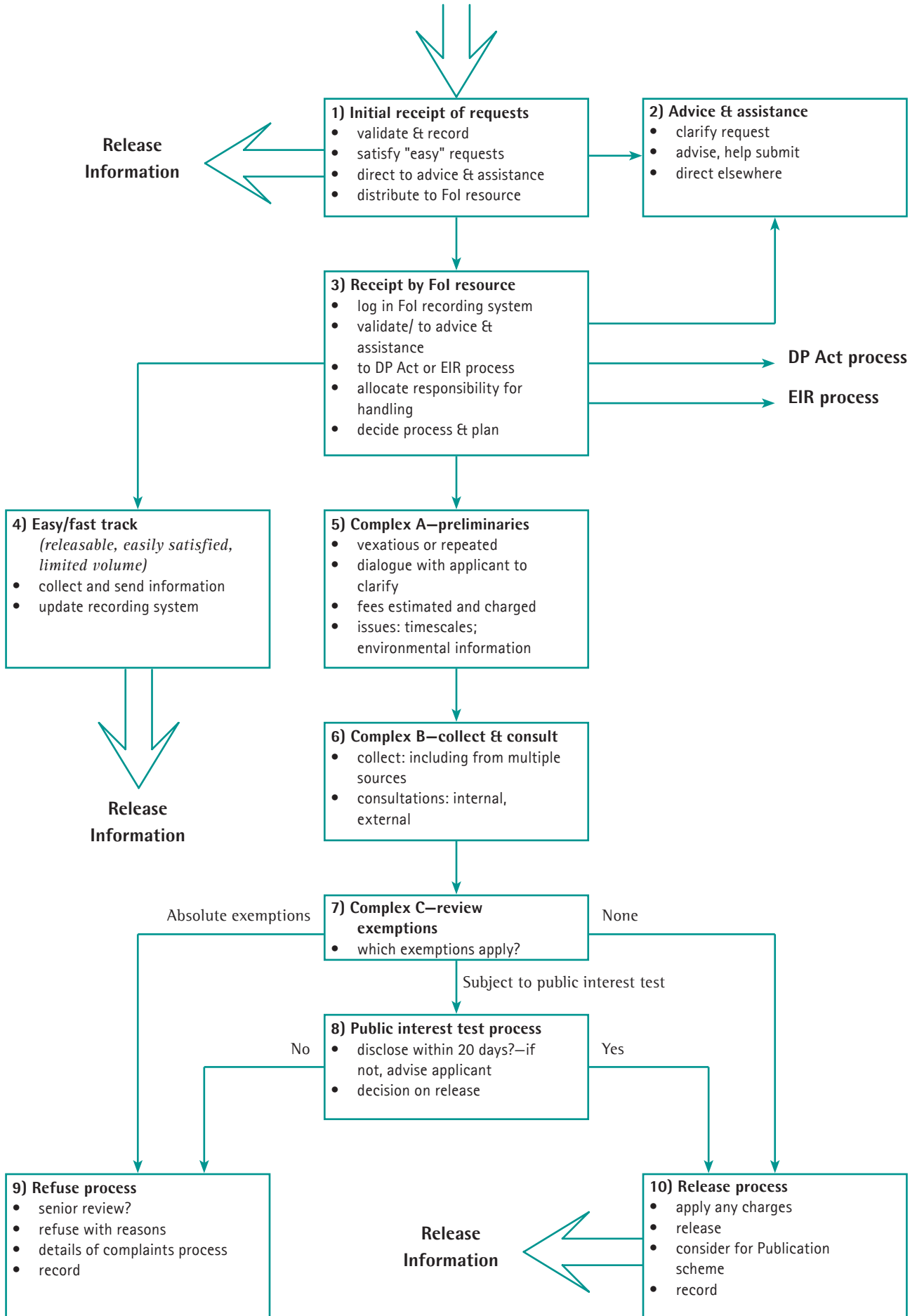
2) Advice and assistance

There is an obligation to provide advice and assistance to applicants when appropriate. The process needs to comply with the Access Code and be supported by policy decisions, e.g. with regard to the handling of languages. The authority must handle the question of transferring requests if the information is not held by the authority, whether in part or in its entirety, as part of advice and assistance or as part of the FoI resource's response process.

3) Receipt by FoI resource

The volume of requests received by the FoI resource should be relatively small compared to the total number received by the authority. However, they may cover a wide range of complexity levels—from very easy to satisfy to very difficult.

Chart: Handling requests under the Fol Act—key processes



All requests received by the FoI resource should be logged and recorded from receipt to completion. The initial tasks are to validate the request, direct it to advice and assistance or the DP Act or EIR process, and decide whether it should be handled using the fast track or complex request process.

Responsibility for handling each request should be allocated to the individual who decides which process should be applied and manages the process through to completion. In many cases this will be the FoI resource but it could be allocated to any trained member of staff.

Transfer to DP Act process

This process should be applied to all requests for “subject access” through which the applicant seeks information about him/herself. For all practical purposes, records which contain personal information, with the exception of unstructured records relating to personnel matters, should be regarded as potentially releasable under the DP Act.

Transfer to EIR process

Requests for environmental information may be transferred to the EIR process at this stage. However, according to the way the authority has chosen to handle such requests, they could progress through the remainder of the FoI process as long as the request is clearly identified as one for environmental information and the differences in requirements are handled properly.

4) Easy/fast track process

This process recognises that many requests raise no issues, are easily satisfied and require minimal processing. If a large number of such requests are being handled via this process, it would be useful to do the following:

- Review the training and processes which apply to the initial receipt of requests with a view to handling more of these requests via this process;
- Consider whether some of the information requested should be included in the publication scheme.

5) Complex A—Preliminaries

It is useful to resolve some preliminary matters before incurring the costs of information collection, undertaking consultations and reviewing exemptions. If it is possible that the request might be considered “vexatious” or “repeated”, these questions should be resolved first.

If the requester has not made his/her request clear or is asking for a large quantity of information, the cost of which could exceed the fees limit, it would be valuable to discuss this with the applicant. (Note: This is formally “advice and assistance”—see step 2 on p 29). This does not mean that the FoI resource should ask the reason for the request, but rather that he/she should establish what is really wanted, calculate whether it is within the cost limits¹² or what the applicant is prepared to pay, and decide whether, if subject to consideration of exemptions and the public interest, it could be provided. This may require an exchange of correspondence or telephone calls with conclusions confirmed in writing in order to confirm understanding about the precise terms of the request.

The objectives of this part of the process are a clear understanding of exactly what has been requested, agreement about any costs which may apply and a plan with timescales for the rest of the process to its

¹² There is no cost limit for environmental information. If the authority has a policy to comply, as far as it reasonably can, with all requests and apply the charges for requests beyond the ‘appropriate limit’ defined in the FoI Act Fees Regulations, then charges for FoI and EIR requests could be the same.

conclusion. At this stage it might become clear that a public interest test will be required and that more than 20 days will be needed to complete it. If so, a notice should be given to the applicant with an estimate of the planned timescale for a decision on release. In addition, depending on the authority's policy and whether a significant fee is likely to be required, the fee can be charged to the applicant and collected before any substantial effort is undertaken.

6) Complex B—Collect and consult

The information should be collected from wherever it is held within the organisation. In some cases, this will involve photocopying documents but increasingly it will involve accessing information held in electronic form.

When consultations are required they need to be handled to short and planned timescales. These can be of two types:

- Internal, where the officers who best understand the issues are consulted, e.g. procurement officers in relation to contract information or finance officers in relation to accounting information. The purpose is to understand whether one or more of the exemptions might apply as well as the nature of any likely “prejudice”;
- External, where third party suppliers of information, or people and organisations who might be affected by release of the information, are asked whether they believe they ‘would or would be likely’ to be prejudiced by release in any way and, if so, why and how.

In both cases, when the party confirms that prejudice might be suffered it is important to establish to which specific parts of the information this applies so that removal (redaction) of only that part of the information can be considered. It is also important to establish whether an explicit or implicit duty of confidence applies to any of the information. If so, the third party to whom such a duty is owed should be asked if they agree to release.

7) Complex C—Review exemptions

A systematic consideration of the exemptions which might apply should be undertaken. If a number of exemptions apply, there may be no need to consider them all in detail but care should be taken to consider the main ones. In the past, the Ombudsman has criticised organisations that come forward with new exemptions after he has ruled that the one presented does not apply. It would be reasonable to expect the Information Commissioner to do the same.

If it is clear that one of the absolute exemptions applies, the request should be passed to the refusal process after considering whether redaction would enable some of the information to be released. If the exemption to be considered is subject to the public interest test, the request moves to the public interest test process. If no exemptions apply, the request is passed to the release process.

8) Public interest test process

The first matter to address is the timescale required to complete this process. If more than 20 days from receipt of the request is needed and, if this has not already been done, notice should be sent immediately to the applicant.

For more detail on this process see p 19. Once it has been completed and appropriate redactions (removals) have been done, the request should be passed to the release or refusal process.

9) Refusal process

Authorities may wish to adopt a policy to define which type of requests can be refused at which level in the organisation. This could be combined with a policy to review all refusals of a certain type at senior level to ensure consistency and that they have support of senior management.

Refusal should be communicated formally to the applicant and include details of his/her rights to complain. The statement of refusal should include reasons and be handled in conformance with the Access Code (XI, 50–51). Detailed records of the refusal and reasons should also be maintained and reported in conformance with this code.

10) Release process

Any estimated fees should be collected unless this has already been done. In general, an authority will expect to collect any significant fees before engaging in the task of collection and retrieval of the information as explained in step 5 on p 31.

Information that is released should be recorded and considered for addition to the publication scheme. This can comprise both the publication of the request and information supplied in full or in summary form and consideration of whether to include information of this type in the scheme in the future.

Other areas relating to the handling of requests

Communication with the applicant

When the request is unclear or requires that a large amount of information be considered for release, it can be helpful both to the applicant and the authority to converse and establish whether what the applicant wants is both deliverable and affordable.

The Information Commissioner in Ireland has reported that a common problem is the amount of time wasted because what the applicant wants is not understood. It may be that a friendly telephone conversation will turn a problematic request into one which is easy to satisfy and meets the applicant's needs. However, the applicant should not be pressed for the reason he/she wants the information. Sometimes a request for information is used as a way to get attention for a grievance. When the applicant volunteers that this is the case, addressing the grievance may be the most satisfactory solution.

Redaction of documents

The FoI Act provides a right to information, not to documents. This means that if a lengthy document contains some information which is properly exempt, the response cannot be to refuse the document as a whole.

Removing (redacting) exempt information from the document while leaving in information that is useful to the requestor should be done whenever possible. It is important, in these cases, for the authority to keep records of the original document, the redactions and the reasons for each redaction. This will prove helpful when presenting the case to the Commissioner in the event of an appeal.



High volume requests and areas likely to be contentious

There will be categories of information that make up a large percentage of requests and topics faced by authorities that require more time and effort to satisfy than others. One main area that will see a high volume of requests is personal information. This is explained in detail in The Constitution Unit's *Practical Guide to the Data Protection Act* by John Woulds. Other areas of high numbers of request and potential difficulties in responding are described below.

Commercial and contract information

Requests for commercial information may be contentious and large in number. In many countries, requests for information of commercial value have been the largest or second largest category in terms of volume. Examples include requests for information about:

- Public contracts and their performance;
- Public grants;
- Licences granted, the conditions which apply and any periodic reports provided;
- Details of submissions made in consultation exercises;
- Regulatory activity.

While a number of possible exemptions could apply to this information, the exemptions most likely to apply are:

- Information provided in confidence (section 41—see p 17)
- Commercial interests (trade secrets and prejudice to commercial interests) (section 43—see p 18)

Reports and advice in sensitive policy areas

Reports and advice from experts in sensitive areas of policy are exempt if they relate to the formulation of government policy (section 35), or 'would or would be likely to prejudice' the effective conduct of public affairs (section 36—see p 17).

Section 35 is a qualified exemption which applies to government departments and the National Assembly for Wales and requires the application of the public interest test before information under it will be released. It exempts any communication between Ministers, including papers of Cabinet and Cabinet Committees, advice by law officers, and information about the operation of Ministerial private offices. But once a policy decision has been made, the statistical information which informed the decision cannot be withheld under section 35.

Section 36 provides a separate exemption for information if its disclosure would be likely to inhibit the free and frank provision of advice, free and frank exchange of views, or 'would otherwise prejudice the effective conduct of public affairs'. This exemption must be applied by a "qualified person". Some of these are listed in section 36 and beyond these a "qualified person" refers to someone authorised by a Minister of the Crown. This exemption is not, unlike section 35, limited to central government but applies to all authorities subject to the Act. It is also subject to the public interest test.

Vexatious and repeated requests

Public authorities are not obliged under the Act to respond to vexatious requests or repeated requests that come from the same person at unreasonably frequent intervals.



Appendix A: Sources of information

Official sources

Department of Constitutional Affairs—<http://www.foi.gov.uk>

Information Commissioner—<http://www.informationcommissioner.gov.uk>

The National Archives—<http://www.nationalarchives.gov.uk/policy/foi>

Department for Environment Food and and Rural Affairs (DEFRA)—<http://www.defra.gov.uk>

The Audit Commission—<http://www.audit-commission.gov.uk>

Other valuable sources

Constitution Unit (Fol/DP team)—<http://www.ucl.ac.uk/constitution-unit/foidp>

Campaign for the Freedom of Information—<http://www.cfoi.org.uk>

The Guardian: Special Report, Freedom of Information: <http://www.guardian.co.uk/freedom>

Joint Information Systems Committee (JISC)—<http://www.jisc.ac.uk>

UK Freedom of Information Act Blog—<http://foia.blogspot.com>



Appendix B: Full list of exemptions

“S” refers to the section of the FoI Act to which the exemption corresponds

Absolute exemptions

- S.21 Information accessible to applicants by other means
- S.23 Information dealing with security matters (as certified by a Minister of the Crown) supplied by or relating to named security organisations
- S.32 Court records, etc.
- S.34 Parliamentary privilege (as certified by the Speaker of the House or Clerk of the Parliaments)
- S.36 Prejudice to effective conduct of public affairs (applying only to information held by the House of Commons or House of Lords)
- S.40 Personal information (where the applicant is the subject of the information)
- S.41 Information provided in confidence
- S.44 Prohibitions on disclosure (by any enactment, incompatibility with any community obligation or contempt of court)

Qualified exemptions

- S.22 Information intended for future publication
- S.24 National security (excluding matters covered by the absolute exemption S.23)
- S.26 Defence (More information about this exemption can be found in the ICO’s Awareness Guidance Number 10.)
- S.27 International relations
- S.29 The economy (More information about this exemption can be found in the ICO’s Section 29–The Economy–Casework Guidance.)
- S.30 Investigations and proceedings conducted by public authorities
- S.31 Law enforcement
- S.33 Audit functions
- S.35 Formulation of government policy
- S.36 Prejudice to the effective conduct of public affairs (excluding matters covered under the absolute exemption S.36)
- S.38 Health and safety
- S.39 Environmental information
- S.40 Personal information (where the information concerns a third party)
- S.42 Legal professional privilege
- S.43 Commercial interests



Appendix C: Case studies to illustrate some common situations

Case study 1: Ms. G and the job interview

Ms. G recently applied for a job as an executive officer in your authority's human resources department. She was turned down in favour of a male applicant three years her junior who is of Chinese descent. Ms. G has telephoned the authority and been transferred to you, the FoI officer. She asks for the following information:

1. The reasons why she was not given the job. She says that she is requesting this information under the Data Protection Act 1998.
2. The original hand-written notes made by the interview panel.
3. Any internal guidance on "targets" which may have been set for appointment of candidates from ethnic minorities as well as the gender, age, sexual orientation and ethnicity of the other candidates.
4. A reference given to the department by Ms. G's school.

Discussion questions

1. How will you deal with Ms. G's telephone call?

These requests cannot be dealt with over the telephone. It would be reasonable to explain that for these requests to be considered under the DP Act and the FoI Act, they should be submitted in writing. If she finds this problematic, she should be offered advice and assistance on how to write the requests. It is also possible that she has not yet been debriefed on her failed application by the HR department. If so, and if they would be prepared to do this, it may be a solution that satisfies her without the need to consider formally her requests. However, her requests stand until she withdraws them.

2. Is this a DP or FoI request?

It is actually a number of separate requests and each question must be addressed using the appropriate Act. Questions 1 and 4 are subject access requests under the DP Act. Question 2 could be both a subject access and a request for personal information about third parties, depending upon whether she just wants the notes about her application or about the other candidates as well. Question 3 is an FoI request.

3. Should you ask Ms. G for proof of identity?

Yes, the authority must be reasonably satisfied about her identity and address before releasing personal information under the Data Protection Act. However, for the FoI request all that is required is a name and address to respond to the question.

4. How will you respond to Ms. G's request for:

- *Reasons why she did not get the job*
These should be provided and would normally be volunteered without the need for a DP Act request.
- *Hand written notes*
This depends on what the interview panel members were told would happen to them. If they exist and the panel were told they would be confidential, legal advice will be needed. If Ms. G wants only the notes about her application, it is a subject access request to be handled under the DP Act. If she

also wants notes about the other applicants, that part of the request must be considered under the FoI Act but in accordance with DP Act principles.

- *Internal guidance on targets*

This information would normally be releasable, unless there is a particular reason, supported by an FoI exemption, why they should not be released.

- *Reference from her school*

This is also a subject access request under the DP Act. If the school submitted it on a confidential basis, legal advice will be needed.

Comments

Issues and questions of this type are best addressed by advance preparation, for example, making clear to all candidates and the interview panel exactly who will be told what and what will be confidential. Steps should be taken to ensure that candidates understand the position and, if they wish, receive a debriefing in line with what they have been told.

All internal guidance should be reviewed with a view to publication or made available in response to requests unless there are good reasons, supported by FoI exemptions, not to do so. When references are requested it should be made clear the status they will have, normally releasable to the subject, unless for particular reasons, agreed in advance, which are supported by the DP Act.

Case study 2: Consultation issues

You are a central FoI officer in the Immigration Directorate (ID) which is responsible for all immigration matters within the Home Office. ID recently published the response to the public consultation on the reform of the British Asylum Council (BAC). Concern for Immigrants (CI), a pressure group, disagrees with the Home Office's proposals for reform. It considers that its own response to the consultation was not given proper consideration by Home Office officials. CI has requested "the information the Home Office holds about local asylum committees relating to the consultation." The Home Office holds a huge range of information "about local asylum committees" on hundreds of files going back several years.

Discussion questions

1. What should you discuss with CI?

The first action to take is to offer to advise and assist CI to clarify their request. Due to the volume of information they have initially requested, the amount of work (and thus the cost) would probably be above the 'appropriate limit' and therefore exempt for this reason. However, the authority may have a policy to supply above this limit but charge the full cost to the applicant. The fees regulations will clarify this position. If CI want to continue on this basis, fees should be estimated, agreed by the applicant and could be charged in advance. Otherwise, CI should be advised to pare down their request to something that is within the 'appropriate limit'.

2. There is legal advice on file from ID lawyers about the reform proposals and the issue of local asylum committees as well as an entire file of email correspondence between the Home Office policy team and its lawyers about the draft Asylum Act (Amendment) Order 2004. Much of this would come within the scope of the CI request. How will you handle this?

If the revised request covers this information, the exemptions most likely to apply are section 35, Formulation of Government Policy, and section 42, Legal Professional Privilege. However, both exemptions are subject to the public interest test so this will need to be applied before reaching a decision.

3. There is also correspondence with the Scottish Immigration Authority (SIA) about some minor non-controversial issues relating to the legislation. Is there any problem with releasing this?

Probably not, but consultation with the SIA would be appropriate before you do. The decision, though, would rest with you in the end.

4. Would you handle the CI request differently if the consultation had closed but the Home Office had not yet published a response?

This part of the request could be considered under the exemption set out in section 22 which would allow the authority to withhold the information for the time being because it is scheduled for future release. You do not have to specify the date by which you will publish it, but the exemption requires that it should be 'reasonable in all the circumstances' to withhold it in this way, so you should not simply use this as a stalling tactic.

Comment

This case makes clear that the questions have only been asked because CI felt that its response had not been given proper consideration. While not in any way delaying the normal process of handling, it may be sensible to review whether addressing the real issue that they have expressed may produce a good

solution. In situations of this type it will often be in the interests of the department and of the applicant to address the underlying issue. An approach of this type could lead to a much smaller quantity of relevant information being provided and enhance the relationship with the pressure group.

Case study 3: Public vs Private

You are the FoI officer at the University of Belham. UB has set up a company to negotiate consultancy contracts on its behalf. University of Belham Consultants Limited (UBCL) has expanded and needs a new home. Ultra-Contractors Ltd. has won the contract for the construction of a £8 million glass megalith to house UBCL and is about to knock down a building owned by the university which stands on the proposed site. The building is in good condition and is of some historic interest due to an association with the original founder of the university. Local conservation pressure group thinks that it should be preserved and incorporated in some way into the new development. However, it is not a 'listed building' and therefore does not have statutory protection. Ultra-Contractors have also said that it would not be economical to keep it. You receive a request from the pressure group for the terms and conditions of the contract with Ultra-Contractors and a detailed breakdown of the £8 million budget.

Discussion questions

1. UB is subject to the FoI Act, but is UBCL subject to the FoI Act?

UBCL, if it is wholly owned by UB and it has no members except from UB, is also subject to the FoI Act. This is under the terms of section 6, 'Publicly-owned companies'.

2. Will you release the terms and conditions of the contract?

Unless the terms upon which this information would be released have been agreed in advance, you will need to consult Ultra-Contractors as set out in the Code of Practice to establish if they object to the release and, if so, for which reasons supported by the Act.

Under section 41, if a duty of confidence has been accepted in respect to the contract or any part of it and you are advised that any breach would be actionable and if Ultra-Contractors will not agree to release and you think that the information should be released, legal advice will be needed.

Section 43 of the Act is an exemption covering commercial interests, and provides exemption if disclosure 'would, or would be likely to, prejudice the commercial interests of any person...'. The response from Ultra-Contractors to consultation may provide reasons to support a claim that they would suffer prejudice if the information was released. This may establish that the exemption in section 43 applies. However, this exemption is subject to the public interest test set out in section 2. It will be up to you and your colleagues to weigh the public interest on both sides of the question and decide accordingly.

3. Would your consideration of the public interest be different if the winning bidder had given UBCL information about its bulldozing processes in confidence?

The question is whether release of the information would constitute an actionable breach of a duty of confidence. If so, there could still be justification for release for reasons of public interest which applies under common law. If this path is chosen, legal advice will be essential. Otherwise the information should be refused. In a case of this type the Information Commissioner may criticise UBCL if he finds that it has accepted a duty of confidence for reasons which, in the light of the Access Code are not justified.

Comments

The problems which arise with questions of this type can be avoided to a large degree if there is clarity between the authority and contractor, from the invitation to tender stage, about what will be released when about the contract and the project. This should provide the potential contractor with the opportunity

to claim which, if any, elements should be kept confidential for how long and the reasons why. This can be negotiated long before Fof requests arrive. Possibly some of the information could be published in the publication scheme.



