

FOI, practically speaking Part I— deadlines

In the first part of a new series of articles dealing with the practical challenges confronted by FOI Officers, Paul Gibbons, FOI Man and Information Compliance Manager, SOAS, University of London, discusses the challenges associated with meeting the 20 day time limit for responding to information requests

As the late, great, Douglas Adams once almost said, “I love 20 working day deadlines. I like the whooshing sound they make as they fly by”. Some FOI Officers are more familiar with that sound than others, but none of us are completely whooshless.

It sounds so simple. You receive a request and you have a massive 20 working days — a whole 4 weeks — to pull together the information or to decide if any exemptions apply. To the journalists on their own deadlines, or to the casual requester, this may seem like an excessively long time to delay a response. Many requesters clearly believe that public bodies just have to press a button to produce the answers to their questions, and that any pause in communication is merely obfuscation and gamesmanship by the wily FOI Officer.

The 20 day time limit and ‘promptly’

But of course, it is not that straightforward. Firstly both the Freedom of Information Act 2000 (‘FOIA’) and its little brother, the Environmental Information Regulations 2004 (‘EIRs’), say that you must comply with the duty to provide information ‘promptly’ or ‘as soon as possible’ and certainly no later than 20 working days following receipt. Like many FOI Officers, I like to forget about that ‘promptly’. It’s terribly inconvenient. Especially when one is having trouble getting information out of a colleague (surely not — but I’ll come back to that later).

But the Information Commissioner has not forgotten it. In one decision (copy available at www.pdpjournals.com/docs/88072), the Commissioner considered Walsall Council to have breached Regulation 5 of the EIRs (the Regulation setting out the time for compliance), even though it had answered within 20 working days. There had been a mistake in the processing of the request that had caused a minor delay, and as a result, the Commissioner concluded that the request had not been answered as soon as possible.

And those journalists who criticise public authorities for taking the full 20 working days? In the latest edition of

Blackstone’s Guide to The Freedom of Information Act 2000, John Wadham and his co-authors argue that if a journalist is writing a story of pressing public importance, the public authority may be required to take account of the time sensitivity of the request in order to meet the ‘promptly’ test. Thankfully this has not yet been tested.

Even if an FOI Officer has 20 working days, that time can easily get eaten up. Say you had your first day off in 6 months, and the colleague covering for you has taken ill. So you lose a day. The department concerned has poor records management despite your best efforts, and the one member of staff who knows what information is held is on sabbatical. A senior member of staff insists on approving what can and cannot go out, but next has a space in their diary to meet with you in August (next year). The department tells you that it will cost too much to provide the information, but after some to-ing and fro-ing, it turns out they have spent double the time it would take to answer the request calculating the exact cost of employing each member of staff involved in its handling (including the Chief Executive), taking into account on-costs (of course), over a time period which bears as much resemblance to reality as the Mad Hatter. Tea parties have almost certainly been included.

Time taken to retrieve information

There are more reasonable causes for responses to be delayed. It might physically take many hours to retrieve information. The Association for Chief Police Officers gives its example of the request to one police force about the Moors Murders that took a whole year to collate information for.

But even seemingly modest requests can consume many hours with meticulous research and hard work. It may be necessary to consult several different people, both in and outside the authority, to collate an answer. FOI Officers are expected to consult third parties, who may, in many cases, not be used to the exacting discipline of answering FOI requests.

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Solutions — ways to legitimately extend the deadline

Exemptions apply: There are, of course, ways to legitimately extend the deadline. If an exemption subject to a public interest test is being applied to any of the information, the deadline can be extended to consider the public interest.

However, it is still necessary to provide information not subject to the exemption, and state which exemption you are applying, within the 20 working day period.

Somewhat creatively, government departments describe requests answered following a public interest extension as being responded to 'in time'. These extensions are somewhat controversial, not least because there is no statutory limit on them. The Information Commissioner recommends that, in most circumstances, there should be no reason to extend the limit beyond a further 20 working days. The Justice Select Committee last year proposed that this should become a formal statutory limit. However, the Ministry of Justice has rejected this. So the potential for eternal extensions remains.

Incidentally, if FOI Officers refuse to confirm or deny whether we hold information, we are still required to confirm that we are doing so in writing within the 20 working days. If a public interest test applies, the deadline can

be extended for this purpose, just as for considering whether or not to disclose information.

Requests for further clarification: If a request is unclear, or it is estimated that it would cost more than the infamous 'acceptable limit', this might also affect the 20 working day deadline. We have all received requests that ramble on for several pages without actually giving us enough information to identify what is being asked for.

In those cases, it is perfectly acceptable to ask the requester to explain what they want, and the 20 working days will only start on the day following the receipt of the explanation (assuming that it makes sense this time).

If it is perfectly clear what a requester wants, but it would take five weeks to search for the information relevant to the request, then FOI Officers must stop the clock until the request has been narrowed down. Once the requester has better defined their request, the FOI Officer must continue counting from the point that was reached when they asked the requester to do so. Of course, many requests fall into a grey area between these categories — a grey area which may be exploited

by FOI Officers to gain a few extra days on the time limit.

Charging for requests: One option for FOI Officers is to consider charging for FOI requests. Even if the applicant is only charged for 'disbursements' (photocopying to you and I), an FOI Officer is entitled to wait until payment is made before

providing the information.

Of course, it is necessary to know how many pages of photocopying to charge for, so it may not be overly useful, but it is an option.

Organisations not subject to the 20 day limit: Some organisations can take longer than 20 working days to answer a request, for example, schools. If you work in a school (now also including academies), you can take up to 60 working days or 20 school days (whichever is sooner) to answer an FOI request.

Armed forces/documents stored overseas: If the individual within the organisation who knows how to find all the information is on active service with the armed forces, or has somehow arranged to store all the relevant information overseas, an application may be made to the Information Commissioner for an extension of up to 40 working days (60 working days in total). Both of these options seem drastic, however, merely to gain a few weeks' grace to answer an FOI request. The author suspects also that the Commissioner may be slightly suspicious if a local council has a commercial storage contract with a company in the Maldives, and half the housing department have joined the territorial army.

Approved 'places of deposit': More realistically, if a local authority holds public records in its Record Office as an approved 'place of deposit' by the National Archives, that have not yet been made available to the public, requests for those records only need to be answered within 30 working days. However, from a past life in the world of archives, the author is aware that in some cases, six weeks can be a very short period of time to locate information in uncatalogued papers that have not been looked at for 40 years.

What counts as working days: One final point — FOI Officers should know their UK calendar of feast days and bank holidays inside out. As one expert recently pointed out, the wording of section 10 FOIA means that bank holidays in Scotland, for instance, do not count as working days for FOI purposes even if the authority is located in England. This temporal eccentricity of the legislation

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could gain FOI Officers a day or two depending on the time of year.

Complying with the 20 day limit—why bother?

Colleagues desperately attempting to prioritise a towering workload are often prompted to enquire of their friendly neighbourhood FOI Officer, “what happens if we don’t answer a request within 20 working days?”. This is a good question. The short answer, most of the time, is nothing. Which does not exactly assist FOI Officers when we are trying to put pressure on those colleagues to help us answer a request on time!

The official answer is that if the Information Commissioner becomes aware that a request is late, he can issue an Enforcement Notice. His guidance on ‘Time for Compliance’ (available at www.pdpjournals.com/docs/88069) states that this is what he will do. And if an authority fails to comply with an Enforcement Notice, they are effectively in contempt of court, so their Chief Executive or equivalent could find themselves heading to prison or paying a hefty fine. Except that Enforcement Notices are hardly ever issued.

More recently, the Commissioner has taken to naming and shaming public bodies who consistently fail to comply with FOI requirements. The latest published list includes two government departments, a local authority and the Office of the First Minister and Deputy First Minister in Northern Ireland. Sometimes this leads to the Commissioner using his other tool of choice — an Undertaking. A number of public bodies have been asked to make undertakings to improve their handling of FOI requests in the last year or so.

One of the problems here is that in practice, it is very difficult for the Information Commissioner to know whether a public body is failing to meet the 20 working day deadline. The only way that the Information Commissioner’s Office (‘ICO’) would know would be if a requester complained to it (and although a lot do, many do not even complain to the local authority in question when it fails to respond within the deadline), or if the authority reported on its own fail-

ings to the ICO. Unsurprisingly, very few are keen to do this.

The Commissioner’s published criteria for ‘monitoring’ — its official term for naming and shaming — public bodies (available at www.pdpjournals.com/docs/88070) include where a body is meeting the 20 working day deadline for less than 85% of requests received. But by the Commissioner’s own admission, this only works where a public body publishes its compliance statistics. In its report on post legislative review of FOIA, the Justice Committee recommended the introduction of mandatory FOI reporting. Again, the Ministry of Justice has rejected this proposal.

One other option — and one to whisper quietly in meetings — is to mention the criminal offence at section 77 FOIA. Arguably, any employee of a public body who fails to provide the information requested to the FOI Officer could be accused of blocking access to the information with the intention to prevent disclosure. In theory, this could result in a criminal conviction and a £5000 fine. If you avoid mentioning that nobody has ever been convicted of such a crime, it just might be persuasive enough to ensure that your colleague prioritises the FOI request above their other tasks.

So 20 working day deadlines then. Not simple at all, as it turns out. But quite whooshy.

The next article in this series will be on datasets and proactive disclosure.

Paul Gibbons

FOI Man

foimanuk@gmail.com
