

FOI, practically speaking Part 5 — holding your own

Paul Gibbons, FOI Man and Information Compliance Manager, SOAS, University of London, discusses the complexities in establishing whether an authority 'holds' information, and advises on the lessons to be learned from the decisions of the Information Commissioner in this area

The very first thing that the Freedom of Information Act ('FOIA') states is that a person making a request is entitled to be told whether the public authority holds that information. Simple, isn't it? Well, not always. Whether an authority holds information can be a complicated matter.

What does the Act say?

As if in recognition that this issue is not as straightforward as it may seem, FOIA goes on to define what it considers 'held' to mean at section 3(2): 'For the purposes of this Act, information is held by a public authority if — (a) it is held by the authority, otherwise than on behalf of another person, or (b) it is held by another person on behalf of the authority.'

So what's the problem?

No man is an island, and public authorities even less so. More and more of the activities that used to be carried out within or by public bodies are being out-sourced to companies and other third parties. This is the big society, after all. Increasingly, the records of those activities are not in the physical possession of the public bodies that pay for them. They might not be legally entitled to see them, let alone fulfil an FOI request for them.

And we employees don't make life any easier. Gone are the days (if they ever existed) when we worked 9 'til 5, headed home and forgot our work. When communication was by letter externally or memo internally and copies would be filed in a central registry. Now we use corporate email accounts to send personal emails to friends to organise drinks. Some of us might use our private email accounts to send an email about policy matters from our own smart phone when we can't sleep at 3 in the morning. If a civil servant takes to Twitter to address a question about government policy, does that mean that the Tweet is held by their department? If I, as a publicly-funded employee, start blogging in work time (which I don't, by the way), does that mean that FOIMan.com and all my related correspondence becomes subject to FOI?

The boundaries between private, social and work lives, and public and private sector are breaking down, blurring. What is 'held' is no longer a simple matter of physical possession, but is increasingly defined by legal concepts and wider context.

Is email held?

Email is a great illustration of the difficulties here. Firstly, when will email be held on behalf of another person? This might depend on the organisation's email policy and on the individual circumstances. If the authority's email policy states that employees are allowed to use corporate email accounts for personal use, then it logically follows that some emails in corporate systems will be personal. If a member of staff has sent an email to a friend discussing plans for a social event, then most FOI Officers would assume that email to be off-limits to an FOI request. The email is being held by the authority on behalf of the employee. However, if the question was how many personal emails have been sent by employees from their work email accounts, a different conclusion might be reached. In other words, even if the content is being held on behalf of someone else, the metadata — the information about the emails — is still held by the public authority.

As last year's controversy over email sent by Michael Gove from his wife's personal email account illustrated, email in private email accounts relating to a public authority's business will normally be held. As the Information Commissioner said in guidance issued following that incident:

'If the information held in a private account amounts to public authority business, it is very likely to be held on behalf of the public authority in accordance with section 3(2)(b).'

This is a particularly tricky situation. For a start, the FOI Officer might not know if a member of staff holds relevant information within a private email account. Even if they have a suspicion, they don't have the right to search the account themselves. They have to ask the member of staff to

[\(Continued on page 4\)](#)

[\(Continued from page 3\)](#)

carry out the search themselves. If the individual concerned has a differing interpretation of the circumstances in which information is held by the authority, or they deliberately choose to mislead the FOI Officer, relevant information may well not be identified. In the *Department for Education* case mentioned above, the fact that a business email was held within a private email account used by the Secretary of State only came to light as a result of a leak to a journalist.

The Information Commissioner's guidance on private email accounts provides some tips for public authorities on how to deal with this issue:

- keep a clear demarcation between private and business work as far as possible; staff should try to ensure that all business is recorded on business systems — perhaps by copying in a corporate email address when sending email from private accounts;
- when requests are received, FOI Officers will need to consider all locations that relevant information might be held in;
- if it seems likely that information might be held in a person's private email account, they should be asked to conduct a search;
- a record should be kept of the searches that they carry out; and
- staff should be reminded that concealment of information requested under FOI is a criminal offence under section 77 FOIA.

Commercial storage

If the public authority uses a commercial storage company to store physical records, the company will be holding the records on behalf of the authority, so the information is held. Similarly, as more organisations store digital information 'in the cloud', information on servers in the custody of the host company will continue to be held by the public authority that contracts the service.

Contractors

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Last year, the Justice Committee's post-legislative scrutiny looked at whether contractors involved in providing public services should be made subject to FOI. The Committee recommended that this was not appropriate, and that instead FOI obligations should be set out and enforced through contractual provisions. This is controversial, because as we'll see, the circumstances where contractors are viewed as holding information on behalf of public authorities are limited.

The Information Commissioner says that 'situations creating an agency arrangement' will

normally mean that information created as a result of that arrangement will be held on behalf of the authority. 'This may also extend to situations where another body carries out the functions of a public authority, either through statute or contractual arrangements.'

The problem is that it is not easy for an FOI Officer advising their employer to establish whether a company is delivering services on their behalf, or whether they are simply delivering a service to the authority.

In *Dransfield v Information Commissioner and Devon County Council*

(EA/2010/0152), the requester had asked for an operations maintenance manual for a school built and maintained by a company under a private finance initiative ('PFI'). The Tribunal ruled that the manual was not held by Devonshire County Council ('DCC'), and indeed wouldn't be held by it until 2033. The terms of the contract meant that DCC could only inspect the manual, but otherwise had no involvement in its maintenance and had no control over it. In such circumstances, DCC couldn't be said to 'hold' it.

A different decision was reached in *Visser v Information Commissioner and London Borough of Southwark* (EA/2012/0125). London Borough of Southwark ('LBS') had outsourced the management of its leisure centres to a company, Fusion Lifestyle. Mr Visser wanted to see a register that a leisure centre kept recording the attendance of school groups for swimming lessons at the centre. The Tribunal ruled that the information was held on behalf of LBS. This was because the register was held to help fulfil a contractual obligation to LBS to provide usage statistics. LBS would need access to the registers to audit compliance with the contract. There was 'an appropriate connection between the requested information and the council'. But as if to illustrate the difficulty with these issues, this result overturned the Commissioner's earlier decision.

When it comes to contractual relationships, 'in some cases it will be important to determine the exact nature of the legal relationship between a person holding information and the public authority' (*Chagos Refugees Group v Information Commissioner & Foreign Office*, EA/2011/0300, para 61) in order to determine whether or not information is held on behalf of the public authority.

Backups and deleted items

When it comes to the issue of deleted information, the Commissioner and Tribunals have been even more split. Both are agreed that information still stored in a 'recycling bin' will still be held. But if information might still be retained on a backup tape or disc only, then things become more difficult.

The Commissioner states in his guidance that as a general rule, information held on a backup is not held for the purposes of FOI. For him, the critical issue is the intention of the public authority. If information has been deleted in line with records management policies, the Commissioner takes the view that it has gone, even if it could be retrieved with specialist software or expertise. A different interpretation, in his view, undermines the principle of good records management.

However, he recognises that this conflicts with the Tribunal's approach. In *Harper v Information Commissioner and Royal Mail Group Ltd* (EA/2005/0001), the Tribunal took the view that if information was on a backup and could be retrieved through technical means, it was effectively held. Their view was that a search could only be ruled out if the authority could demonstrate that carrying it out would exceed the appropriate limit under section 12.

Tribunals ever since have taken a similar approach to the Tribunal in *Harper*, despite the Commissioner's scepticism. In one recent case (*Keiller v Information Commissioner and University of East Anglia* (EA/2011/0152)), the Tribunal found that information held on a backup was held even though at the time the request was received, the backup was physically in the custody of police.

The one lesson that FOI Officers should take from all of this is to make sure that they have clear (and ideally, short) retention policies for their backups, and get advice from IT colleagues as to the difficulty or otherwise of retrieving information from backups.

Simply a question of fact?

Somewhat in the face of all the facts (and notably, this was a relatively early decision), one First Tier Tribunal decision commented that whether information was held was 'simply a question of fact' (*McBride v Information Commissioner and Ministry of Justice*, EA/2007/0105).

These examples show that it is not that straightforward. It will always be

necessary to analyse the surrounding circumstances to decide whether or not information is held. If the Commissioner and Tribunals cannot agree on the right approach, then FOI Officers will occasionally find themselves having to make some difficult decisions.

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