

FOI, practically speaking Part 6 — looking for approval

Paul Gibbons, FOI Man and Information Compliance Manager, SOAS, University of London, discusses the various methods for obtaining approval for responding to FOI requests and the risks involved in the various methods

FOI Officers, probably — hopefully — know more about FOIA than anyone else in their organisation. However, they cannot know everything that might be asked about in a FOI request. Furthermore, some disclosures, or even refusals, will be controversial. Often in a fairly junior position, they do not want — and will rarely be allowed — to make those decisions on their own. Any head of department worth their salt will not want misleading or inaccurate information about their service to be released into the outside world. If the request has been made by a journalist, many organisations will want their press office at least to have advance warning of any potential stories that may result from FOI disclosures.

Whatever the reason, it is unlikely that the FOI Officer will be able to send out a drafted response without first involving a number of colleagues.

Consequences of a close shave

Most public authorities will have well-established procedures setting out who should be involved in the decision to disclose information (or not, as the case may be). From time to time, these procedures will come under scrutiny, usually prompted by a news story that includes some juicy nugget that embarrasses a senior official or politician. In a previous role, I found myself having to explain why details of the Mayor of London's visits to the barber (clearly not the current one) were being reported in the Evening Standard. Whilst it turned out that this had been an error made by the Mayor's own team, it nonetheless led to a review of FOIA authorisation procedures. Other FOI Officers will no doubt have experienced something similar.

Of course, it is healthy to review procedures on a regular basis. The danger here is that, and this is particularly true if such a review follows the embarrassment of a politician or senior official, there will be pressure to introduce additional levels of bureaucracy. Public relations colleagues will want more say over FOI responses, especially those going out to the media. In some cases, those

at the top of the organisation will insist on seeing every response.

In these circumstances, there is often little that the FOI Officer can do to prevent what they may view as unwelcome changes to authorisation procedures. However, they can point out the risks of a more cumbersome process.

Reputation

The most significant risk attached to senior officials or politicians becoming involved in the drafting or approval of FOI responses is reputational. A politician may believe that they are protecting the authority's reputation by monitoring FOI responses, but without safeguards, they can actually damage it (not to mention their own).

In 2011, the leader of Kirklees Borough Council found himself at the centre of adverse media attention when it came to light that he insisted on seeing, and occasionally amending, 'sensitive' FOI responses. Internal correspondence obtained by the local newspaper, the Huddersfield Examiner, appeared to show that he had in somewhat forthright tones criticised responses drafted by the council's FOI Officer and substituted his own wording. Following an internal inquiry, the councillor was referred to the First Tier Tribunal (Local Government Standards). The Tribunal cleared him of bullying and of bringing the council into disrepute, but concluded that 'the Respondent did not cross [the] line. But, in the Tribunal's view he did step on it'.

Delays

Another risk that arises from involving more people in FOIA procedures is that it will become more difficult to meet the statutory deadlines. In a previous article (Part 1, published in Volume 9, Issue 3 of *Freedom of Information*), I wrote about the difficulties of answering requests on time, and the Information Commissioner has just published new guidance on this subject covering much the same ground. In particular, the regulator has stressed the importance of the word

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'promptly' in section 10(1) of the Act, and of the phrase 'as soon as possible' at Regulation 5(2) of the Environmental Information Regulations 2004.

What this means is that, even if the request is answered within 20 working days, the Commissioner may view an authority as failing to comply if they take longer than they reasonably should.

In 2011, Walsall Borough Council found itself at the wrong end of a Decision Notice despite having answered the request within 15 working days. The Information Commissioner's Office argued that the accidental deletion of an email by a member of staff handling the request had nonetheless delayed the response. Whilst there are no examples as yet of the Commissioner finding that a request has not been answered 'promptly' because the authority's procedures are too bureaucratic, it is a logical consequence of this approach.

More likely, though, is that a bureaucratic approach, with many people involved, will lead to the 20 working day deadline being breached. If this happens enough times, it might lead the Commissioner to place the authority under review (interestingly, Kirklees Borough Council was placed under review just after the Huddersfield Examiner had highlighted the leader's keen interest in FOIA, though it is not clear if this was a factor in the Commissioner's decision).

Alternatively, just one complaint might lead the Commissioner to criticise the process in a Decision Notice if he felt that it had led to unreasonable delays. If the regulator felt that the procedure breached the section 45 Code of Practice, he could also issue a practice recommendation encouraging the authority to change its ways.

Press Officers and FOIA

It is common practice for authorities to employ press officers. Their job is to liaise with journalists and the wider media, and to 'control the message'. FOIA obligations are potentially in conflict with that aim, since they require authorities to disclose any requested information within a set timeframe and requests can be made by anyone at any time.

Journalists in particular have a number of reasons for being suspicious of press office involvement in FOIA procedures. Firstly, there is the suspicion that press officers are 'spinning' the FOI response — can they trust that the information disclosed has not been tampered with by wily communications staff? In my experience, this fear is exaggerated — press officers understand that authorities have to meet their legal obligations. They may want to add wording to a response to give context, but not to actually change the requested information itself. Most often, it is a matter of being

forewarned of what stories might be on the way.

Secondly, if a journalist is pursuing a long-term public interest investigation, they may be nervous that their request will offer clues to seasoned press officers and reveal their target prematurely. Again, and more prosaically, many media users of FOIA are just concerned that press office involvement adds a further level to the process delaying responses that they already think they wait too long for, and impacting their own deadlines.

An academic study of Canada's freedom of information experiences a decade ago suggested that journalists there were being treated differently to other requesters. So the complaints of the media here may not be entirely unfounded. FOI Officers should therefore be aware of those fears and in my opinion should be wary of the introduction of any procedure that appears to place the press at a disadvantage to other requesters. Many journalists are likely to take steps to avoid such procedures by, for example, using private email accounts and pseudonyms.

Many FOI Officers have good and healthy working relationships with Press Office colleagues. The Information Commissioner's own Head of Communications issued guidance for 'communications professionals' on how Press Officers and FOI Officers should work together in 2011, demonstrating that the Information Commissioner believes that Press Officers and FOI Officers can work together legitimately.

Sharing names of requesters

If an FOI Officer's senior or press office colleagues insist on seeing responses, they may also insist on knowing who made the request. There are three reasons why FOI Officers might feel uncomfortable with this:

- the principle that FOI requests should be considered in an applicant-blind manner — it should not matter who has made a request, and if those providing the information do not know, it will be easier to demonstrate that this principle has been followed;
- it is arguable that unless others need to know the name of the requester, sharing their details

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could be a breach of the Data Protection Act; and

- if colleagues have the name and contact details of requesters, they can bypass the established procedure altogether, making monitoring of compliance more difficult, and worse, putting pressure on a requester to withdraw their request.

Anecdotally, the latter has been known to happen, but is difficult to prove (and indeed may be seen as a practical solution to a hard-pressed public service). The other two arguments can be easily undermined.

Firstly, there is no legal requirement to consider requests in an applicant-blind manner — it is merely good practice. In some cases, the legislation — or at least any practical application of it — requires authorities to consider the source of the request. For example, if an authority is to refuse a request under section 12 FOIA on the basis of the estimated aggregated cost of multiple requests for similar information, the identity of the requester will be relevant.

Secondly, if FOI Officers follow the narrow 'Durant' definition of personal information, it is debatable whether the identity of a requester is personal information at all. Furthermore, it could be argued that the requester would have a reasonable expectation that their identity would be shared with those involved in answering their request. If that is the case, then providing their name to colleagues is unlikely to breach any of the data protection principles. Finally, if a request is made by a company (as a 'person' in law that's possible), then their identity will not be personal information.

There is a significant risk that FOI Officers that refuse to provide the identity of requesters to colleagues will be seen as uncooperative. And this approach can have unpredictable consequences. Evidence was presented to the post-legislative scrutiny of FOIA last year to the effect that requesters were able to make requests anonymously. This was obviously a misconception — possibly caused by FOI Officers refusing to share the names of requesters internally — but it led to one of the more bizarre recommendations in the Justice Committee's report, to publish the names of requesters in disclosure

logs. This in turn led to a Private Member's Bill earlier this year which aimed to enact this (an attempt which has proved unsuccessful).

Benefits of effective approval mechanisms

Of course, as suggested in the first paragraph of this article, there are benefits to establishing reasonable and proportionate mechanisms for the approval of responses to FOI and EIRs requests. Whilst there may be a risk that, for example, the involvement of press officers in agreeing a response could be perceived as undermining the credibility of the FOIA process, it cannot be denied that our colleagues in these areas are tasked with protecting the reputation of our organisations. If information is being disclosed that might be presented in an unflattering light (especially if to do so would be unfair), it is surely not unreasonable that our organisation should do all it can legitimately do to defend its reputation. It follows that there is nothing wrong with FOI Officers sharing draft responses with public relations colleagues, or even adjusting the wording of responses (though not information disclosed) in consultation with those colleagues.

The FOI Officer may benefit from wider sharing of a draft response by avoiding pitfalls of an unchecked response. Take, for example, the recent civil monetary penalty against Islington Borough Council. If someone had noticed the inadvertent inclusion of a pivot table containing personal information, a significant fine and a lot of embarrassment, let alone the potential breach of privacy of the data subjects involved, could have been avoided.

So FOI Officers need to ensure that they have robust procedures in place for the approval of their responses. But there are risks associated with byzantine lines of authority, just as there are with lack of oversight. The trick is to retain the trust of colleagues whilst ensuring that any oversight is reasonable and proportionate to the task in hand.

Paul Gibbons will be speaking about when and whether a public authority 'holds' information at the 10th Annual Freedom of Information Conference in London on 15th and 16th May 2014. For further information, see www.pdpconferences.com

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