

How important is good records management to FOIA compliance?

Freelance information rights consultant and trainer best known for his FOIMan blog (www.foiman.com), Paul Gibbons, discusses the importance of good records management

Paul Gibbons will be speaking on 'To Hold or Not to Hold' at the 10th Annual Freedom of Information Conference being held in London on 15th and 16th May 2014. For further information, see www.pdpconferences.com

Managing your records well is essential to be able to comply with the Freedom of Information Act ('FOIA'). That's what the government, commentators and especially records managers like myself were telling everyone before FOIA came into force in 2005. FOIA itself requires the Lord Chancellor to issue a Code of Practice 'providing guidance...as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records.'

At the time, many records managers were ecstatic about this. Often under-resourced, for the first time there was statutory backing for their role. Almost religiously, those of us given jobs to improve the management of records in preparation for FOIA's implementation would recite the mantra, in reports and training, from the foreword to the section 46 Code:

'Freedom of Information legislation is only as good as the quality of the records and other information to which it provides access. Access rights are of limited value if information cannot be found when requested or, when found, cannot be relied upon as authoritative.'

The idea that improved records management was essential for compliance with the Act went relatively unchallenged in the early days of FOIA, but how accurate is that assumption? Research in 2008-09 by academics at University College London ('UCL') appears to challenge this view.

The research found that many FOI Officers believed that improvements or otherwise in records management had had very little impact on their ability to comply with FOIA. As one officer quoted from a London Borough said to researchers:

"I think what we found in terms of FOI is that the ability to retain information is based on a person, and not a system. It is the person who knows what keyword it is. It is the person that knows what the subject area is. It is the person that interprets a request. It's the person that says 'this department is the one that you need to go to because they had dealings over this'. So a lot of the knowledge is with the person."

The suggestion is that the knowledge of colleagues in particular departments is more important than whether a public authority has invested in records management. A further quote continues:

"A few years ago people were insisting on records management for FOI compliance. The proof in the pudding now is that you have had hundreds of Enforcement Notices [sic] from the Information Commissioner's Office, dozens from the First-Tier Tribunal and how many have related to records management? One, maybe two. I think before people were saying records management has FOI as a driver because it was an unknown quantity and now it is not an unknown. Now, most authorities can quite happily service FOI requests without having an EDRM system."

The Information Commissioner has not issued hundreds of Enforcement Notices — I think the officer quoted really meant Decision Notices. But he or she is right that very few have mentioned records management.

Codes of practice are not statutory, in the sense that authorities have a legal requirement to comply with them. However, if the Information Commissioner takes the view that a public body is failing to follow a code, he can issue a Practice Recommendation. It is notable that this has only happened twice in respect of the section 46 code. The first was issued to Nottingham City Council in 2007, and the second to the Department of Health in 2009. It is almost impossible to locate the two documents — it looks as if they have been removed from the ICO's website.

It appears that records management and compliance with the section 46 Code is not viewed by FOI Officers or the Information Commissioner as being crucial to meet FOIA requirements. But this may be taking too simplistic a view.

Firstly, good records management by its very nature will not attract attention. If authorities are able to answer FOI requests, there will be little introspection as to why. Perhaps the knowledge is there because of

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earlier improvements to records management. It is only if an authority fails to locate information, and if the requester knows enough to challenge them and it later transpires that information was held after all, that poor records management is ever likely to be identified as a factor. These circumstances are rare.

Secondly, the emphasis here has been on locating information. Few records managers would describe Google as a records management tool. Another interviewee from the UCL research lamented:

"I doubt we answer our requests completely. My guess is that the quality of what we are providing — we might answer a request — but the quality of what we are providing on the whole is not good because of records management. If we had better records management, the quality would be better because you will be sure the documents you are providing will be the latest one."

Getting records management right includes effective version control. It includes clear policies around use and management of email. It includes having an understanding of the legal as well as technological status of information available to the authority. All those arguments about whether information is held by an authority that are so controversial when considered by Tribunals should be rehearsed at an earlier stage, and documented. That's a job that records managers are well-placed to assist with.

Of course, there are many other reasons for investing in improvements to the management of an authority's records and information. It will be impossible to comply with the Data Protection Act for one without having controls in place to ensure that records are kept up-to-date and are not retained longer than necessary. As the foreword to the section 46 Code goes on to say:

'Records management is important for many other reasons. Records and information are the lifeblood of any organisation.'

The Study referred to in this article is by Shepherd, E; Flinn, A; Stevenson, A; (2010), 'Information governance, records management and freedom of information: a study of local government authorities in England' — Government Information Quarterly, 27 (4) 337 - 345.
Copy available at www.pdpjournals.com/docs/88156

A copy of the Lord Chancellor's Code of Practice on the management of records, is available at: www.pdpjournals.com/docs/88157

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