

Mythbusting FOI

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New Course — the Role of the FOI Officer

Starting at the end of October 2019, I will be delivering a new course for PDP on The Role of the FOI Officer. Rather than looking at the detail of what the legislation says, this course will focus on the practicalities of managing FOI in a public authority.

What is the job of an FOI Officer? How do you interpret caselaw on FOI? Is there a right way to process FOI requests? If you're new to FOI, or you have been a practitioner for some time but want to benchmark your methods against best practice, this is the course for you. Details of the course can be found on the PDP website, www.pdptraining.com. I look forward to meeting some of you.

When it comes to handling Freedom of Information requests, there are certain facts that are well established. Guidance and decisions of the regulators and case law have built up over time, which have turned into FOI standards. This is all well and good, as standards help to save time and create consistency.

However, after nearly 15 years of the Freedom of Information Act 2000 ('FOIA') and Freedom of Information (Scotland) Act 2002 ('FOISA'), other 'facts' have become established which aren't actually true. Myths abound due to concepts being exaggerated or misunderstood, then communicated to others thereby being reinforced because they are convenient.

In this article, I'm going to discuss a few FOI myths and the decisions that help debunk them. Like all myths, there is an element of truth in all of them, but it is important to be able to separate the essential truths from the misleading beliefs that surround them. I use examples from both the UK and the Scottish jurisdictions, as the laws share a lot in common and whilst decisions of the Scottish Commissioner do not have direct effect on the interpretation of UK law (except in the rare event of an appeal to the UK Supreme Court), they often cast light on issues that have not yet been dealt with under the UK system. In a similar way, UK cases can be helpful when exploring the application of FOISA. That being said, care does need to be taken to recognise the differences in these laws and their application in two very different legal systems.

Myth: all requests should be handled in an applicant and purpose blind manner

FOI requests must be processed in an applicant and purpose-blind manner. In other words, it doesn't matter who is asking, or why. This is a principle which is drummed into every FOI Officer from their first involvement in administering the legislation. Indeed, the UK Information Commissioner's own Guide to Freedom of Information says:

'The information someone can get under the Act should not be affected by who they are. You should treat all requesters equally, whether they are journalists,

local residents, public authority employees, or foreign researchers...'

In general terms, this principle is a good one and it is normally right to abide by it. However, as one decision of the First Tier Tribunal (Information Rights) noted, the principle '... is a misleading oversimplification' (*K v IC*, EA/2014/0024, paragraph 19). The FTT went on to list some of the circumstances in which the identity of the applicant and the purpose of their request would be relevant to the handling of the request:

- the motives of a campaign group might be relevant to the consideration of the public interest balance where a qualified exemption is being applied;
- the Act requires the applicant's identity to be stated for a request to be valid;
- the identity of an applicant may be relevant when establishing whether a request can be answered within the appropriate limit under section 12 (especially when considering whether to aggregate the costs of multiple requests);
- identity and motive are considerations in deciding whether a request is vexatious under section 14(1) (and, though the FTT didn't mention it, identity will be important in establishing whether a request is repeated under section 14(2));
- if advice and assistance is to be effective, it will often have to take account of the needs of the specific applicant;
- as we will see, it is necessary to consider the circumstances of an applicant if deciding whether information is accessible to them, and therefore whether section 21 of the Act will be relevant; and
- the identity of the applicant dictates whether section 40(1) applies, and the purpose of the request could affect a decision under section 40(2) as to whether personal data can be disclosed to a third party.

This extensive list illustrates that this so-called 'fundamental principle' is more of a rule of thumb, if that. It certainly isn't a sacrosanct requirement of the legislation as it is often regarded. The reason why the FTT was so keen to expose its limitations in *K v IC* is that following the principle too rigidly can disadvantage the

applicant. In that case, the applicant had been in correspondence with their council regarding child protection matters. The applicants had been told that they could not access certain information because it had been destroyed in line with the council's retention schedule. They followed this up with a request for access to this schedule which was eventually provided to them. The schedule concerned did not contain policies covering child protection records.

Challenged on this, the council explained that it was under no obligation to take the previous correspondence into account when considering how to respond to the applicant's request, since it was not supposed to take the applicant's identity (and therefore their history of dealing with them) into account. The FTT believed this approach to be perverse, and an example of how the 'applicant-blind' principle can negatively affect the very applicants it is supposed to be supporting if taken too far.

The identity of an applicant and the reason for their request should certainly not affect whether they receive the information that they have requested in most circumstances. Practitioners should not be demanding an explanation before disclosure.

However, it is perfectly appropriate to take into account the history of the authority's dealings with the applicant if it helps understand what they are after. Asking those who have made requests why they are doing so may even help the conscientious FOI Officer to provide helpful advice and assistance to requestors. Just as long as they are careful that their positively motivated enquiry cannot be interpreted as a threat by a sceptical citizen auditor!

Myth: as long as the information is available elsewhere, it doesn't have to be provided

Section 21(1) of the UK Act and section 25(1) of FOISA allow public authorities to refuse requests where the information is 'reasonably accessible' or 'reasonably obtainable' by other means than making an FOI request. What is often forgotten is that in both pieces of legislation, it is not that that information is generally accessible that is relevant. It is whether it is obtainable by the applicant.

For the most part, what is available to many will be accessible to a specific applicant. However, this is not always the case. It might be that the applicant's circumstances put them at a disadvantage, and where this is the case, the public authority must take this into account.

A recent decision of the Scottish Information Commissioner illustrates this perfectly. Mr L, a prisoner, had requested information from the Risk Management Authority (Decision: 108/2019, Mr L and the Risk Management Authority). The Risk Management Authority ('RMA') refused to provide some of the information on the basis that it was either available online or commercially available from the publisher. The Commissioner noted that he had to take into account the circumstances of the applicant. Prisoners are unable to access the internet, and prison libraries cannot access information on behalf of prisoners.

The Commissioner also judged that the cost of obtaining the commercially published information put it beyond the means of Mr L. Therefore the authority was unable to rely on section 25(1) to refuse the relevant parts of the request.

It is not up to public authorities to guess the circumstances of appli-

cants though. The UK Commissioner takes the view that: '...it is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.' (see for example decision FS50621841 at paragraph 14).

The Commissioner's guidance also stresses that the circumstances of the individual won't always trump the authority's method of accessibility. The UK Act talks of information being 'reasonably accessible' so there will be times when it is reasonable for an authority to make information accessible in a particular manner. So the fact that a Record Office only makes a historical document available via inspection in that location might be reasonable, even if the applicant is based many miles away.

Nonetheless, before refusing to provide information on the grounds that it is otherwise accessible (or obtainable), practitioners will need to take into account the circumstances of the person making the request and decide whether a different approach is needed.

Myth: if information is inaccurate or incomplete it is not held

Ordinarily, it is not that difficult to say whether or not requested information is held. It either is or it isn't, most people would argue. However, practitioners will be familiar with the situation where relevant information is held... 'sort of'. A colleague confirms that there is some information recorded, but it is incomplete. The question is often raised in these circumstances, does an incomplete record mean that the information is not held for FOI purposes?

The Scottish Commissioner looked at an example of this in action in April of this year (Decision 059/2019: Mr F and Chief Constable of the Police Service of Scotland). Police Scotland had been asked a series of questions about stopping individuals

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under the Terrorism Act 2000. In particular, it was asked how many individuals had been requested to disclose their passcodes for mobile devices, and how many had refused. Police Scotland had responded that this information was not held. On further investigation though, the Force had explained that the absence of a reference in the paperwork to a request for a passcode did not mean that a request had not been made. Similarly, since not all refusals resulted in further action, not all refusals were recorded. Police Scotland had concluded that because it was possible that the records gave a misleading impression, the information was not held.

The Scottish Commissioner disagreed, concluding that: 'Simply stating that it is feasible that not every instance has been recorded does not necessarily equate to not holding information.' There was nothing stopping Police Scotland from disclosing the information that it did hold, even if it wasn't an infallible record of what had been requested. As the UK Commissioner and Tribunals have often pointed out, the fact that information might give a misleading impression is not normally a good enough reason to withhold information. The answer is to provide enough contextual information in the response so that applicants understand the quality of the information that they have been given.

Much as it might be the preferred option, it is not normally going to be appropriate to refuse to provide information just because it presents an incomplete picture.

Myth: correspondence signed by a secretary isn't relevant

A common theme of FOI requests received by public authorities is to ask for the disclosure of correspondence between specified individuals, usually senior officials of the authority. For example, it might be correspondence between an MP and a Minister, or a councillor and a local business owner or hospital chief

executive.

During my days as an FOI Officer for the Greater London Authority, it was common to receive requests for emails and letters between the Mayor of London and prominent individuals. Sometimes colleagues responsible for unearthing the affected missives would be keen to limit the scope of what they had to provide. That might purely be to reduce the volume of documentation that they had to read through, or it might be reluctance to disclose embarrassing comments. In these circumstances, occasionally the question would be raised: if a letter is signed by an individual's PA or a civil servant signs a letter from a Minister, does that letter count as being from the individual or Minister? At the time there was no guidance on this matter, and certainly no case law to assist.

Personally, I was always uncomfortable with interpreting these requests so narrowly. Thankfully my discomfort was eventually shared by the Upper Tribunal when it discussed a very prominent FOI case in 2012. Readers will remember the long running saga resulting from requests made to several government departments in 2005 for correspondence between the Prince of Wales and government ministers. Eventually, following the controversial application of the ministerial veto to the letters, the government was forced to disclose most of the material by the Supreme Court in 2015. In 2012 though, the case had reached the Upper Tribunal and one of the many issues that they discussed was whether correspondence signed — or even written by — the Prince's Private Secretary counted as correspondence from the Prince himself.

In fact, the government conceded that if a letter was sent in the Prince's name, even if it was signed by an official, it should be considered as being sent by the heir to the throne. The Tribunal went further though, giving the example of a Private Secretary writing to another Private Secretary reporting that their Minister has asked for enclosed information to be forwarded to the Prince of Wales. In this circumstance, it argued, the letter is in sub-

stance a communication from the Minister to the Prince.

The point is that it will rarely be defensible to interpret a request for correspondence so narrowly, especially if the aim is to gain some advantage by reducing its scope. If someone requests correspondence between one individual and another, it will include letters and emails sent and received on their behalf.

Conclusion

As practitioners go about their jobs, busy with ever increasing volumes of requests, it is easy to rely on hearsay ("this is how we've always done things, so this is how we will deal with any new requests that we receive"). The problem, as we've seen, is that "how we've always done things" is not necessarily good practice. This is why it is so essential that FOI Officers keep up to date with the latest caselaw and challenge their thinking by engaging with other practitioners and following the latest developments.

In particular, we've seen here that it will often be appropriate to take into account someone's identity and the reason for their request, particularly if doing so is helpful to the applicant. Also, the fact that information is accessible to some people, doesn't mean that it's accessible to all — and that needs to be considered before refusing to provide information because it is believed to be otherwise available.

We've also seen that incomplete information can still be held by a public authority, and might have to be provided even if there is a risk that it could give a misleading impression. And finally, correspondence signed or even written on an individual's behalf will be within scope when processing requests for correspondence from that individual.

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