

# FOIMan's Festive FOI Inbox

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**Paul Gibbons, aka  
FOIMan, answers three  
more readers' questions.  
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## New Course — the Role of the FOI Officer

What is the job of an FOI Officer? How do you interpret caselaw on FOI? Is there a right way to process FOI requests? Details of the course can be found on the PDP website, [www.pdptraining.com](http://www.pdptraining.com)

**A**s we approached the festive season, a familiar jingling sound filled my ears. It was not the sound of bells, though, but the repetitive ping of emails arriving in my inbox. Like most Freedom of Information Officers, I regularly receive emails asking questions. However, in my particular case, they're not FOI requests anymore. It is entirely my choice as well, since I asked you all to get in touch with your FOI problems.

Earlier this year, I answered three readers' questions about their FOI foibles, some about the application of the law, others about the practicalities. My gift to you in this issue is another three questions answered by practitioners' favourite (and only) FOI agony uncle.

Today our questions come from an FOI Officer with existential angst concerning their information; another confused by the tricky relationship between subject access and FOI requests; and — unusually — a question from an applicant wanting to be forgotten, whose question has implications for practitioners' record-keeping.

Remember, if you have a problem, and no one else can help, you know where I am: drop me a line to [feedback@foijournals.com](mailto:feedback@foijournals.com) with FOIMan's FOI Inbox in the subject line. (Like one of the questioners included in this batch, feel free to ask for a pseudonym if that is your preference.)

## Schrodinger's fact

Is it possible for information to be both held and not held, do you think? In a nutshell, that's the question at the heart of our first problem today, which was sent to me by Carol Smith of Cambridgeshire and Peterborough NHS Foundation Trust. Carol asked the following:

'If someone asks for something — say they want letters written by Person A to Person B, or the amount spent on X.

There are no letters, or there was no spend on X.

Do we not hold the information because there were no letters or spend, or do we hold the information, and the information we hold is the fact that there were no letters (or spend)?'

Very often when questions come up about whether or not information is held, the debate is because the public authority is trying to decide whether information that may actually be in its physical possession is also held for FOI purposes. Carol's question is the opposite — in her case, she wants to know what is the right way to answer when the information is not in any sense held.

As always with a question about the interpretation of 'held', we should look back to the Upper Tribunal's authoritative decision in *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection* (GIA/194/2011, 11th May 2011) in which the following words were uttered: "hold...is an ordinary English word and is not used in some technical sense in the Act." The Information Commissioner's guidance on the issue interprets this as meaning that whether or not information is held is a 'matter of fact'. So we don't need to over-complicate the issue.

In Carol's examples — the letters or the spend — it is a fact that information is not held. Assuming that the original request was worded 'Please send me correspondence between A and B' or 'Please tell me how much was spent on X', taking a very 'matter of fact' approach, the response to the applicant should be to the effect of 'the information is not held' (i.e. the first of the two alternative responses that Carol mentions). It would be slightly different if the question was worded 'Please tell me whether you hold any correspondence between A and B' or 'Please tell me whether you have any information on how much was spent on X'. Here, the technical answer would be that the authority does hold information on those questions, and that the information is 'We don't'. However, bothering to distinguish between these two might be an exercise in pedantry as the end result will be the same.

My answer to Carol and anyone else who might be struggling with this question is that the first option — the information is not held — will be the correct phrasing of the response. Even if that's not entirely accurate in every situation, or you disagree, the end result for the applicant is precisely the same. As long as the refusal notice is clear that the information is not held (or that the answer is 'not held'), it doesn't much matter.

Sometimes a question like this emerges in office debates and seems very difficult and critical, but its practical effect is minimal.

## Refusing SARs

Our next question comes from Helen (not her real name) from a Scottish public authority. It relates to the tricky borderline between FOI and data protection laws.

Readers will be familiar with the right for data subjects to make subject access requests ('SARs') under the General Data Protection Regulation ('GDPR'). This right allows individuals to ask organisations (including, but not restricted to, public authorities) to provide them with a copy of any information that they hold about themselves. Practitioners may be annoyed that I even feel the need to explain this to them, especially as many of them also have responsibilities for leading on data protection within their authorities (and we will come back to that in our next question). However, members of the public, and even some of our colleagues, are not so expert in the niceties of information rights.

Very often, an individual — perhaps a member of the public, or one of the authority's employees — will write in stating that they are making an FOI request for their own information. Helen's question is about what happens in this circumstance. Technically, there is an exemption in both the Freedom of Information (Scotland) Act (FOISA) and in the UK's FOI Act covering this. However, does it really make sense to send out a refusal of the request when this

happens, when in fact the authority is most likely to answer it, but under a different statutory right?

The relevant provision, exempting 'personal data of which the applicant is the data subject', is found at section 38(1)(a) of FOISA and at section 40(1) of the UK Act. Exceptions with the same effect can be found in the UK Environmental Information Regulations ('EIRs') at Regulation 5(3) and at Regulation

11(1) in the Scottish equivalent. So it is clear that under all these laws, public authorities can refuse information where it is personal data of the person making the request. An example of this in action can be seen in the ICO Decision Notice FS50761635 in which the Commissioner ruled that Reading Borough Council was entitled to refuse a request from an individual about their own previous FOI requests made through the What Do They Know website.

However, Article 15 of the GDPR states that the 'controller shall provide a copy of the personal data undergoing processing' to an individual asking for access to their personal data. The GDPR further allows that organisations (or controllers to be precise) may ask for proof of identity where they have 'reasonable doubts' about the identity of the applicant. Otherwise it is up to the organisation concerned to recognise a SAR when it comes in, so it

shouldn't matter that an individual has badged their request as an FOI request.

The UK Commissioner's guidance used to take an entirely pragmatic line on how to deal with this situation,

rather than one which was totally consistent with the letter of the law. It advised that if the SAR could be answered within 20 working days (as the FOI deadline will still apply in the absence of a refusal notice), and if further proof of identity was not necessary, then public authorities could simply respond to the original request, explaining that the information was being disclosed under data protection laws rather than FOI. Interestingly, the most recent version of the Commissioner's guidance on the section 40 exemption takes a more literal approach to the law, advising that a refusal notice must be issued in these circumstances, but advising that the request will be handled as a SAR. The Scottish Commissioner (relevant for Helen, of course), has always taken that approach.

In summary then, Helen should issue a refusal notice citing section 38(1)(a) but advising the applicant that the request will be handled as a SAR. One caveat raised by the Information Commissioner in its guidance: it is only appropriate to refuse a request using section 40(1)((38(1)(a) in Scotland) if the practitioner is satisfied that the applicant is the individual whose personal data have been requested. If there is any doubt over the identity of the applicant, the request should be refused as if the applicant was asking for someone else's data — using section 40(2) (or section 38(1)(b) in Scotland).

## Keeping records of FOI requests — and applicants

Many FOI Officers will, like myself, come from a records management background. Even if they don't, practitioners will recognise that it is important to keep records of the fulfilment of FOI requests. There are a number of reasons for this:

- they need to prove that they've met their legal obligations;
- they might need to defend themselves were an applicant to suggest that they hadn't;

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- they might want to refer back to a previous response if a similar situation arises;
- they will need to monitor and report on performance against FOI deadlines and other measures of quality — in other words prepare statistics;
- they may want to monitor other trends; and
- they may need evidence of an applicant's behaviour if they are considering the refusal of a request as vexatious.

There will be other reasons why records of FOI administration will be retained, but these are the primary ones.

There are, of course, different kinds of record that will be retained. There will be the request itself, any correspondence with the applicant such as clarifications, and the response. There will be internal correspondence and perhaps responses to consultation of third parties. Most authorities will maintain a database — in Microsoft Excel or something more sophisticated — of requests containing summary information about each one.

Just like any other records, these need to be managed. This is even more important for records that are, or contain, personal data. The GDPR requires organisations to know what personal data they are collecting, why, to have a legal justification for using them and to have and apply policies on how long the data will be kept. In respect of the process of answering FOI requests, the identities of individual applicants will be personal data, as will the names of those working for organisational applicants (such as businesses) that make requests. Applicants' contact details will be personal data, and the fact that an individual has made a request about a particular subject. Sometimes the information being requested can be a sensitive subject — especially if it lies at the heart of a local dispute or is very personal to the individual.

All of the above is useful context for the third of our enquiries. In this case, the person asking the question is not an FOI Officer, but an applicant. In addition to the right to access their personal data, individuals (or data subjects) have the right of erasure in certain circumstances. Some people call it 'the right to be forgotten'.

I was asked by a gentleman, let's call him Bob, whether he could insist on a public authority deleting the records they had about his requests. It occurred to me that this is an issue that practitioners may encounter, and I thought I'd tackle it here.

My answer to Bob was that I believed the authority would be within its rights to refuse his request. The right to erasure is not an absolute right. Put simply, it only applies if an authority cannot provide a valid legal justification for continuing to retain personal data. Readers may recall from a previous article ('How the GDPR affects the administration of FOIA', Volume 14, Issue 2, pages 4-7) that there are six lawful conditions that organisations can use to justify their use of personal data. These are in summarised form:

- consent;
- necessary for performance of a contract;
- necessary for compliance with a legal obligation;
- necessary to protect vital interests;
- necessary for performance of public tasks; and
- necessary to fulfil a legitimate interest.

The primary purpose for collecting the personal data of applicants is so that the public authority can fulfil its legal obligation to answer the request. So there is a valid legal justification for processing that data for that purpose.

Bob made a good point, though. Surely once the request has been answered, that lawful basis has expired. There is no legal requirement on the authority to keep records

about applicants. What's the answer to that?

Whilst it's true that there is no legal requirement to keep records, those records are kept to demonstrate compliance with the legal requirement. What happens if Bob accuses the authority of failing to comply six months down the line? The authority will be unable to prove that it has done so.

The GDPR recognises this risk, and at Article 17(3) disapplies the right of erasure in several situations, but notably where the processing of personal data are necessary 'for the establishment, exercise or defence of legal claims'. I would argue that since practitioners can't know whether their actions will be subject to such challenges, it will be necessary — and justifiable — to retain such records. Not indefinitely, but for a reasonable period.

Not all processing of applicants' personal data is justified on the basis of a legal obligation. As I argued in my previous article referenced above, some of the things we do with applicants' data are not necessary to fulfil the legal obligation. If we note the type of applicant, or earmark certain applicants for special treatment — such as alerting a Press Office to a request from a journalist — then the justification (if we can indeed justify what we're doing) will be that this processing is necessary to fulfil a public task. It isn't essential to the functioning of FOI, but we are arguing that it helps that statutory process run more smoothly and this is in the public interest.

In these circumstances, applicants also have the right to object to the use of their data. If this happens, the authority has to demonstrate that the public interest overrides the objections of the applicant. This would need to be seriously considered (and the reasoning recorded) but in many cases — such as use to determine whether an applicant's request is vexatious — it would be possible to show that the applicant's right to object was overridden. If it wasn't, the right to erasure would come back into play for these records.

Where Bob does have a point is that it is unlikely that a public authority could legitimately retain records of an applicants' requests indefinitely. This is where retention or disposal schedules come in. If authorities have in place a realistic and reasonable retention policy for records of FOI request handling, then it is more likely that they will be able to resist requests for erasure.

What is 'reasonable' then? Fortunately we can see plenty of examples of retention schedules online, including that of the Information Commissioner. The ICO's own retention schedule indicates that it keeps records of its own FOI requests for two years after the case is closed. This is similar to many public authorities and provides a reasonable rule of thumb. Obviously practitioners need to consider their own circumstances and whether there is any reason why records should be retained for a shorter or longer period.

There would be nothing preventing an authority from retaining records for longer in a fully anonymised form. So if FOI Officers want to retain details of how a request had been dealt with for reference purposes or maybe in published disclosure logs, that can

be done quite legitimately (though you may still want to reflect how long these anonymised records should be kept in your retention schedule).

In summary then, Bob can certainly ask a public authority to delete details of his FOI requests, but it is very likely that the authority would be within its rights to resist his request, at least until the point that a reasonable retention policy indicates that they should be destroyed.

## Conclusion

My thanks to Bob, Helen and Carol for getting in touch with their questions. We've established that:

- if information is not held, that's all you need to say (aside from providing some advice and assistance of course);
- if someone makes an FOI request for their own personal data, public authorities should refuse the request before going on to handle it as a SAR; and
- the right to erasure is unlikely to require the deletion of an authori-

ty's records of an FOI request unless they are being retained for an unreasonably long period.

As the UK's FOI laws near the end of their fifteenth year in force, practitioners still have plenty of questions about its implementation. That won't end in 2020, and I hope to answer more of your questions here over the next 12 months.

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