Running fast just to stand still

In this article, Paul Gibbons, aka FOIMan, looks at what could be improved about FOI. Paul is Head of the Examination Board for the Practitioner Certificate in Freedom of Information (www.foiqualification.com)

Twenty years, five governments, four information commissioners, three political parties in the UK government, two major inquiries, one update of the s.45 code of practice. Quite a lot has happened since the Freedom of Information Act 2000 ('FOIA') received royal assent. Yet not much has changed in terms of the legislation itself and the discussions around it.

Public authorities and those who work within them are often still uneasy about FOIA and the burden that it places on them. It does not seem to have settled in as a routine activity. Whenever the opportunity arises, most recently as a result of emergency legislation to deal with the coronavirus crisis, there are always authorities or groups representing them who will ask for FOIA requirements to be eased.

Meanwhile, those who make FOIA requests are often still frustrated by delays in the processing of their enquiries. Very often they have to fight harder than they should to get access to information that should be readily accessible.

Applicants and campaigners point to failings on the part of the regulator. Public authorities — often prominent ones — fail to meet even their most basic obligations under FOIA with impunity. At times, it seems like the Information Commissioner isn't really interested in enforcing FOIA.

There have been two inquiries into FOIA in the last decade resulting in very little happening. Campaigners and their allies have been occupied simply defending what exists, and whilst they have been very successful in this have had little success in pushing for progress.

In this, my last piece (for now) for the *Freedom of Information Journal*, I consider what's wrong with FOIA. I speak to other stakeholders to see what they think needs to change. Finally, I make some suggestions as to how freedom of information could be improved for the benefit of practitioners and applicants alike.

Inquiries lead to stalemate

In the last decade, FOIA has been subject to formal review twice: the post-legislative scrutiny conducted by the House of Commons' Justice Select Committee which concluded in 2012; and the Independent Commission on Freedom of Information set up by David Cameron in 2015 (reporting in March 2016).

Public authorities made their voices heard. For the most part, they argued that FOIA was placing an unreasonable burden on them, and called for the cost limit to be reformed. Government departments were particularly concerned about preserving a 'safe space' for policy making. Meanwhile journalists and campaigners argued that FOIA was an invaluable tool that had led to important public interest stories. They highlighted the risk that as more and more public services were outsourced, the coverage of FOIA was being eroded and called for it to be extended to private companies delivering public services to address this.

Both inquiries inspired heated debate, especially in the media. There was much suspicion of the aims of the Independent Commission in particular, leading to some surprising voices joining the fray. Whilst it was not unexpected to read about FOIA in broadsheets, particularly *The Guardian*, it was very unusual to see a fiery editorial in *The Sun* on this subject.

All of this noise served to disguise the fact that neither inquiry led to anything much happening. Campaigners and the media succeeded in preventing recommendations that could have led to weakening of the legislation. However, they failed to achieve any changes that would have improved it. When both reports said pleasant things about FOIA and openness, and recommended few changes, it felt like a victory. In reality, it was more like stalemate.

The inquiries made very similar recommendations, primarily:

- more proactive publication of information;
- publication of FOI performance statistics by all public authorities;
- making the section 77 offence triable either way, making it easier for the ICO to prosecute;
- placing a time limit of 20 working

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days on public interest extensions and internal reviews; and

- more protection (whether formally or informally) for policy making in government.

The fact that these recommendations turn up in both reports demonstrates how little had happened following the post-legislative scrutiny. In neither case has the government of the day done very much in response.

After the Independent Commission reported, the Minister for the Cabinet Office, Matt Hancock, told the Commons that its recommendations would be reviewed, but that 'no legal changes' were necessary.

The last decade has seen some 'legal changes' to FOIA, but they have mostly been of limited effect:

- the section 37 exemption was amended to provide more protection for communications with senior royals (Constitutional Reform and Governance Act 2010 (CRAG));
- the '30 year rule' for release of public records in the National Archives was reduced to 20 years over a transitional period, affecting the longevity of several FOIA exemptions;
- the duty to provide information in a requested format was amended to require requested datasets to be released and published in a reusable format (Protection of Freedoms Act 2012 ('POFA'));
- incumbents of the Information Commissioner role were limited to a single term in office ('POFA');
- a new exemption was added at section 22A to better protect unpublished research data — one of the few recommendations of the post-legislative scrutiny to be taken up by government (Intellectual Property Act 2014); and
- several bodies were added to coverage of FOIA, including Network Rail, the Police Federation of England and Wales, and academies (various regulations).

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Where are we now?

It is four years since the Independent Commission reported, and I wanted to get a sense of how FOI is seen right now. So I asked several people with an interest in FOI for their thoughts: the ICO, practitioners, a journalist, and a campaign group.

Firstly, what does the regulator think about the overall health of FOI in 2020?

I was told that 'The ICO continues to engage at all levels with government on information rights law to ensure it remains relevant and fit for purpose in the present day and believes FOI remains in as healthy a position as it did when the Act came into force in 2000.' That sense that FOIA is 'fit for purpose' and 'healthy' is not shared by everyone.

Anecdotally, it seems that many practitioners continue to be concerned with the burden that FOI imposes on their authority. One from a local authority told me 'real life experience is that some staff can see [FOI requests] as overly time consuming and a diversion from their real job', with particular concern over requests 'from businesses after contract information'. Interestingly, the issue seems to be 'trying to sell why an FOI needs to be responded [to] versus the day job to those who deal with real life issues daily such as social services'. Another practitioner tells me that their problem is less with the volume of requests, and more with situations where one applicant is dissatisfied:

'On the whole, I think it works well and we manage ok as we don't really have a lot of requests. However, it can very easily become a struggle when just one applicant becomes unhappy. Public interest tests, decision making and enforcement action are all open to interpretation and can be very work/time intensive.'

When I conducted research a few years ago, many practitioners were keen to stress that FOI was not their only task. It is clear that many feel overwhelmed by the amount of work involved in handling FOI requests, especially bearing in mind that they have other responsibilities. It is not surprising that they may question the value of the right to know at times. Those who exercise that right have a different perspective.

Claire Miller is a journalist who makes extensive use of FOIA and transparency requirements. In her own words, 'FOI is vital to my work'. As a topical example of how she uses FOI, Claire told me about current research she was conducting into potential racial disparities in the use of force by the police. The data enabling her to do this should be published proactively by police forces, but there is huge variance in compliance and in the granularity of data that is published. Claire says:

'It takes FOI to get the full dataset (including internal review and complaint to the ICO). And that is what the Act should be there for, to ensure that public bodies can't just opt out of transparency.'

Her view of public authorities' approach to FOI is not entirely negative, having experienced 'pockets of good practice and… people who are really committed to the ideals underpinning the Act…FOI officers who are really trying to help you get some or all of the information you've asked for, who try to understand what you are after and find ways to make it work, who are willing to take on board points raised in internal reviews and use them to inform future decisions.' However, she has experienced 'poor understanding and bad attitudes' with public bodies showing 'no urgency to answer requests' and issuing 'poorly thought-through or formulaic refusals', and 'generally people not getting the information they are entitled to.'

The Campaign for Freedom of Information ('CFOI'), as its name suggests, has been prominent in promoting FOI since 1984. Maurice Frankel, the Campaign's Director, believes '[t]here are systemic problems with FOI, particularly the delays, that need to be addressed.' He adds: 'There is little to deter authorities from ignoring or repeatedly deferring responses to requests and no sanction where this is deliberately done.'

Enforcement

This failure to effectively enforce FOIA was identified as an issue by both Claire and Maurice. 'The compounding problem is the lack of consequences', says Claire, adding that enforcement is 'too slow, it can be extremely toothless'. Ironically, it seems that this was about to change at the start of 2020.

A disclosure by the ICO at the end of May in response to an FOI request revealed a significant ramping up of enforcement action, with enforcement notices drafted, several public authorities required to produce 'action plans' to improve their compliance, and a move towards re-establishing the ICO's monitoring programme, which 'names and shames' under-performing authorities.

CFOI argues that the 'disclosures show that the ICO had at last been proposing a robust FOI enforcement approach'. Unfortunately, this was the point at which the pandemic arrived in the UK, and the Commissioner signalled a change in approach. The ICO confirmed to me that:

'Prior to the coronavirus pandemic, the ICO had committed to taking enforcement action where public authorities were not meeting information rights obligations, and had begun to refocus resources to this end. As the pandemic took effect, the ICO acknowledged its responsibility to take into account the exceptional circumstances of the pandemic…'

Maurice understood the need for a change in approach as a result of the coronavirus, but worries that the ICO has gone too far. 'The relaxation of FOI enforcement during the pandemic made sense for a short period as authorities responded to the emergency. But it's one thing to protect NHS and other frontline bodies where they genuinely could not deal with FOI without undermining their emergency work — another to shield the entire public sector, including bodies whose staff are continuing their normal functions from home.'

As Maurice says: 'The steps the ICO were finally taking to deal with compliance with time limits were encouraging. The removal of enforcement pressure across the board during the pandemic and failure to say exactly how the ICO has been dealing with it (coupled with a policy statement simultaneously pointing in multiple different directions) has not been.'

Disillusionment on both sides

The common theme is one of disillusionment. Practitioners and their colleagues perceive FOI as an ever increasing source of work as resources have become progressively tighter. Many will share the view expressed by one practitioner I spoke to that there 'needs to be some changes to the Act to relieve some of the burden from authorities whilst not jeopardising the transparency the Act provides'.

Meanwhile, those who campaign for FOI or who use it are increasingly frustrated by delays and a sense that public authorities see it as an unwelcome distraction, rather than an integral part of their public service role. Claire articulates this frustration:

'…ultimately, FOI is in need of an attitude change. While it is seen as a burden, an annoyance, something public bodies often don't want to do, I feel like we are just going to spend time every few years defending the Act against attempts to restrict it.'

These are two sides of the same coin. For as long as public authorities, and in particular administrative functions, are poorly resourced, practitioners and their colleagues are bound to feel frustrated with something like FOIA that they feel they have little control over. That frustration, and lack of time and resources, is bound to filter through to those exercising their right to ask for information.

Fantasy FOIA

How can this situation be improved? Maurice helpfully identifies 'three interrelated aspects to the problem: the legislation, the funding and the culture'.

Taking legislation first, my own view is that we are fast approaching the point when a new FOIA will be needed. As Maurice points out, this is not without risk, since the passage of legislation could be used to weaken the right to know as well as enhance it. However, at some point FOIA will at the very least be amended, and it's always fun to fantasise about what could be achieved, even if it never comes to reality.

In the last two or three years, it has felt like FOI has slipped down the agenda, particularly for the ICO. This is well illustrated by the omission of any reference to FOI in at least one of their recent monthly e-newsletters, normally used to update subscribers

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on all the ICO's workstreams. The reason of course is that during this period the focus of the ICO has been on implementation of the General Data Protection Regulation ('GDPR') and associated legislation. The GDPR, though, potentially provides a useful template for future improvements to the UK's FOI regime.

One of the most useful innovations in the GDPR is the concept of the Data Protection Officer. I asked a practitioner what changes they would like to see in an updated FOIA, and they told me: 'Requirement for a FOI Officer should be included, the same as in [data protection] to give it equal importance.' There are precedents in other countries for FOI laws that require such an appointment, so this would not be a completely novel innovation.

Another well-publicised feature of the GDPR is its robust powers of enforcement, including significant fines. At the moment, the consequences of failure to comply with FOIA are minimal, even if the ICO is willing to utilise all its powers. Senior management in public authorities would be much more likely to properly resource FOI if failure to comply could result in meaningful sanctions. Penalties do not have to be entirely financial in nature: in Mexico, failure to issue a refusal notice on time results in automatic disclosure of the requested information. Unsurprisingly public authorities' performance against deadlines is often close to 100%.

"Given that the ICO's focus is on data protection these days, perhaps the time has now come to give FOI its own Commissioner. The example of the Office of the Scottish Information Commissioner ('OSIC') demonstrates how well an office focussed on the promotion and enforcement of FOI could work. This would also benefit data protection in the UK, since the ICO could concentrate on those responsibilities without distraction."

Given that the ICO's focus is on data protection these days, perhaps the time has now come to give FOI its own Commissioner. The example of the Office of the Scottish Information Commissioner ('OSIC') demonstrates how well an office focussed on the promotion and enforcement of FOI could work. Such an office could take on responsibility for enforcing the many other transparency and open data obligations that now exist in the UK, but are often as neglected as FOI. This would also benefit data protection in the UK, since the ICO could concentrate on those responsibilities without distraction.

Of course, FOI does not just mean FOIA. The Environmental Information Regulations ('EIRs') regulate the use of environmental information. The EIRs implement in UK law not only a European Union Directive (which will no longer matter following the end of the current transition period) but also obligations under the Aarhus Convention, an international treaty to which the UK is a signatory. So the requirements of the EIRs have to exist. However, presumably it is not necessary for them to continue to exist in separate legislation.

One possibility therefore might be to merge FOIA and EIR. In particular the obligations for internal review could be incorporated within the new FOIA, and the more liberally worded exceptions could replace the exemptions in Part II of FOIA, with almost all of them subject to a public interest test. Such an approach would be progressive since it would encourage more disclosure – indeed a 'presumption to disclose', and practical as practitioners would only need to familiarise themselves with one FOI law. With rights come responsibilities, so why should public authorities be the only ones subject to codes of practice? There could be a code of practice for applicants outlining appropriate use of FOI, encouraging good practice and discouraging unreasonable behaviour. The vexatious provision in the legislation could be linked to compliance with the code. There could be a code of practice outlining how FOI Officers should fulfil their role, just as there is in Ireland.

Outside of FOIA, a new Public Records Act, perhaps modelled on the Public Records (Scotland) Act 2011, could promote better record-keeping – even the 'duty to document' that Elizabeth Denham has called for. If public authorities were forced to keep specified records and publish lists of these, it would avoid the situation often faced by applicants where they have to guess what records are likely to exist and invariably find themselves on the wrong side of the cost limit in trying to account for this. It would make practitioners' jobs easier too since better record-keeping would facilitate the collation of information to answer FOI requests.

Funding

All of this is meaningless without sufficient funding. I asked Maurice Frankel whether splitting up the ICO was a practical solution, and he warned: 'an underfunded ICO is always going to face problems, whatever the law says, and replacing it with an equally underfunded FOI-only Commissioner may not be much of a solution. Properly funding the ICO's work would be a major advance.'

A glance at the ICO's accounts for the last 5 years confirms this as an issue. In the 2014/15 financial year, the grant-in-aid received from government to cover their FOI work was £3.7 million. In 2018/19 it was £2.9 million. At one stage it reached £5.2 million, but this included a loan to fund the ICO's restructure to facilitate GDPR. The funding for FOI in 2018/19 is so low because this loan had to be paid back through a lower grant-in-aid for FOI.

It's not just the ICO's funding that needs to improve. It is not surprising that many in the public sector are sceptical when it comes to FOI given some budgets have been cut year-on-year for much of the decade. It is right that public authorities are held accountable for their spending — one of the justifications for FOIA — but it is understandable that this causes rancour when there is little left to spend in the first place. The reason public authorities (particularly those outside central government) and those who work in them are so critical of FOI has less to do with the concept of openness itself, and more to do with the difficulties of delivering public services in what is still an age of austerity. If public bodies become better funded, complaints about FOI are likely to decline.

Culture

Which brings us to culture. Claire Miller said:

'If we start to embrace transparency, openness as default, then FOI is just part of a wider commitment to publish information, a way for people to ask for what they're interested in to help them understand how public bodies work.'

Change is needed if FOI is ever to fulfil its potential. Legislative change and better funding will help, but both only serve to facilitate the most fundamental and necessary change, that of the culture of the public sector. As Claire suggests, what is really needed is for transparency to be embedded in the way that public authorities work so that it becomes second nature rather than an added burden. If we can get to that point, it will be so much the better for all concerned — practitioners and public alike.

During the last decade, my own journey has taken me from dealing with FOI requests, to blogging about FOI, to training fellow practitioners, and eventually to writing a book on the subject. I firmly believe that the key to FOI working well now and in the future is well-informed, dedicated, professional practitioners who can foster a positive attitude to openness within public authorities. That, more than anything else, will ensure that FOI fulfils its original aims, and contributes to an effective and successful public sector that works — and is seen to work — with and for all the people of the United Kingdom.

Training Course — the Role of the FOI Officer

What is the actual job of an FOI Officer? How do you interpret caselaw on FOI? Is there a right way to process FOI requests? Paul Gibbons addresses these issues in the training course, 'Role of the FOI Officer'. Details of the course can be found on the PDP website, www.pdptraining.com

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