

Denham's drive for a duty to document

Paul Gibbons, aka FOIMan, looks at the issues surrounding the Information Commissioner's proposals for a new duty to document

Any practitioner that has attempted to promote records management within their organisation will be familiar with the following quote from the preface of what was until recently known as the 'Lord Chancellor's Code' (now the rather less snappily entitled 'Secretary of State for Culture, Media and Sport's 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."

Its appearance at the beginning of the Code of Practice on Records Management highlights the importance of managing information to complying with the Freedom of Information Act ('FOIA'). It makes sense — how on earth can any public authority answer FOIA requests if it does not keep records of its decisions well, or indeed at all?

In the early days of FOIA implementation, the government appeared to embrace this concept. In announcing that the right to know would come into effect in 2005 (four years after the Act received Royal Assent), the government said that this date too would be when its electronic records management programme came into effect. The additional time would allow government to improve its records management, it claimed.

Yet most people who have worked in public authorities — and many who haven't — know that record keeping is commonly very poor even to this day. In fairness, this isn't simply an affliction of the public sector — but FOIA appears to have done little to improve matters. There are also complaints, rightly or wrongly, that FOIA has led to more 'sofa government', with public sector employees, ministers and other elected individuals proving reluctant to record their conversations or advice.

Perhaps this is what led the new Information Commissioner, Elizabeth Denham, to announce at a recent event that her Office would be pressuring the government to legislate to create a new 'duty to document'. Giving a speech to mark 250 years of FOI on 8th December 2016, she said: "A positive, legal obligation to document actions and

decisions is my answer to the challenge of decisions taken by text, by instant message, by email.

"If public authorities are placed under an effective duty to document regime, then we are telling them to write down their decisions, to note their reasons and most importantly to write things down well."

Taking into account Ms Denham's background as an archivist and records manager, the emphasis on record keeping is perhaps unsurprising. However, her announcement raises a number of questions. Is new legislation needed? Have other countries done this before? What would such a duty look like?

Doesn't FOIA already require records to be kept?

Taken at face value, that regularly quoted passage from the preface of the section 46 Code (which reappears in the preface of the equivalent Scottish Code), suggests that FOIA provides an effective driver for improved records management. Experience though, suggests something else.

Academic research appears to corroborate the anecdotal experience of those working in the public sector. A study from UCL academics in 2010 found that FOIA had had limited impact on records management. Notably for present purposes, one practitioner interviewed by the researchers said: "I don't think anybody has ever thought 'this FOI ought to make us have a re-look at the records management'. I don't think there has ever really been a link."

Fundamentally, practitioners have discovered in practice that they can comply — more or less — with FOIA without taking steps to improve their records management. As another FOI Officer commented:

"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."

What's more, FOIA itself has in some cases been seen to contribute to a decline in records management due to the resources that answering requests consume:

"The sheer workload that FOI is now engendering is harming record management, because I don't have the time to review the policies that are written, and I don't have time to update the retention schedule and investigate it."

Far from providing a basis for improving the management of information, FOIA is often seen by those responsible for FOIA and records management in public bodies as undermining it. If practitioners have not seen much evidence of FOIA as a driver for good record keeping in their day-to-day experience, neither have they been encouraged to view it in this way by the decisions of those tasked with interpreting the legislation on appeal.

Tribunal decisions

There are numerous Tribunal decisions that criticise the way that public authorities manage their information. However, they rarely produce results that are likely to encourage authorities to change their ways.

In *Johnson v Information Commissioner* (EA/2015/0167), the First-Tier Tribunal ('FTT') accepted the Information Commissioner's argument that "FOIA is about the right of access to recorded information held by a public authority, and not about what information *should* be held, or about *how* a public authority holds that information and whether or not it implements a given records management system."

Another iteration of the FTT recognises 'inadequacies' in the recording of complaints by Liverpool City Council, but sees this as justification for placing a limit on searches (*Tripp v IC and Liverpool City Council*, EA/2014/0221). As far back as 2008, the FTT in *Robin Williams v IC and Cardiff & Vale NHS Trust* (EA/2008/0042) states that it could not disallow reliance on section 12 on the basis that the reason that the cost limit would be exceeded was down to poor record keeping. This will even be the case where the standard of record keeping might result in the authority failing to comply with other legislation (*Cruelty Free International v Information Commissioner*, EA/2015/0154).

FOIA's limited benefit as a driver of good records management has even been recognized at Upper Tribunal level when in *Metropolis v Information Commissioner and Donnie Mackenzie* ([2014] UKUT 0479 (AAC)), Wikeley J. concluded that record-keeping practices are a matter outside the control of the requestor: "the fact is that FOIA is about the citizen's right to information...It is not a statute that prescribes any particular organizational structure or record-keeping practice in public authorities."

Sofa government

On several occasions, civil servants and others have warned against the danger that FOIA may lead to ministers and officials making decisions 'off-line'. Furthermore, some have indicated that this does in fact happen. In his evidence to the post-legislative scrutiny back in 2012, former Cabinet Secretary Lord O'Donnell indicated that:

"Tony Blair thought it was a problem. Therefore, how do you avoid this problem arising? You basically find a medium which is not covered by FOI. The cost of mobile phone bills goes up between Ministers. They are going to find ways around it. Things are not going to be written down."

The most commonly cited academic research on FOIA, conducted by researchers from UCL's Constitution Unit, found limited evidence of FOIA having this effect. It further suggested that where 'sofa government' did happen, it could be ascribed to other causes such as new technology, different personalities' preferences, or fear of leaks. However, even the UCL researchers were able to quote civil servants who described minutes being shortened as a direct reaction to FOIA.

In 2012, it was also revealed that the Secretary of State for Education, Michael Gove, was using his wife's email account to correspond with his advisers, allegedly to avoid FOIA. Whilst this came to light, and resulted in a decision from the Information Commissioner ordering disclosure, we can only speculate how many other Ministers and officials are doing the same thing beneath the radar. We have no way of knowing how prevalent such practices may be outside of central government where there may be significantly less scrutiny.

What can the Commissioner do now?

Despite the Commissioner's case to the FTT in *Johnson*, she does have some discretion to tackle poor records management under FOIA. Section 48 of the Act states that the Commissioner 'may give the authority a recommendation' (or 'practice recommendation') 'specifying the steps which ought in his opinion' to be taken by the authority to bring them into compliance with one of the Codes of Practice. These practice recommendations do not have statutory force (failure to comply will not constitute an offence), but they do provide the Commissioner with

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a way to highlight poor practice.

Only two practice recommendations have been issued in relation to the section 46 Code, and both were issued in 2009. One was to the Department of Health, and the other to Nottingham City Council. If the new Commissioner wants to promote better records management, she could do worse than to utilize this oft ignored power.

There is even scope to use the practice recommendations to promote the duty to document. As was pointed out by one of the authors of the section 46 Code at the 250 years event, the section 46 Code requires that authorities 'keep the records they will need for business, regulatory, legal and accountability purposes' (Part 1, section 8). It goes on to indicate that authorities should decide what records are needed, establish business rules as to what should be kept and how, and take steps to ensure that those records are kept. According to the author of the Code, this was a deliberate attempt to require the creation of records to an appropriate standard, and therefore to empower the Information Commissioner to take action where that didn't happen.

As a starting point at least, practice recommendations provide the Commissioner with a tool to tackle the inadequacies of records management under FOIA. It is true to say though that this is a limited tool and we can see why she would like new legislation to be brought forward.

Record-keeping legislation

At the moment, the only UK legislation relating specifically to record-keeping is the Public Records Act 1958, as amended in 1967 (and further amended by FOIA in 2000). This is limited though, in several ways.

Firstly, it only applies to central government departments, quangos, and NHS bodies. Local government, universities, schools, and so on are

excluded. Secondly, it merely requires those bodies that are covered to 'make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping' – there is no requirement on them to create or keep particular records.

There have been attempts to update the Public Records Act for the modern age. In 2003, the National Archives launched a consultation on Proposed National Records and Archives Legislation. Amongst its aims would have been the extension of records management standards to local and regional government, including a requirement to create and maintain records to a specified standard. However, despite strong support for the proposals, they do not seem to have captured the imagination of the government. No further proposals to legislate for better record keeping emerged following the end of the consultation.

Scandals have occasionally led to muted calls for change. For example, it has been suggested that the Independent Inquiry into Child Sexual Abuse may result in changes to the Public Records Act, especially after incidents like the Home Office's loss of 114 files, reported in 2014.

In Scotland, the Public Records (Scotland) Act 2011 came about as a recommendation following an abuse scandal in children's homes in Scotland. The Act obliges public authorities to submit a 'Records Management Plan' to the Keeper of the Records of Scotland, and thereafter to follow it. Although there is no direct requirement in the legislation to create records, the Keeper's 'Model Plan' includes a records management policy which should set out what records the authority should keep. This may offer some discretion to the Keeper to require public bodies to adhere to their policy and create records that have been identified in the policy.

There are, of course, other laws that require records to be kept in certain circumstances. For example, local authorities are required (under Regulation 7 of the Openness of Local Government Bodies Regulations

2014) to 'produce a written record of any decision...to grant a permission or licence,...affect[ing] the rights of an individual, or...award[ing] a contract or incur[ing] expenditure which, in either case, materially affects that relevant local government body's financial position'. But record-keeping requirements set out in a range of often obscure regulations will probably fall short of what the Information Commissioner has in mind.

So we have to look abroad to identify legislation that meets the description of a public sector duty to document. In response to questions after her speech, Elizabeth Denham specifically referred to legislation in Queensland. It is assumed that she was referring to the Public Records Act 2002, which states at section 7 that:

'Making and keeping of public records:

(1) A public authority must—
(a) make and keep full and accurate records of its activities; and
(b) have regard to any relevant policy, standards and guidelines made by the archivist about the making and keeping of public records.

(2) The executive officer of a public authority must ensure the public authority complies with subsection (1).'

Importantly, this legislation applies to every public authority in Queensland, not just central government. This kind of legislation, applying across the public sector, and requiring all public bodies to keep records, seems to be what the Information Commissioner has in mind.

Summary

Far from acting as a driver for improved records management, FOIA has often been seen as undermining it. Whether it be the consumption of limited resources, or the encouragement of sofa government and 'Mrs Blurt' style email accounts, there is some evidence for this.

Neither has the interpretation of FOIA assisted the cause of improved information management. Time after time, the Commissioner and Tribunals have found that FOIA doesn't require the creation or good management of information— rather, it requires that information that can be found be disclosed unless exemptions apply. It is easy to understand the frustrations of requestors, where poor record keeping is the reason an authority cannot locate information within the appropriate limit.

In these circumstances, it is also easy to understand why the new Information Commissioner is so keen to address this problem. Even if she fails to persuade the government to implement new record keeping legislation, it is useful that she has highlighted the issue. She can draw further attention to it by using the limited powers she has under FOIA in the form of practice recommendations. FOIA may yet help, by making deficiencies in the management of information across the public sector more obvious.

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