

# What Do They Know about refusing requests?

**Paul Gibbons, aka FOIMan, looks at the legal requirements for FOI refusals, highlights some examples of bad practice from his review of 250 refusal notices, and advises on how to achieve good practice**

**F**reedom of Information is about openness and transparency, as the long title of the Freedom of Information Act 2000 ('FOIA') indicates. It is 'an Act to make provision for the disclosure of information held by public authorities or by persons providing services for them.' As referred to in recent articles, the Environmental Information Regulations 2004 ('EIRs') are even clearer that public authorities should 'apply a presumption of disclosure.'

Despite this, there are times when it is entirely appropriate to refuse FOI requests. Compliance with a request may be too costly, vexatious or perhaps the information just simply is not held. Or perhaps providing the requested information would result in unjustified harm to an individual or organisation's interests. Both FOIA and the EIRs make provisions for these situations and in all the above cases, public authorities are required to issue a 'refusal notice'.

The rather legalistic term 'notice' to me sends the wrong signal to both public authorities and applicants. It encourages cold, bureaucratic responses which may meet the bare legal requirements of the legislation, but are unlikely to achieve what the drafters intended, and may in fact foster the very distrust that FOIA was originally aimed to counter. Really what we're talking about here is a response, or more specifically an explanation for the refusal of a request. Giving a notice ought to be geared towards customer care, and doing the best we can to assist the applicant by, at the very least, helping them to understand why information cannot be disclosed. It shouldn't be about ticking a legal compliance box.

In this article, I look at what the legislation requires and what the Information Commissioner's Office ('ICO') expects, before going on to highlight examples of bad practice found during a brief review of recent responses made to requests made via the WhatDoTheyKnow.com website. I will complete the analysis by drawing some conclusions about what a 'good' FOIA refusal should look like.

## FOIA and EIRs on refusing requests

Section 17 FOIA requires that authorities must issue a notice to FOI applicants if they decide to refuse their request. Depending on the reason for refusal, that notice must contain different elements.

If the authority is neither confirming nor denying whether it holds information, or if it is refusing to provide information due to an exemption, it must:

- state that this is the case;
- specify which exemption applies; and
- explain why it applies.

If the exemption claimed is a qualified exemption, the response must also state the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the information is held, or in disclosing it. If the authority needs longer than 20 working days to consider the public interest, it must still issue a response containing the items listed in the bullet points above within 20 working days, and estimate when it expects to reach a decision on the public interest.

Notices must also be given to the applicant where a request is being refused because compliance would exceed the appropriate limit (section 12 FOIA) or because the request is vexatious (section 14). If an authority has already refused a request under section 14, and it would be unreasonable to expect the authority to issue a further response, it does not have to respond again. In its guidance, the ICO has advised that it expects authorities wishing to rely on this justification to have informed applicants in previous responses that it will not respond to similar requests in future.

Any final response (i.e. one not where a decision on the public interest is outstanding) must also contain details of the authority's internal review procedure and of the right to appeal to the Information Commissioner.

Regulation 14 of the EIRs sets out very similar requirements. The only significant difference is an additional duty in

the exception at 12(4)(d) covering 'unfinished documents'. Where information has been refused on these grounds, public authorities have to estimate when the material is likely to be completed, and if the information is being produced by another authority, identify it.

### What the Information Commissioner expects

The Commissioner advises that public authorities should tell applicants which legislation they have considered the request under – FOIA or EIRs. In cases where the applicant is asking for their own information, the ICO advises handling it as 'a subject access request' under the Data Protection Act 1998 rather than formally refusing under section 40(1) FOIA or Regulation 5(3) of the EIRs.

The ICO's guidance states that 'it is good practice to use plain English and avoid the use of jargon or abbreviations whenever possible.'

Where exemptions are being claimed, the Commissioner adds that: 'The explanation in the refusal notice should be detailed enough to give the requester a real understanding of why the public authority has chosen not to comply with the request.'

This should include an explanation of how disclosure would cause prejudice if the exemption is a 'prejudice-based' one, or how the information falls within the class of information described in a 'class-based' exemption. In explaining why the public interest favours

withholding the information, the ICO suggests that all the matters taken into account and an explanation of the decision should be provided.

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the quality of the notice into account when considering complaints.

The ICO continues: 'If the reasons for the decision are particularly complex or several exemptions were applied, then it may be advisable to split the notice into shorter subsections to make it easier for the requester to follow.'

Where a request is being refused on cost grounds, the ICO recommends that authorities go further than the requirements of section 17 in order to meet the section 16 duty to provide advice and assistance. Referencing the section 45 Code of Practice, the ICO advises that the refusal notice should contain a breakdown of the costs involved, and an indication of how the request could be brought within the appropriate limit.

The Commissioner lists a series of benefits of good refusal notices, including:

- there are likely to be fewer requests for internal review as applicants will better understand the reasons that their request was refused;
- there are also therefore likely to be fewer complaints and appeals made to the Commissioner or the Tribunal; and

- the Commissioner and Tribunal will take

### What should a refusal notice look like?

Taking the statute and the Commissioner's views into account, what should a good refusal notice include?

Clearly, it must set out as a minimum what is being refused, which provisions are being utilised, and why they apply, together in most cases with details of how to complain. However, a really good notice should also be written in plain English and structured in such a way as to communicate its contents clearly. It should be helpful, in line with the section 16 duty (or Regulation 9 in the EIRs), and if relevant, explain how the applicant could resubmit a request that might result in a more successful outcome.

### How do most FOIA and EIRs responses look?

Fortunately, we have a ready source of material to test this ideal against. The website [WhatDoTheyKnow.com](http://WhatDoTheyKnow.com), as many readers will know, provides a facility whereby applicants may submit a request to a public authority online. What is really useful for this study's purposes is that public authorities' responses are automatically published on the site.

I browsed through the 250 most recent 'unsuccessful' requests on the site to see how public authorities responded to requests. Only cases that were marked as having been refused (as opposed to 'information not held', for instance) were inspected. There were many responses that were helpful and compliant with section 17. There were, however, a significant minority of responses that failed to achieve either of those benchmarks.

### Examples of failure to comply with section 17

A significant quantity of refusals were made on the basis of cost. One university, for example, explained that the requested information was held,

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but that it was 'unable to comply...under section 12'. Leaving aside for a moment the fact that section 12 does not oblige a public authority to refuse a request, the response fails to outline how this conclusion was reached beyond explaining that 'it would take one person more than 18 hours to extract and compile [the information]'. This falls below the Commissioner's recommendation that a breakdown of the estimate be provided. Further, no advice is offered on how the request might be brought within the appropriate limit, thereby breaching the requirements of section 16. These were common failings; in another example, an authority which aggregated the cost of two requests provided a total estimated cost without offering any explanation of how it reached this estimate.

One of the core requirements for refusals is to explain why a particular exemption applies. A response from one government department that states that 'disclosure of the information would prejudice the commercial interests of [the department], in addition to causing prejudice to international relations...', without further explaining the nature of the prejudice, falls short of this. One local authority's response (unnecessarily) quotes the whole of section 31 of the Act, supposedly to explain the application of a single clause (section 31(1)(a)), but does not explain what prejudice would be caused by disclosure. It has long been established that authorities are expected to indicate the likelihood of prejudice (see, for example *Oxford City Council & Hogan v IC*, EA/2005/0026 and EA/2005/0030, 17th October 2006, para. 34), yet this response does not say whether prejudice 'would' or merely 'would be likely' to be caused. Aside from failing to meet either the Act or the Commissioner's criteria for refusal notices, such responses leave the applicant completely in the dark.

There might be excellent reasons for withholding information requested as part of an FOI request, but in the absence of any explanation, it is impossible for an applicant to know.

It will not come as a surprise to learn that the same council response boldly states that 'we consider that the public interest in maintaining the exemption outweighs the public interest in disclosing the information', without providing any further justification. At least that response acknowledges the existence of a public interest test.

In another example observed, an examination board applies the section 22 exemption which permits authorities to refuse requests where the information is intended for future publication. As this is one of the qualified exemptions, this public body ought at the very least to explain why the public interest in withholding the information outweighs the public interest in disclosure. In this case, however, the public interest is not even mentioned.

### Examples of poor practice

These are all examples of responses that omit required elements. Often though, it is what a public authority includes in a response that makes it unhelpful to the applicant.

One police force insists on beginning its responses with an outline of its FOIA obligations: 'When a request for information is made under the Freedom of Information Act 2000 (the Act), a public authority must inform you, when permitted, whether the information requested is held,' and so on. In the first instance, this seems unnecessary, as the fact that someone has sought to make a request indicates their awareness of their rights. Given the identity of the authority, it is possible that the very formal and legalistic wording of this response might also be seen as intimidating. This effect is compounded by the lengthy 'legal annex', which buries some very well explained arguments within extensive (and again unnecessary) quotes from the text of the Act. With such verbose responses, the suspicion can arise that there is the intention to bamboozle the applicant so that they will not be tempted to appeal the decision.

In fairness to the authority mentioned, at least it does attempt to

provide a helpful explanation of why the relevant exemptions apply. A different response from another public authority similarly provides a 'legal annex', but it mostly consists of the full text of the particular exemption with very little else besides.

Sometimes, it is about the order in which information is provided. One authority uses the first page of its response to outline the copyright and re-use implications. Once we finally reach the page where the request is answered, it becomes clear that re-use rules are unlikely to apply in this particular case, especially given the fact that some of the information is being withheld.

It can be helpful for a response to reproduce the questions requested. However, in many of the responses I saw, this is done in a counter-intuitive manner. Rather than quoting a question from the request and then following it with the relevant answer, very often all the questions are quoted at the beginning of the response, with the answers grouped together below it. The effect of this can be that it is difficult to match question to answer, without having to keep scrolling up and down the page.

Another common shortfall arose with the use of confrontational or legalistic language. Most people, and I suspect even those responsible for drafting the refusals, do not use phrases like 'I would contend' in every day conversation or even in their correspondence. Then again, at least this use of language retains some civility, unlike the college whose patience had clearly been tested before responding:

'Stop wasting our time and making spurious requests for information that you already have.'

### Good practice

A perusal of the WhatDoTheyKnow site throws up many examples of poor practice, as we have seen. It can, however, also provide us with instances of good, professional practice. Its very nature as a database of FOIA requests and responses makes

it a useful tool for the purposes of identifying best practice. So what are the features of the best FOIA refusals?

Having read through several responses for the purpose of this exercise, and indeed in the past, it seems to me that the best responses are clear. They explain why information is being withheld in concise and easily understood terms. They reference sections of the Act, and may provide brief quotations where they assist the applicant in understanding why the information has been withheld. Good responses are not unnecessarily or artificially lengthy. Throwing the full text of a particular section into the response will not make a response any clearer to the applicant.

A common feature of responses on WhatDoTheyKnow, the 'legal annex', may also constitute part of a good response. A brief one or two line explanation of why information is being withheld may be provided in the main body of the response, whilst a more detailed argument is set out separately. This means that the response gets to the point quickly, so that the applicant does not need to wade through many pages to find out whether or not their request has been met. If they want further explanation they can read on. However, an annex of this sort should not be an impenetrable dense text full of jargon. It should still be written in plain English and shouldn't contain unnecessary quotes.

Legal annexes are also a good place to include, where relevant, each of the public interest arguments considered both in favour and against disclosure. The more useful information provided

to the applicant at this stage, the less likely they are to complain. Since the arguments considered from the start are documented, it may have a further desirable side-effect of making any appeals that do follow much easier to administer. This is equally true of explanations as to how compliance with a request is likely to exceed the cost limit, and advice as to how their request may be brought within that limit. The more (useful) detail provided, the better.

Many authorities have adopted standard templates for their responses. This is good practice, as it provides a guide to the person drafting the response, ensuring that they always include essential attributes. However, this only works if those drafting responses understand what needs to be included in each section of the response. Such individuals also need enough confidence to be able to remove text that isn't relevant in a particular case (such as statements about copyright).

Good responses come from a human being, and practitioners should try to ensure that they sound like one. FOIA may be a legal requirement, but refusals do not have to read like a formal indenture. It is unlikely that a less formally worded response will result in sanction, especially if it is meaningful and helpful to the applicant.

In my own experience as an FOI Officer, the process of drafting refusals often assisted

the decision-making process. If I found myself unable to explain why a particular disclosure would prejudice commercial interests, let's say, it prompted me to ask colleagues more questions so that I might understand

what the problem was. After all, if I didn't understand the arguments I was making, it was very unlikely the applicant would. On more than one occasion, this resulted in information being disclosed, as it became clear from the difficulties in drafting that we were unable to justify refusal.

If practitioners do not understand the arguments being made, they should not make them. They should consider whether they would be able to explain them to the Information Commissioner if a complaint was made. Fundamentally, this is the key to a good FOIA or EIRs refusal notice.

## Conclusion

FOIA is about openness and transparency. That is something to be considered not just when deciding to disclose information, but also, and perhaps more importantly, when deciding to withhold it. That is why FOIA requires authorities to explain their decisions in a notice.

Being more open means being able to explain the reasons why decisions are reached, including those relating to FOIA. If we are unable to justify those decisions clearly, then there must be a question mark over whether they are correct. This is why, as the Information Commissioner points out, good refusal notices result in fewer complaints. If people understand decisions, they are much less likely to pursue matters further. If public authorities make unconvincing arguments, they cannot be surprised when applicants challenge them.

Good refusals focus on explanation, not legislation. Practitioners should ensure that they understand why information is being withheld, and that they explain it clearly in their response. If they are unable to do so, it may be a prompt to consider whether the decision is the right one.

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