

# Freedom of information, copyright and re-use

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**Paul Gibbons, aka FOIMan, clarifies how copyright laws interact with FOIA, and explains the new rules on re-use of information. Paul is a Member of the Examination Board for the Practitioner Certificate in Freedom of Information**

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**T**he Freedom of Information Act ('FOIA') imposes a duty on public authorities to release information to anyone who makes a request for access to it. However, it is silent on what happens next.

It is common practice these days for practitioners to include a statement in responses placing limitations on what applicants may do with the information that has been disclosed to them. In some cases, public authorities have even refused to supply information, because they argued that by doing so, they would be infringing other legal requirements.

There is (and always was) a lot of confusion about copyright and intellectual property laws. Put that confusion together with the complexities of FOIA compliance, and some discomfort with having to disclose the information at all, and you have a recipe for misinformation.

Into this maelstrom, the government has added further complexity (or clarified matters, depending on your point of view). Amendments to FOIA in 2012 introduced specific rules requiring authorities to permit re-use of datasets under a licence. On top of this, the Re-use of Public Sector Information Regulations 2015 ('RoPSI') effectively expand that rule to any other information that a public authority might disclose.

It is not surprising that many feel baffled by all of this. Even if they can get to grips with it, there are practitioners that resent the idea of having to allow businesses and others the free use of information that has been created and crafted at public expense.

In this article, I hope to clarify how copyright laws interact with FOIA, and explain the new rules on re-use of information. We will see that contrary to what many believe, copyright will only rarely prevent applicants from re-using information that is disclosed to them.

## Copyright 101

Just as physical property, such as houses or computers, are protected by law, so too is 'intellectual property' — the products of an individual's or an organisation's creativity. Copyright is a

form of intellectual property, and copyright law sets out to protect this property from theft, and to ensure that copyright owners — creators — have rights.

For something to be protected by copyright, it just needs to be created: written, drawn, or otherwise recorded. Under UK law at any rate, there is no need to add a copyright symbol and claim copyright — it automatically exists from the moment that a work is created. If an individual writes a document, they will normally hold the copyright in that work. However, unless otherwise stated, the copyright in information created in the course of employment will reside in the individual's employer. Thus the copyright in information created by public employees will normally be held by the public authority. Information created by employees of the Crown — simply put, civil servants — is protected by Crown copyright, meaning that the copyright belongs to the government. Similarly, work created or commissioned by either House of Parliament is protected by Parliamentary copyright.

However, one thing which causes confusion is the issue of when a piece of work will attract copyright protection. To do so, it must be an original piece of work, it must be recorded somewhere, and the (legal or natural) person claiming copyright protection must have created it. The really tricky bit is deciding whether the creation concerned is original or not. The copyright expert Graham P. Cornish suggests (in 'Copyright: Interpreting the law for libraries, archives and information services', 6th ed, p.7) that "the author must have contributed quite a lot of their own ideas or skills to the making of the work". He goes on to say that 'trivial' works will not be covered, and neither will works that are copies of existing information.

In many cases, the information disclosed as part of a FOIA response, or published as part of a public authority's publication scheme, will be protected by copyright. However, by no means will every piece of information be protected. To be protected by copyright, the information will need to be something new, and it will need to be significant enough to attract copyright.

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*(Continued from page 3)*

One common FOIA request asks for statistics — perhaps the number of FOI requests that have been received in a particular year. It is questionable whether the number quoted in a response could attract copyright.

Even if it can attract copyright, there are exemptions and limitations in copyright law, just as there are in FOIA and other laws. Copyright can only protect ‘substantial’ parts of a work. So, let’s say the number of FOI requests is part of a larger report, it might be hard to argue that the figure formed a substantial part of it.

‘Substantial’ is about more than quantity — it is about the most significant part of a work as well. But if we are going to argue that disclosed information cannot be re-used by the applicant as it would be a breach of the authority’s copyright, then we should be sure that the information disclosed would actually attract protection under these laws. If we are disclosing a short extract or a single figure, we cannot be sure of this.

## Fair dealing and other exemptions

The concept of fair dealing recognises that copying or using someone else’s work won’t always adversely affect them, and in fact might be for the benefit of society. Fair dealing can provide a justification for use of copyright material for non-commercial purposes, quotation, criticism and review, and importantly in a FOIA context, for news reporting. Fairness is not defined in law, and has to be judged on a case-by-case basis.

A key consideration is how much of a work can be copied. Again, this is not defined in law, but copyright experts

advise that 5% will normally be fair. It is likely that the disclosure of information through FOIA would provide sufficient basis for journalists to rely on fair dealing to justify reproduction of disclosed information. Going beyond fair dealing, journalists and others may also be able to rely on public interest as a defence for breach of copyright. For example, if disclosed information exposes malpractice, or would help to raise awareness of a public safety risk, it would be hard for a public authority to enforce its copyright.

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Finally, copyright does not last forever. For ‘literary works’, a term which would generally capture FOIA disclosures, the duration of copyright is 70 years from the end of the year of the author’s death, where the author is known. Otherwise it is 70 years after the end of the year of creation, or as will be relevant to FOIA, 70 years after the information is disclosed.

## FOIA and copyright

The practitioner might reasonably point out that the disclosure of information to the public in-

volves reproducing and transmitting that information. If that information is protected by copyright (as it normally will be), then the very act of complying with FOIA will breach copyright. The answer to this is that section 50 of the Copyright, Designs and Patents Act 1988 (CDPA) provides that:

“Where the doing of a particular act is specifically authorised by an Act of Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe copyright.”

So answering a request does not automatically involve breaching copyright, since FOIA specifically authorises the disclosure of information.

Another question that might occur to the practitioner might be in relation to situations where disclosure involves the automatic publication of disclosed documents on a public website. The most obvious example of this is the WhatDoTheyKnow.com website, through which applicants can submit requests, and authorities’ responses, together with any attachments, are then automatically published for all to see.

On one occasion, the House of Commons refused to send requested information unless the applicant provided an alternative email address, as it took the view that disclosure to the WhatDoTheyKnow.com address would result in a breach of copyright. The argument made was that in effect, the request was asking for the information to be published in a particular form in line with section 11 of FOIA, and the Commons argued that the breach of copyright that would result made it not reasonably practicable to comply.

The Information Commissioner disagreed, and ordered that the Commons disclose the information (FS50276715). Interestingly, the Commissioner does not disagree that the publication of the response on the WhatDoTheyKnow.com website might breach parliamentary copyright. The notice merely indicates that if this is the case, then that would need to be pursued “as a copyright issue”. To my knowledge, such action has not been pursued, and unless and until anyone does so, it is impossible to know for sure what view the courts would take of this situation. The fact that no public authority has pursued this perhaps indicates that it is not a clear cut situation.

The Commissioner’s approach in this matter is indicative of the ICO approach to copyright generally. Its view is that FOIA and copyright are two separate things for the most part. It tends to be unsympathetic to arguments that disclosure will lead to infringement of copyright, since it argues that there is an alternative means to pursue such infringements if and when they happen.

## Environmental information

The Environmental Information Regulations ('EIRs') include a specific exception covering circumstances where disclosure of information would adversely affect intellectual property rights. A simple search of the ICO's website indicates though that the Commissioner is likely to raise similar concerns to those above when they attempt to apply this exception. Of the 16 cases listed, in not one of them has the Commissioner ruled in favour of the authority's use of Regulation 12(5)(c).

The Scottish Commissioner has proved more open to the use of this exception. In *Mr V Jordan v Scottish Environment Protection Agency*, (SIC 049/2016, 3rd March 2016), the Ordnance Survey and the Centre for Ecology and Hydrology had provided data to the Agency that formed the basis of a requested dataset. They successfully demonstrated to the Commissioner that they would suffer financially if the data were released by the Agency outside of their licence conditions. They successfully argued that it would be impractical to enforce their rights, as disclosure through the EIRs would result in mass breach of copyright, beyond their resources to pursue.

Despite this case, it is clear that neither the Scottish nor the UK Information Commissioners are particularly sympathetic to arguments from public authorities that disclosure of information will infringe their copyright or other intellectual property.

## Commercial interests

The ICO guidance on intellectual property and FOIA does indicate that the Commissioner is open to arguments that disclosure of intellectual property could damage commercial interests.

The guidance stresses though that the fact that copyright will be breached is not in itself enough to demonstrate that the exemption at section 43(2) (or exception at Regulation 12(5)(e)) applies. The authority must be able to demonstrate that

commercial prejudice would (or would be likely to) be caused as a result of disclosure.

An example is provided in ICO decision FS50564815, in which it was accepted that the commercial interests of a third party training provider to the Office for Nuclear Regulation ('ONR') would be prejudiced if their training materials were disclosed, since their competitors would be able to use the information to gain commercial advantage. The ONR was also successful in arguing that their own commercial interests would be prejudiced, since it would make it more difficult to procure training in future if providers knew that there was a risk that their training materials would be disclosed to their rivals.

## Datasets and licensing

Aside from the exemptions and restrictions on copyright described above, material subject to copyright can also be legitimately copied or re-used under licence. Two changes to the law in recent years have required public authorities to allow use of disclosed information under licence. The first of these, the Protection of Freedoms Act ('PoFA'), amended FOIA in 2012. The amendments had the following effects:

- if an applicant requested a dataset (effectively raw data from a database) in a re-usable form, then the authority must disclose it in such a form as long as it is reasonably practicable to do so;
- if the authority or the Crown own the copyright in the dataset, then they must licence the applicant to re-use the data;
- if a dataset has been requested for re-use, it must be published as part of the authority's publication scheme, along with a licence allowing others to re-use it, unless it is not appropriate for this to happen.

The key aspects for the purposes of this article are the requirements to licence re-use of datasets. This meant that, in theory at least, the response to some requests made

under FOIA would need to include details of what the applicant was allowed to do with the information. A new Code of Practice was issued under section 45 setting out how this should be complied with. In practice, not that many requests for re-use were made following the amendments, or at least not many reached the regulator's attention. In theory, the rules still apply, but only to organisations not covered by the Re-use of Public Sector Information Regulations ('RoPSI').

## The Re-use of Public Sector Information Regulations 2015

The RoPSI introduced more sweeping requirements for many public authorities. They apply to public sector bodies, which includes most of the same organisations that are subject to FOIA, and they have much in common with the latter. If a public sector body receives a request to re-use any information that it holds, then it must consider it, and unless an exemption applies, it must allow it by issuing a licence. Requests have to be made in writing, just as with FOIA, and must be answered in 20 working days. The regulations are enforced by the Information Commissioner. Details of information available for re-use must be published.

There are exemptions for information where the intellectual property is owned by third parties, and information that is exempt from disclosure under FOIA or the EIRs. The Regulations don't apply to documents created by broadcasters, educational or research establishments, cultural establishments (other than libraries, museums and archives), logos or crests, or personal data that requires protection.

Public sector bodies may place conditions on re-use through a licence, and are allowed to charge for re-use, but only the marginal costs of reproduction, production and dissemination of documents. This does not apply to trading funds

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and other public bodies that are required to generate revenue to cover a substantial part of their costs, or to libraries, museums or archives, all of whom are allowed to make a reasonable return on investment as well as covering direct costs, and reasonable overheads and indirect costs.

The Information Commissioner recommends that re-use is licenced using the Open Government Licence ('OGL'). This permits applicants to re-use information pretty much how they see fit, as long as they acknowledge the public body that created the information, and indicate that the re-use has been permitted under the OGL. The OGL is available from the National Archives via their website, along with other licences, such as a non-commercial use licence, and a licence to be used where a public body is charging for re-use. In practice, it seems that authorities will struggle to justify using any licence other than the OGL for the purposes of licensing re-use.

The Commissioner has issued two decisions under RoPSI so far (FS50630368 and FS50619465). In both cases, the Commissioner found against the public authorities concerned, on the grounds that they had sought to unnecessarily restrict the way in which the information was re-used. In both cases, this was because they had sought to place alternative terms on the applicants than those of the OGL.

Effectively, the RoPSI regulations mean that most public authorities will have to permit re-use of any information that they disclose under FOIA, or publish through their publication scheme under the OGL. They will need strong arguments to persuade the Commissioner that any other

terms will be appropriate.

## Conclusion

Information disclosed through FOIA or the EIRs remains subject to copyright. It is absolutely correct that practitioners inform applicants of this when they respond to requests. However, it is important that practitioners do not mislead applicants in respect of the extent of any copyright protections. In particular:

- a lot of information that is disclosed through FOIA will not be protected by copyright since it is not 'substantial' enough;
- applicants will often be able to rely on 'fair dealing' to justify re-use of material that is protected by copyright;
- if there is a public interest in widening public access to information, this will be a valid defence in any action for copyright infringement;
- in practice, in the past public authorities appear to have been reluctant to take action to enforce their copyright, even if they feel that it has been infringed;
- the RoPSI Regulations will normally require a public authority to allow re-use; and
- the Information Commissioner will usually see any attempt to depart from the terms of the OGL as being unnecessarily restrictive.

Given the above, a sensible approach to copyright under FOIA for most authorities would be to adopt a standard policy allowing re-use of published and disclosed information which the authority retains the copyright in under the OGL. A statement to this effect can then be included in standard response templates. At the very least, requests for re-use should routinely be allowed under the OGL.

It will remain important to remind applicants that information that was created by third parties will still be subject to copyright, and that they should contact those third parties for permission if they want to re-use the information. A different approach will also be required for information where copyright is retained by trading funds, libraries, museums and archives.

Copyright is a complex area of the law, but it is not a tool for routinely frustrating the aims of FOIA applicants. Practitioners need to ensure that they understand any warnings that they might give to applicants, and don't intentionally or inadvertently mislead them.

Some may remain unhappy that information is having to be made available freely for re-use. However, the government's answer to this has always been that the public, including businesses, have paid for the creation of public sector information through taxation. Furthermore, they argue, commercial re-use of this information can benefit us all if it helps businesses to innovate and grow.

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