

Breaking the Code

Paul Gibbons, aka FOIMan, dives deeply into the new and improved Section 45 Code of Practice. Paul is a Member of the Examination Board for the Practitioner Certificate in Freedom of Information

I imagine the first paragraph of this article in black and white, with a crackle to its soundtrack. Picture a man (as it undoubtedly would have been in those unenlightened days) dictating to his female secretary, pausing occasionally to draw on his pipe. The room is full of smoke, and smells like an old railway carriage. It is lit only by a green-shaded lamp on the desk, beside which the man perches. The regular rattle of the typewriter keys being punched down, punctuated by the bell signalling that the end of the ribbon has been reached. Glancing through the blinds, he notes with a shiver that a pea-souper awaits them, street lights and the occasional set of car headlamps penetrating the gloom of Whitehall.

Perhaps I've been watching too many episodes of *The Crown*, but this is how I envisage the drafting of the first section 45 Code of Practice all those years ago in 2004. Certainly a lot has happened in the intervening years, and the Code now looks as dated as that old typewriter. Unlike its sibling, the section 46 Code of Practice on managing records, this Code hasn't received an update since.

Now, and bringing us back swiftly to colourful high definition and surround sound, the government has published a new draft of the section 45 Code. As my sledgehammer subtlety will no doubt have signalled, I believe it is about time.

The update is necessary not only due to the passing of the years, but also because the Independent Commission on Freedom of Information recommended changes to it back in March 2016, which the government then promised to implement. We were expecting this new Code a year ago—even the events of early 2016 now seem impossibly distant. The Information Commissioner herself indicated a delay to the new year of 2017 at an event in early December 2016. That it has taken almost a further year for the draft to see the light of day is yet another signal that other matters have pushed FOI down the pecking order over the last 18 months.

Aside from being a product of the Independent Commission, the new Code is the most significant action to be taken yet by the Cabinet Office since it as-

sumed responsibility for FOI from the Ministry of Justice in July 2015. It is also the first move we have seen Theresa May's government make in FOI policy.

The new Code has been issued as a draft and by the time you read this article, the consultation on it will have closed. Assuming no significant changes result, what will the new Code mean for public authorities? In any case, what does the published draft tell us about government attitudes to FOI?

The old Code

Section 45 of the Freedom of Information Act 2000 ('FOIA') states that the Minister for the Cabinet Office:

"shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I."

The existing Code begins with a foreword describing the role and powers of the Commissioner in relation to compliance; a brief summary of Part I of the Act; encouragement to authorities to ensure that staff are sufficiently trained to understand their responsibilities; and pointers to further guidance from the government (notably that produced by the now defunct Department for Constitutional Affairs, which has long since ceased to be maintained by its successor bodies), Information Commissioner's Office ('ICO') and representative bodies.

The Code itself first provides guidance on providing advice and assistance to applicants. It sets out the need to publish procedures for dealing with requests, including details of where requests should be sent. It gives examples of the assistance that should be given when seeking clarification, and when refusing on cost grounds.

Further sections explain the circumstances in which requests may be transferred to another authority and how; discuss when third parties should be consulted; and discourage the acceptance of confidentiality clauses

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except in limited circumstances.

The final section covers complaints, and is the primary basis for most current internal review procedures.

These five subject areas: advice and assistance, transfers, consultation with third parties, confidentiality, and complaints were specified in section 45. The Code does not attempt to go any further than legally required. It is therefore of limited use when it comes to some of the day-to-day difficulties that practitioners encounter.

The Protection of Freedoms Act 2012 amended section 45 to require additional guidance on compliance with the new datasets provisions brought in by that legislation. Rather than using this opportunity to update the original Code, the Ministry of Justice chose to produce a separate Code of Practice on datasets in 2013.

The Independent Commission on Freedom of Information

The Commission reported on 1st March 2016, and made 21 recommendations, notably among them:

- the extension of the deadline for consideration of the public interest should be replaced with a more widely-applicable extension for complex and voluminous requests (i.e. similar to the way environmental information request time limits can be extended), but this should be limited to a further 20 working days;

- a similar limit should be placed on the time to be spent on internal reviews;
- a new legal requirement to publish statistics on FOIA compliance should be introduced for authorities with 100 or more full-time equivalent employees;

- the same authorities should have to publish requests and responses where information has been provided (i.e. maintain disclosure logs);

- 'benefits in kind' and expenses of senior employees should be published pro-actively;

- amendments should be made to the exemptions at sections 35 and 36;

- clarity should be provided on the exercise of the ministerial veto;

- appeal to the first-tier tribunal should be abolished;

- section 11 should be amended to provide clarity on how far authorities must go in meeting requests for information to be provided in a particular format; and

- that the section 45 Code should be reviewed and updated and incorporate guidance on the use of section 14(1) to refuse requests.

The Commission envisaged many of these changes requiring

legislation.

The government immediately played down the possibility of legal changes to FOIA, and given the parliamentary arithmetic and the legislative programme demanded by BREXIT preparations, it seems unlikely that that position will change. The Minister for FOIA at the time, Matt Hancock, did however promise that the final point

in the above list would be delivered, and also indicated that some of the other recommendations could be met without the need for legislation. Many of them can now be found set out as best practice in the new version of the Code.

The new draft Code of Practice

The new draft Code is organised into 11 chapters, preceded by a very brief foreword. The main body of the 2004 Code fits comfortably into 8 pages, but the new version extends to about 5 times this length, and is more substantial in every sense.

Chapter 1 deals with the right of access. It starts with the fundamental of what counts as 'information'. It stresses the right to information and not to documents, and that opinions and clarification of policy cannot be asked for under FOIA. Alongside this, it states that a request will be handled under the Act unless:

- the information is given out as part of routine business; or
- the request is for environmental information; or
- the request is for the applicant's own personal data.

Some may feel that this does not provide sufficient clarification of when requests should be logged and processed under FOIA, and when they should be treated as 'business as usual'.

Later on in the Code, the Commission's recommendation that public authorities publish statistics on FOIA requests is implemented. Without a clear definition of which requests should be monitored, there is a risk that these figures will be inconsistent and unreliable from the start.

A series of paragraphs in the new Code on whether information is held or not are mostly uncontroversial. However, observers may raise an eyebrow at the Code's suggestion that deleted information held only 'in electronic back up files, should generally be regarded as not being held.'

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There is guidance on the extent of searches ('based on an understanding of how the public authority manages its records'), the section 77 offence, and the means of communication. A section defining valid requests indicates that this includes those received via social media. It states (with perhaps surprising confidence), that requests made in a foreign language will not be valid.

The following couple of chapters deal with advice and assistance and consultation with third parties, adding little to the guidance provided in the current Code. Chapter 4 addresses questions relating to the time limits in FOIA, for example:

"If a request is received on a non-working day... the next working day... should be counted as 'day one' towards the deadline."

Partially addressing the Commission's recommendation, Chapter 4 also indicates that public interest extensions should be limited to a further 20 working days. Similarly, Chapter 5 suggests that internal reviews should 'normally' be limited to the same period. According to the Code, public authorities will not have to consider complaints made later than 40 working days from when the response has been issued.

A chapter on the cost limit expands a little on the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, before Chapter 7 meets the Commission's recommendation that vexatious requests be addressed in the Code.

For the most part, this follows the approach set out in the *Dransfield* rulings and subsequent guidance from the Information Commissioner. However, the latter part of the chapter emphasises that authorities should consider the use of section 14 for burdensome requests, particularly where the cost limit does not apply. It

specifically points to circumstances where a very significant burden would be created by preparing information for publication, redacting information, consulting third parties, or applying exemptions. Whilst not significantly departing from the spirit of the *Dransfield* rulings and the Commissioner's guidance, it appears that a clear message is being given to authorities and the Commissioner here.

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The original Code did not cover the duty to adopt a publication scheme, and this is addressed in the new Code at Chapter 8. It begins with a reminder to authorities to follow the Commissioner's model scheme and definition documents.

The meat of Chapter 8 though is in the instructions to proactively publish FOIA performance statistics and senior executive pay and benefits.

The requirements in relation to FOIA statistics are particularly interesting, and if consistently enforced (which is a large if, of course) could potentially make a big difference to FOIA performance. As suggested by the Independent Commission, authorities with more than 100 full-time equivalent employees will be expected to publish statistics on a quarterly basis covering:

- numbers of requests received;
- numbers answered in 20 working days;
- numbers granted;
- numbers withheld; and
- numbers of internal reviews.

The Commission, of course, also recommended that bodies meeting the same criteria should publish requests and responses where information has been supplied to the applicant. Despite this, Chapter 8 makes no reference to any requirement to maintain a disclosure log.

One of the persistent calls for change is for FOIA to be extended to private sector bodies providing public services and handling information on behalf of their public sector clients. Chapter 9 of the Code offers an attempt to — at least partially — address the concern about lack of transparency in this area. Specifically, it suggests that contracts set out which information is subject to FOIA obligations in an annex, and that procedures for dealing with requests for information held by contractors are also incorporated within the contract or in a related Memorandum of Understanding. Chapter 9 also covers the agreement of confidentiality clauses, but adds little to the guidance in the current Code on this issue.

Chapter 10 briefly sets out what should be included in responses, based on the requirements for refusal notices at section 17 of FOIA. It adds to this with a similar list covering internal review responses.

Finally, Chapter 11 brings the content of the datasets Code of Practice, originally published separately in 2013, within the body of the main Code. It updates the guidance to recognise the changes that the Re-use of Public Sector Regulations 2015 have made in this area. It also notes that the datasets provisions introduced by the Protection of Freedoms Act now apply to only a few datasets not covered by the regulations. An annex provides further guidance on re-use of datasets.

Overall, the new Code provides a much more comprehensive guide to handling FOIA requests than the current one. What does it tell us about the government's current approach to FOIA though, if anything?

What is the current government's attitude to FOIA?

As mentioned at the start of this article, it has taken a long time for the draft revised Code of Practice to ap-

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pear since the intention to produce one was first declared in March 2016. Perhaps this is understandable in the current political climate – since then we have voted to leave the European Union, a new Prime Minister has taken office, and we have had an unexpected general election. At such a time of turbulence, it is not surprising that FOIA and openness issues more generally are of less priority (though some would argue that these and other forms of scrutiny are even more important than usual at such times).

It is possible from the timing of the publication of the Code in late 2017 that it is part of a wider push within the government to improve openness. A month following its publication, the Prime Minister herself wrote an open letter to Cabinet colleagues promoting ‘online transparency’. Sceptics of the Prime Minister’s conversion to openness have pointed to the very poor FOIA performance of the Home Office during the period that she served as Home Secretary.

As can be seen from the above analysis, the Code is much more substantial than its predecessor, which is to be welcomed. Also, it provides some helpful guidance on the practicalities of complying with FOIA. Whilst there is currently plenty of guidance on exemptions, for example, there is not much available assistance with the practicalities of FOIA compliance. The Code addresses this with some success.

When the Independent Commission was announced back in July 2015, there was considerable suspicion that its role was to provide legitimacy to any planned attempts to constrain FOIA. In the event, amidst an apparently unexpected media reaction, the Commission’s report was relatively balanced, and the government clearly felt unable to make significant changes. There might be a suspicion in some quarters that the Code provides another opportunity to water down FOIA.

Indeed, the Code does contain a few hints indicating the Cabinet Office’s lukewarm attitude to FOIA. In one or two places, interpretations of FOIA’s requirements that clearly suit the government are stated as fact, for exam-

ple the statements that information on back ups will not be held, and that requests made in a foreign language will not be valid requests. There is a strong emphasis on refusing requests that are invalid or vexatious, or impose a significant burden. This is not surprising since the Independent Commission suggested that instead of introducing new limits on FOIA, public authorities should be encouraged to use existing mechanisms, including section 14(1), more freely. A further hint is in the government’s decision not to include a requirement to publish a disclosure log in Chapter 8.

Perhaps the best summary of the government’s approach to this Code comes from the Minister now responsible, Chris Skidmore, who writes in the foreword to the accompanying consultation paper that:

“Freedom of Information has transformed the landscape of transparency and the Government is committed to ensuring both the public and public authorities have confidence in the functioning of the Act and the access to information it affords. For any Freedom of Information regime to be truly effective it is important that both its users and those subject to it have faith in it.”

The Code is meant to reflect this balanced view of FOIA. For FOIA to thrive, it is necessary not just for applicants to have confidence in it, but also for public authorities to feel that protection is afforded where necessary for their proper functioning.

Conclusion

In the end, the success of the Code will depend on awareness and enforcement. Few practitioners take note of the 2004 Code’s requirements, and many may not even be aware of its existence. The revised Code is undoubtedly more useful in terms of its content, but this will not mean much if those responsible for handling requests are unaware of it.

Practitioners may have in the past concluded that the Code’s contents are merely a ‘wish list’ and pick and choose which guidance to follow. The Code, for example, may state that FOIA performance statistics have to be published. However, if this is to

be applied in practice it will require two things to happen.

Firstly, the government will need to make it clear that it expects compliance.

Secondly, the Information Commissioner will need to take action in the form of issuing Practice Recommendations, or at the very least by naming and shaming those authorities that fail to comply. Unless these things happen, the more positive aspects of this Code will fail to have any impact.

Taking a wider view, in the context of the Scottish government extending the Freedom of Information Scotland Act 2002 (‘FOISA’) to (admittedly only some) private bodies providing public services, including a short chapter on transparency of public sector contracts in a non-statutory Code of Practice is a relatively small step. That the revised Code feels like progress probably says more about the rate of progress in UK FOIA than about the Code itself.

Overall, the revised Code is a welcome improvement on its predecessor. However, if we take it in context, it reinforces the impression that the UK government continues to lack enthusiasm for FOIA, and perhaps the wider openness agenda.

Paul Gibbons
FOI Man
paul@foiman.com
