

What we don't know

Paul Gibbons, aka FOIMan, discusses three of FOIA's unresolved questions. Paul is a Member of the Examination Board for the Practitioner Certificate in Freedom of Information (www.foiqualification.com)

It's tempting to assume that 18 years after the Freedom of Information Act ('FOIA') became law, we know everything about its application. Practitioners could be excused for believing that — although they themselves don't know the answer to every FOI query that might arise — they aren't more than a few decision notices or tribunal decisions away from knowing.

Yet this isn't the case. As with most laws, there are questions about FOIA's interpretation that have never been asked, let alone answered. Even where they have come up, there hasn't always been a definitive conclusion to the dispute.

Surprising as it may seem, there have been plenty of problems with the interpretation of FOIA over the years that have taken a long time to resolve. Probably the best known example was the confusion that many experienced about how to apply the vexatious provision at section 14(1) of the Act. Public authorities seeking to understand when they could use it were left bemused by the fact that the First-Tier Tribunal's ('FTT's') rulings were often in conflict with the Information Commissioner's decisions and guidance on the issue, and equally commonly with the outcomes of other FTT cases. It was only in January 2013 that an Upper Tribunal ('UT') decision provided the definitive statement on the matter (later confirmed by the Court of Appeal).

Donald Rumsfeld, the former US Secretary of Defense, famously divided up ignorance between 'known unknowns' — the things we are aware we don't know — and 'unknown unknowns'. Saving the difficult task of tackling the latter for another day, in this article we will look at some of the FOIA questions that we know have yet to be conclusively resolved.

The legal stuff

First of all, a primer in English law (Scotland and Northern Ireland have their own legal systems which follow a similar approach; Wales is subject to the English legal system). English law can be made in one of two ways:

- by passing legislation — Acts of Parliament or secondary legislation

like orders and statutory instruments; and

- by the courts making decisions over how that legislation should be applied.

Governments are at their most powerful when they have the numbers in Parliament to pass the legislation that they want. Very often though, disputes arise as to the interpretation of the wording of legislation. When that happens, the courts have to decide what the correct interpretation is.

Not all courts are equal. The FTT, for example, has the power to review decisions taken by the Information Commissioner, and whilst an FTT hearing may resolve an individual dispute, the decision it takes won't be binding on other public authorities, the Information Commissioner, or indeed on other FTT panels. The next time that the same issue comes up, the Information Commissioner can, if she chooses, ignore the FTT's decision. In practice, the Information Commissioner's Office ('ICO') generally tries to adopt FTT decisions in its own approach, but it doesn't have to. Therefore FTT decisions are said to be 'persuasive', but they don't set binding precedent.

The UT, however, sets precedent. This was why the decision relating to vexatious requests in January 2013 described above was so important. The criteria that the judge in that case set out for deciding whether requests were vexatious had to be used by public authorities, the Information Commissioner, the FTT and so on, until and unless a court higher than the UT made a different decision on the same issue.

The upshot of this is that unless an issue relating to FOIA has been considered by the UT, we don't have a definitive take on how it should be interpreted in future. However many times the matter may have been considered by the Information Commissioner or the FTT, we still can't rely on there being 'an answer.' Even if a question has reached the UT, if the Court of Appeal or the Supreme Court ever disputed the UT's interpretation, that could potentially change the way that the law is read in future.

Depending on which court has examined a question in relation to FOIA

then, the certainty with which we can rely on their decision will vary. This explains why at times it is difficult to give a definitive answer to certain questions about how FOIA works.

Is information on a back-up 'held'?

The first of our FOIA mysteries — concerning whether information that has been deleted but is still on a back-up can be considered 'held' — is a good example of an area where there has been a lack of a definitive answer. If reading published guidance and text books (including my own), practitioners could be excused for believing that there is certainty on this issue. Yet depending on who has written it, there are different (and mutually exclusive) answers given in each. So in fact we have anything but certainty.

Last July, the Cabinet Office published its revised Code of Practice ('the Code') issued under section 45 FOIA. At paragraph 1.11, the Code confidently states:

'A search for information which has been deleted from a public authority's records before a request is received, and is only held in electronic back up files, should generally be regarded as not being held.'

This is no doubt a convenient answer for public authorities. Having to search through back-ups every time a request might potentially cover recently deleted files or emails could potentially be very time-consuming and possibly technically difficult. However, it conflicts with the case law from the FTT on this subject.

This issue was first considered in one of, if not the, earliest FTT decision on FOIA: *Harper v Information Commissioner* (EA/2005/0001, 15th November 2005). In that case, the FTT found that it:

'will be a matter of fact and degree, depending on the circumstances of the individual case whether potentially recoverable information is still held for the purposes of the Act... Simple restoration from a back-up tape, should normally be

attempted, as the Tribunal considers that such information continues to be held' (para. 27).

An even firmer conclusion was reached in an Environmental Information Regulations ('EIRs') decision six years later. In *Dr Don Keiller v Information Commissioner & University of East Anglia* (EA/2011/0152, 18th January 2012), the FTT commented that:

'...it was a matter of common-sense that information backed-up onto a back-up server in the control of UEA, but deleted from the computer on which the original email was composed, was still 'held' by UEA' (para. 27).

Later still, in *Catherine Whitehead v The Information Commissioner* (EA/2013/0262, 29th April 2014), the FTT considered whether Thanet District Council was under any obligation to search its backup tapes for correspondence between the council and a contractor regarding work it was carrying out for Ms Whitehead. The council had stated to the Information Commissioner that:

'...the Council may well hold a copy of the requested information on a back up tape but ... these are retained by the Council for disaster recovery purposes only, not as an archive' (para. 10).

The Information Commissioner had agreed with the council's argument. The FTT on the other hand was moved to say that it 'strongly disagreed with the Commissioner' that the purpose for which data were retained had any bearing on whether or not information was held. It was, in its view, irrelevant whether it was kept for 'disaster recovery purposes'. It went on to say that:

'If requested information is in (or on) back-up tapes which are themselves held by the public authority, or is in some way still stored on the public authority's server, we consider that it is clearly 'held' by the public authority' (para.16).

If it is difficult or time-consuming to retrieve the requested information from the backup, it argued, then section 12 (cost limit) may be brought to

bear. In the case of the correspondence that was in dispute, it did not think that would be an issue, and so it ordered that the correspondence be retrieved from the backup.

The FTT has been consistent in concluding that information on back-ups is 'held' for FOIAs purposes. The decision in *Harper* was a little more equivocal than in *Keiller* and *Whitehead*, but nonetheless concluded that they would often have to be searched. It seems difficult to square this with the section 45 Code's assertion that 'information which has been deleted...and is only held in electronic back up files, should generally be regarded as not being held'.

If we take a look at the ICO's current guidance on this though ('Determining whether information is held', v.3, May 2015), we find some support for the Code's approach. The guidance starts out by citing the *Whitehead* FTT case above in support of the proposition that records on a back-up are still 'held' for the purposes of FOIA. However, it then goes on to say that 'regard must be had to the wider implications of the section 1(4) provision'. Section 1(4) says that the information that applicants have a right to under FOIA:

'...is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is communicated under section 1(1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.'

The ICO's guidance extrapolates from this that 'it would not be reasonable to require a public authority to communicate information that has been deleted before the request has been received'. In other words, what the ICO appears to be arguing is that it now agrees with the FTT that information on back-ups is 'held'; but that public authorities are not under an obligation to provide it if the information had been deleted from the original location before or after the request was received. The ICO also suggests that in the absence of an

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equivalent to section 1(4) in the EIRs, environmental information that is held on a back-up would have to be provided in most circumstances.

Yet there is no reference to section 1(4) in the *Whitehead* decision which the Commissioner cites with apparent approval. The FTT doesn't seem to make the same distinction. In truth, I personally find it difficult to follow the logic of the Commissioner's approach to this issue. Surely the intention of section 1(4) is to justify amendments and deletions that would have taken place regardless of a request being received, not to prevent the disclosure of information that is actually present on an authority's back-up media.

However, since it has yet to be considered by the UT, the simple answer is that we just don't know whether the decisions of the FTT are right, or whether the Information Commissioner is right. Nor can we say with certainty that the section 45 Code is wrong.

Tweeting requests

Something else the Code says is that requests submitted through social media will be valid as long as they meet the requirements of section 8 of the Act, namely by including:

- the name of the applicant;
- an address for correspondence;

and

- a description of the information requested.

According to the Code, addresses for correspondence 'can take the form of an email address or a unique name or identifier on a social media platform (for example a Twitter handle), as well as postal addresses.' This is in line with the ICO's position as set out in its guidance ('Recognising a Request made under the Freedom of Information Act' (Section 8) v1.2, November 2016):

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“Every practitioner knows that requests must be complied with ‘promptly and in any event not later than the twentieth working day following the date of receipt’. They may be surprised to learn that there is still debate over when that twenty working days starts. This is particularly confused in circumstances where a request is received on a non-working day, for example over a weekend or on a bank holiday.”
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'as long as that [social media] site offers a means for the authority to respond, such as a hyperlink to the requester's email address or a 'reply' button, that request will fulfil the requirement to provide a valid address.'

On the only occasion that a request made via Twitter reached the FTT though, the Tribunal reached a different conclusion in respect of the provision of an address. In *Ghafoor v Information Commissioner* (EA/2015/0140, 9th November 2015), the FTT expressed its view that 'a Twitter username is not an address for correspondence'. It commented that:

'A means of communication which is limited to 140 characters

is unsuitable for correspondence between the public authority and the requester concerning the request' (para. 28).

In respect of providing a name, the Commissioner's guidance states

that:

'Where the requester's username is an obvious pseudonym, or only includes a part of their real name (for example @john3453 or @smith6474) then the request will only be valid if their real name is visible elsewhere on their user profile.'

Mr Ghafoor's profile did indeed contain his name, yet the FTT found that this did not amount to providing his name in the request (his username being @FOIKid – no relation to the author). Although finding the applicant's name 'could not have been easier', the FTT believed it was a matter of principle – public authorities should not have to go searching for the name of the applicant.

As far as the FTT was concerned in this case, an FOI request made by Twitter can only be valid if the Tweet contains the name, email address and description of information required within the body of the Tweet. Even with the extension of character limits in Twitter, it seems unlikely that requests made via this medium would be legitimate if we accept the FTT's ruling.

Once again though, since this matter has yet to reach the UT, we are left to decide for ourselves whose opinion to follow.

What day is it?

The section 45 Code and the Information Commissioner aren't always in agreement. Every practitioner knows that requests must be complied with 'promptly and in any event not later than the twentieth working day following the date of receipt'. They may be surprised to learn that there is still debate over when that twenty working days starts. This is particularly confused in circumstances where a request is received on a non-working day, for example over a weekend or on a bank holiday.

The Code states that:

'The date on which a request is received is the day on which it arrives

or, if this is not a working day, the first working day following its arrival' (my emphasis).

Contrast this with the ICO's guidance ('Time limits for compliance under the Freedom of Information Act' (Section 10), v.1.1.1, 20th July 2015) which points out that section 10 of the Act defines the date of receipt as 'the day on which the public authority receives the request for information' (my emphasis again):

'As there is no requirement for this to be a working day, the date of receipt can also be a non-working day such as a weekend or bank holiday.'

There is no mention at section 10 or in the Commissioner's guidance of any distinction for requests received on a non-working day. Interestingly, the draft version of the Code circulated in late 2017 did not make this distinction either, and was therefore in agreement with the Commissioner's guidance.

For the most part, this disagreement between the finalised Code and the ICO's interpretation will be academic. Requests should in any case be answered promptly, and few applicants will quibble over a day even when authorities are disclosing information on the twentieth working day (whichever version of that it decides to follow). It is important to note though that despite the Code's confident assertion, like the other examples I've mentioned, there is no relevant case law to resolve this dispute.

Conclusion

These are just three points about FOIA's interpretation that have never been clarified by the courts. There are plenty of other statements in the section 45 Code that are based on the Cabinet Office's opinion rather than on the firm ground of decisions made by the courts.

To my knowledge, the questions of whether a request made in a foreign language is valid (no, says the Code) or what the time limit to submit a request for internal review should be (the Code states 40 working days) have never been the subject of an

FTT decision, let alone one from a court that could set precedent. Leaving the Code aside, many routine aspects of FOIA administration have never been comprehensively examined by the FTT, let alone the higher courts.

Practitioners will wonder what they should do when such contentious, but unresolved, issues affect their handling of FOI requests. It is important that they make their own minds up from an informed perspective. Many debates can be resolved by going back to the legislation itself — if we strip away the arguments and the interpretation, what does it actually say? Then we can read the Code and the ICO's guidance. We might, as I have done here, explore the FTT's views where they have ruled on a matter. If these sources are in dispute, then it is up to the practitioner to decide which they accept. In doing so, they will want to consider not just which interpretation is most convenient for their authority, but also which makes sense — i.e. is most persuasive.

Having a wider knowledge of decisions of the higher courts can help too. For example, when it comes to back-ups, I am persuaded that the FTT is right about the status of deleted information retained on those tapes. Its decisions are most consistent with a ruling in a UT case which stated that 'hold': 'is an ordinary English word and is not used in some technical sense in the Act' (*University of Newcastle upon Tyne v Information Commissioner and the British Union for the Abolition of Vivisection*, GIA/194/2011, 11th May 2011). For me, it is hard to square that with the complex argument found in the Commissioner's guidance on the matter. However, it is up to each practitioner to reach their own conclusion where no definitive ruling has been made. The key thing is to be able to justify any decision that has been reached, so it is important to document this process in case the outcome is appealed.

Practitioners have to remember that part of their job is to interpret the law. From time to time, they will find this is not a simple task since the views of government, regulators and courts will

not always coincide.

What do you want to know?

As this article has demonstrated, sometimes there are no simple answers to the conundrums that face FOI officers and their colleagues. In the next issue of *Freedom of Information*, I'd like to answer some of your questions about FOIA or the EIRs.

If there's an issue that you've never been able to resolve or that you're just curious about, please send details of your FOI problem to the editor at feedback@pdpjournals.com with 'FOI Journal Q&A' in the subject line. We can't guarantee that your query will be featured, but I'll try to tackle as many as possible.

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