



Key Points - the Information Acts

The Freedom of Information (FOI) Act was passed on 30 November 2000. It gives a general right of access to all types of recorded information held by public authorities, with full access granted in January 2005. The Act sets out exemptions to that right and places certain obligations on public authorities.

Requests for Information Any individual will be able to make a request for information. The individual does not have to be the subject of that information, or be affected by its holding or use. For example, based on experience in other countries with similar Freedom of Information legislation, the media are likely to use the legislation widely to obtain information for broadcasting or publication. If an individual is the subject of that information then the principles of the Data Protection Act to protect the data subject will take precedence over any FOIA right.

The Act gives applicants two related rights:

1. To be told whether the information is held.
2. To receive the information, where possible in the manner requested, for example as a copy or summary, or in paper or electronic format. An individual may also request to inspect records in person

Requests for information made under the Freedom of Information Act must be made in writing, which includes electronic communications such as fax and email. The request must contain details of the applicant and of the information sought. We can ask for further details in order to identify and locate the information. Applicants are not required to mention either the Freedom of Information Act or the Data Protection Act when making a request for information. In responding to a request for information, we will be obliged to provide information recorded both before and after the Act was passed. (the Act is fully retrospective)

Requests for information must be dealt with promptly, and the Act sets a maximum time for response of 20 working days. (This is rather shorter than the 40-day limit set for subject access requests under the Data Protection Act 1998.) A fee may be charged for providing the requested information. (Refer to FOI Fee regulations) Where a fee is required, the 20 working days will be extended by up to three months until the fee is paid.

There is no obligation to comply with 'vexatious' requests, or repeated requests,(refer to the guidance published by the information commissioner – www.ioc.gov.uk) if the institution has recently responded to an identical or substantially similar request from the same person, but there is a duty to provide advice and assistance to anyone making a request.

Exemptions The Act creates a general right of access to information we hold, but also sets out 23 exemptions where that right is either not allowed or is qualified. The exemptions relate to issues such as national security, law enforcement, commercial interests, and data protection. In particular, information is exempt from the Act if it is accessible to the applicant by other means, such as from DE or an education board. Therefore, information already accessible under a schools publication scheme need not be provided in response to an individual request.

Apart from vexatious or repeated requests (refer to the good practice guides on the information commissioners web site at www.ico.gov.uk) , there are two general categories of exemption:

1. those where, even though an exemption exists, we have a duty to consider whether disclosure is required in the public interest, and
2. those where there is no duty to consider the public interest.

The public interest test requires us to determine whether the public interest in withholding the exempt information outweighs the public interest in releasing it, by considering the circumstances of each particular case and the exemption that covers the information. The balance will lie in favour of disclosure, because information may only be withheld if the public interest in withholding it is greater than the public interest in releasing it, for example where disclosure of information held by a school would harm a police investigation.

In some cases you can apply the exemption separately to whether you confirm that you hold the information and whether you disclose it.

Exemption where the public interest test applies. Exemptions for which we have a duty to consider whether disclosure is required in the public interest are listed below. Where we consider that the public interest in withholding the information requested outweighs the public interest in releasing it, the institution must inform the applicant of its reasons, unless providing the reasoning would effectively mean releasing the exempt information. eg s22 means section 22 of the FOIA etc.

s22	Information intended for future publication
s24	National security (other than information supplied by or relating to named security organizations, where the duty to consider disclosure in the public interest does not arise)
s26	Defense
s27	International relations
s28	Relations within the United Kingdom
s29	The economy
s30	Investigations and proceedings conducted by public authorities
s31	Law enforcement
s33	Audit functions
s35	Formulation of government policy, and so on
s36	Prejudice to effective conduct of public affairs (except information held by the House of Commons or the House of Lords)
s37	Communications with Her Majesty, etc. and honours
s38	Health and safety
s39	Environmental information
s40	Personal information ¹
s42	Legal professional privilege
s43	Commercial interests

¹ If we believe that disclosure would not breach any of the data protection principles, but the individual who is the subject of the information has properly served notice under s.10 DPA 1998 that disclosure would cause unwarranted substantial damage or distress, or the individual who is the subject of the information would not have a right to know about it or a right of access to it

under the DPA 1998, there is no absolute exemption, and we should consider the public interest in deciding whether to release the information.

Absolute exemptions. Absolute exemptions are the exemptions for which it is not necessary to go on to consider disclosure in the public interest.

s21	Information accessible to applicant by other means
s23	Information supplied by, or relating to, bodies dealing with security matters
s32	Court records, and so on
s34	Parliamentary privilege
s36	Prejudice to effective conduct of public affairs ²
s40	Personal information ³
s41	Information provided in confidence
s44	Prohibitions on disclosure where a disclosure is prohibited by an enactment or would constitute contempt of court

² Applies only to information held by House of Commons or House of Lords

³ There is an absolute exemption from the provisions of the FOIA if an applicant making a request for information under the FOIA is the subject of the information requested and they already have the right of 'subject access' under the DPA 1998. There is also an exemption from the provisions of the FOIA if the information requested under the FOIA concerns a third party and disclosure would breach one of the Data Protection Principles

Whole category exemptions. These are exemptions where we need to consider whether particular information falls within a particular category (or class) of information, such as:

s30	Information relating to investigations and proceedings conducted by public authorities
s32	Court records
s35	Formulation of government policy

If information falls into the category described in one of these exemptions, we are not required to release it. There is no requirement to consider whether releasing the particular information requested would prejudice a particular activity or interest.

Prejudice test exemptions These are exemptions where we must consider whether disclosure of particular information would, or would be likely to, prejudice:

s27	The interests of the United Kingdom abroad
s31	Law enforcement

The information therefore only becomes exempt if disclosing it would, or would be likely to, prejudice either of these factors.

Applying exemptions. If we wish to rely upon a specific exemption, we should ask ourselves:

- Is the information potentially covered by an exemption?
- Does the exemption apply to all or part of the information requested?
- If an exemption does apply, does it require consideration of whether disclosure should be made in the public interest, irrespective of the exemption?
- If an exemption does apply, does it require consideration of whether disclosure would be prejudicial to a particular activity or interest?

We need to read the exemptions with care when determining whether they can be relied on. Only the information to which an exemption applies can be withheld. For example, if a requested document contains some exempt information, only those specific pieces of exempt information can be withheld and the rest of the document has to be released.

Where we decide an exemption applies and withhold information, we must give reasons for the decision and inform the applicant of his or her right to complain to the Information Commissioner.

Where an exemption applies, but we are required to release the information by the Information Commissioner, because it is in the public interest to do so, we must disclose the information requested 'within a reasonable time'.

It is useful to view decisions made by the office of the Information Commissioner in order to get a “feel” of the type of information public authorities are instructed to release.

The Information Commissioner The Commissioner is an independent public official reporting directly to Parliament who is responsible for implementing the Act. The position of Commissioner involves:

- Promoting good practice
- Approving and advising on the preparation of publication schemes
- Providing information as to the public's rights under the Act
- Enforcing compliance with the Act

Enforcement A person who has made a request for information may apply to the Information Commissioner for a decision on whether the request has been dealt with according to the Act. In response, the Information Commissioner may serve a decision notice on us and the applicant, setting out any steps that are required for compliance with the Act.

The Commissioner also has the power to serve information notices and enforcement notices on public authorities. In certain circumstances, the Information Commissioner may issue a decision or enforcement notice requiring disclosure of information in the public interest. If it feels that the Commissioner has erred, the public authority then has 20 days from receipt of the notice to obtain a signed certificate from a Cabinet Minister overriding the Information Commissioner's notice (Executive override). There is no right of appeal against the Ministerial certificate. All notices may be appealed to the independent Information Tribunal.

Codes of Practice The Act requires the Secretary of State to issue a code of practice for public authorities to follow when dealing with requests for information. The Code of Practice on the Discharge of the Functions of Public Authorities under Part I of the Freedom of Information Act 2000 will include matters such as the advice and assistance that should be given to applicants, and procedures for dealing with complaints. It is currently available on the Department of Constitutional Affairs* web site.

* www.dca.gov.uk/foi/index.htm

The Act also requires the Lord Chancellor to issue a code of practice to follow in relation to keeping, managing and destroying their records. *The Code of Practice on the Management of Records under s46 of the Freedom of Information Act 2000 is designed to establish standards of good practice in relation to record keeping. Good practice would make more efficient location and retrieval of information in response to requests.

Appeals When serving a notice of any kind, the Commissioner must include an explanation of the appeals mechanism. Where a decision notice has been served, either the complainant or the public authority may appeal to the Information Tribunal, which may uphold, overturn or vary the notice. Where an information or enforcement notice has been served, a public authority has the same right of appeal. Appeals to the High Court against decisions of the Tribunal may be made by any party to the appeal.

Freedom of Information and Data Protection The Information Commissioner oversees both the Freedom of Information Act 2000 and the Data Protection Act 1998. Both Acts relate to aspects of information policy. They overlap where personal information is considered for disclosure. Joint responsibility allows the Information Commissioner to develop a more effective structure for information handling and to provide a single point of contact for public authorities and the public.

The Freedom of Information Act 2000 makes some amendments to the Data Protection Act 1998. One of the most significant amendments is that the definition of 'data' is

extended, as far as public authorities are concerned, to cover all personal information held, including 'structured' and 'unstructured' manual records. The Freedom of Information Act 2000 thus extends access rights that already exist under the Data Protection Act 1998. A request by an individual for information about him or herself will be exempt under the Freedom of Information Act (section 40) and will continue to be handled as a 'subject access request' under the Data Protection Act. In certain circumstances, such a request may involve the release of associated third party information.

Where an applicant specifically requests information about a third party, or where responding to a request would involve the disclosure of personal information about a third party, the request falls within the remit of the Freedom of Information Act. However, the authority must apply the data protection principles when considering the disclosure of information relating to living individuals. An authority must not release third party information if to do so would mean breaching one of the Principles.

Where the disclosure would not breach the principles, the authority may release the information. However, if the third party has served notice under s.10 DPA 1998 that disclosure would cause them unwarranted substantial damage or distress, or the third party would not have a right to know about the information relating to them or a right of access to it under the DPA 1998, the institution is required to consider whether release of the information would be in the public interest.

The Data Protection Act 1998 came into force on 1 March 2000. It provides living individuals with a right of access to personal information held about them. The right applies to all information held in computerized form and also to non-computerized information held in filing systems structured so that specific information about particular individuals can be retrieved readily.

Individuals already have the right to access information about themselves (personal data), which is held on computer and in some paper files under the Data Protection Act 1998.

The right also applies to those archives that meet these criteria. However, the right is subject to exemptions, which will affect whether information is provided. Requests will be dealt with on a case by case basis.

The Data Protection Act does not give third parties rights of access to personal information for research purposes.

The FOI Act does not give individuals access to their personal information, though if a request is made, the Data Protection Act gives the individual this right. If the individual chooses to make this information public it could be used alongside non-personal information gained by the public under the terms of the FOI Act.

The Data Protection Act does not give third parties rights of access to personal information for research purposes.

The FOI Act does not give individuals access to their personal information, though if a request is made, the Data Protection Act gives the individual this right. If the individual chooses to make this information public it could be used alongside non-personal information gained by the public under the terms of the FOI Act.

Key Facts- FOIA:

- Has a huge impact- increased work load-
- Applies to all **Public Authorities**, i.e. schools, colleges. government etc
- Affects everyone in the organization
- Statutory duty to implement
- Allows anyone, no matter who or where they are, to find out whether information is held, and if it is, to have access to it
- Is fully respective
- Creates the office of the Information Commissioner
- Specifies exemptions covering information that does not have to be released
- Requires all organizations to set up and maintain publication schemes that tell the public what information is held
- Allows arrangements for enforcement and appeal
- Can result in imprisonment for contempt of court.

The Public sector means:

- Central Government
- Local Authorities
- Police and Police Authorities
- The Health Service
- Schools, Colleges and Universities

Freedom of Information Act is intended to break down barriers within the education sector and to help us learn from each other as well as improving our performance.

Key Points

- We must reply within 20 working days to any credible written request for information from anywhere in the world

- the request can be made by email or written on a piece of paper and made to any member of staff
- it does not have to refer to the Freedom of Information Act
- you cannot ask the reason for the request, or question its reasonableness – you can work with the person requesting information to help them clarify what it is they are after so that you can best meet the request
- Environmental Information Regulations (see below) state that any verbal or written question about [the environmental effects of your services or products] must be answered

What if we don't comply? The Freedom of Information Act will be enforced by the Information Commissioner, formerly, the Data Protection Registrar. The Commissioner is responsible for the enforcement of:

- Data Protection Act 1998
- The Freedom of Information Act 2000 and;
- The Environmental Information Regulations

How does the Information Commissioner enforce FOIA? FOIA is openness with teeth. The maximum sentence punishable under the FOIA act is two years imprisonment for the accountable officer of the public body. A **practice recommendation** can be issued that outlines the steps to help the authority with compliance. These must be given in writing and refer to the relevant section of the Codes of Practice with which the authority doesn't comply. If an individual feels that they have not had their request for information dealt with in accordance with the Act, they may apply to the Commissioner for a decision. If the complainant has **exhausted all internal procedures**, the Commissioner either informs the complainant that no decision will be made and the reason for that or, serve a **decision notice** on the complainant and the public authority.

When the Commissioner has received an application for a decision notice or requires more information to consider whether compliance has been achieved with the Codes of Practice and the Act, he can serve an **information notice**. This is time limited and again, must be in writing and must say why the notice has been issued.

If the authority fails to comply with any of its duties under the Act, he may serve an **enforcement notice**. Failure to comply with any of the Decision, Information or Enforcement notices may result in the Commissioner certifying this to the Court who may ultimately deem non-compliance as Contempt of Court.

Environmental Information Regulations Since 1992 there has existed a statutory right of access to environmental information held. The new Environmental Information Regulations (EIR) came into force on 1 January 2005. They will also be enforced by the Information Commissioner.

In general terms, environmental information covers a wide range of areas and has a very broad definition. It covers any information that relates to:

- Air, water, land, natural sites, flora and fauna, built environment, health

Requests for information. These differ from usual FOIA requests that must be made in writing. EIR information can be requested verbally, in person or by telephone or in writing. The requests might be answered by correspondence, verbally or by allowing personal inspection – whichever is the most appropriate. It is permissible to charge for the information provided and the regulations provide a discretionary power to defray costs by making a charge.

There are grounds for refusal and these include:

- Environmental information held for judicial or legislative purposes
- Requests that are manifestly unreasonable
- Other grounds e.g. national relations, defense or public security
- Personal information

Reasons for refusal must be given in writing and aggrieved applicants can appeal by asking the public body to review their decision, some cases may have a statutory right of appeal, take the matter up with their MP or take an action in the national courts.

Requests using FOI

What type of information can be requested? The type of information that can be requested must be the type that we believe will not cause significant harm, for example, to national security or the ability to enforce the law. In such cases, the information will be withheld under an appropriate exemption of the code of practice.

Complaints Procedure The best policy is to be as open as possible and supply the information that has been requested. If you consider the release of that information to cause significant harm then the Information may be withheld. Remember you need to justify/ explain fully your reasons. The Information Commissioner might later force the disclosure of the information. In the case where information is requested and there are sections of the information that are exempt then the document should be clearly marked to show where exempt information is withheld. If all information is withheld, then we must give full reasons as to why the information has been withheld.

If the person requesting access is not satisfied with the reasons, they have the right to appeal. They may also appeal if they think that the charges for information are unfair.

Publication Scheme We are required to adopt and maintain publication schemes, which must be approved by the Information Commissioner. Such schemes must set out:

- The classes of information we publishe
- The manner in which the information is published
- Details of any charges

Department of Education wrote to all NI schools in 2005 to advise that a model publication scheme template was available on the DE web site for those schools who did not wish to write and present their own publication scheme to the Information Commissioner. (A publication scheme should be presented to the Information Commissioner as a text document).

Once the scheme is approved it is up to the school to decide how to make it available to the public. For example, the school could publish its scheme on its own web site. However, the school would have to take into account the potential requirements of those who do not have access to the Internet, or who might require the scheme in an alternative form, such as a foreign language or in Braille. Publication schemes must be reviewed periodically, and the initial period of approval is likely to be five years.

When deciding what information should be included in its scheme, we need to take into account the issue of public interest when:

- considering the degree of access to information provided
- publishing the reasons for its decisions with regard to access

As information included in the publication scheme is exempt from requests for information, it may be in our interest to consider including a wider range of documentation in its publication scheme than was previously considered necessary to make public. For those of us who have a web site, the inclusion of large amounts of material could allow individuals to download information. With such a system, those responsible for FOIA compliance could ensure that demand for materials in other formats, such as foreign languages and Braille can be met as well as keeping down costs.

I hope this document is helpful. Remember, interperatiog this legislation is not easy. If I can be of any assistance , please do not hesitate to contact me.

Liz Johnston Belb

028 9056 4316

lizjo@belb.co.uk