

## **The Protection of Freedoms Act and Datasets under FOI**

**By Ibrahim Hasan**

***The Protection of Freedoms Act amends the Freedom of Information Act 2000 (FOI) so that in the future, public authorities will have greater obligations in relation to the release and publication of datasets. However this may also bring an opportunity to raise some much needed revenue.***

In January 2011 the Government announced plans to amend the Freedom of Information Act 2000 (FOI) to ensure public authorities proactively release data in a way that allows businesses, non-profit organisations and others to re-use it for social and commercial purposes. OpenlyLocal, a local government data aggregation site (<http://openlylocal.com/>), has said that at present the majority of councils do not provide "fully" open data that could be reused and distributed, while the cabinet minister Francis Maude has previously accused councils of "deliberately making data unusable to anyone else". On the other hand some authorities have expressed concerns about FOI being "abused" by the private sector. They have cited examples of FOI requests where they are effectively asked to do unpaid research or to supply information, which is then sold on to other public authorities.

Section 102 of the Protection of Freedoms Act, (<http://www.legislation.gov.uk/ukpga/2012/9/contents/enacted> ), expected to come into force in April 2013, amends FOI to as to require all public authorities to release datasets in a re usable electronic format. Once these provisions come into force, they will lead to more information requests from commercial companies and data aggregators and fewer legitimate reasons for public authorities to say no.

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### **What is a Dataset?**

A dataset is a collection of information held in electronic form where all or most of the information meets the three criteria set out in the new section 11(5) of FOI (as inserted by the Act):

1. It has to have been obtained or recorded for the purpose of providing a public authority with information in connection with the provision of a service by the authority or the carrying out of any other function of the authority
2. It is factual information which:
  - (a) is not the product of interpretation or analysis other than calculation (in other words that it is the "raw" or "source" data) and
  - (b) is not an official statistic the meaning given by the Statistics and Registration



Service Act 2007 (“SRSA 2007”). (Official statistics have been excluded from the definition of datasets as the production and publication of official statistics is provided for separately in the SRSA 2007.)

3. It remains presented in a way that (except for the purpose of forming part of the collection) has not been organised, adapted or otherwise materially altered since it was obtained or recorded.

Datasets which have had ‘value’ added to them or which have been materially altered, for example in the form of analysis, representation or application of other expertise, would not fall within the definition. So a set of financial accounts would not be a dataset but income and expenditure records would be.

Other examples of datasets which meet the definition include postcodes and references used to identify properties, spend data, lists of assets, organisation structure charts, contacts and FOI request lists and employee statistics.

### **Datasets to be Released in Re Usable Electronic Form**

Section 102 of the Act will amend section 11 of FOI (means by which communication to be made). At present section 11 allows a requestor to choose the format of the information to be supplied to him. As long as this is reasonably practicable the public authority must give effect to his preference.

A new section 11 (1A) will mean that in future where a request is made for information held by a public authority that is a dataset, or which forms part of a dataset, and the applicant requests that information be communicated in an electronic form, then the public authority must, so far as is reasonably practicable, provide the information to the applicant in an electronic form that is capable of re-use. This is in a machine-readable form using open standards which enables its re-use and manipulation. Thus, in future, authorities will be prevented from turning an Excel spreadsheet into a PDF before releasing it in order to stop recipients conducting their own analysis or re formatting the data.

However section 11(1A) states that “the public authority must, so far as is reasonably practicable, provide the information to the applicant in an electronic form capable of re use.” There is no absolute duty for datasets to be provided in a re-useable format as it is recognized that, in some instances, there may be practical difficulties in relation to costs and IT to convert the format of the information.

### **Re Use of Copyright Works**

New section 11A(2) provides that when communicating a dataset to an FOI applicant and all or part of the dataset contains a relevant copyright work, a public authority must make the copyright work available for re-use in accordance with the terms of the specified license. The terms of such a license will be specified in a new section 45 Code of Practice. We are still waiting for a draft(s) but there now seems that public authorities will be able to charge



for the reuse of copyright work contained in datasets (see later).

The definition of a “relevant copyright work” includes any copyright work (as defined by the Copyright Designs and Patents Act 1998) as well as any database subject to a database right. This provision is designed to prevent public authorities from refusing to release datasets on the basis that they contain a copyright work and so are exempt under section 43 (commercial interests).

New section 11A(1) provides for the four criteria which must be met for the new requirement to allow re use of datasets (in section 11A(2)) to apply:

- (a) a person must have made a request for a dataset
- (b) the dataset requested includes a ‘relevant copyright work’
- (c) that the public authority is the only owner of the ‘relevant copyright work’ (in other words that it is not owned in whole or in part by a third party); and
- (d) that the public authority is communicating the relevant copyright work to the requester under the FOI (in other words it is not being withheld under one of the exemptions).

These provisions will require public authority information professionals and lawyers to brush up on their knowledge of copyright and database law. There are many cross references to the Copyright Designs and Patents Act 1998 as well as the Copyright and Rights in Databases Regulations 1997.

### **Proactive Publication**

Once a dataset is disclosed following an FOI request, the Act amends FOI to place obligations on the public authority to make that dataset more widely available. Under new section 19(2A) of FOI, publication schemes must include a requirement for the public authority to publish any dataset it holds, which is requested by an applicant, and any updated version of a dataset.

All datasets published in this way will have to, where reasonably practicable, be in an electronic form which is capable of re-use and any relevant copyright work within it will have to be made available for re-use in accordance with the terms of the specified licence (as above).

New section 19(2A) into the FOI Act, requires authorities to publish any dataset as discussed above unless “the authority is satisfied that it is not appropriate for the dataset to be published”. The Campaign for Freedom of Information (in its Submission to the Protection of Freedoms Act Committee on clause 92 of the Act) has criticized this carve out as not within the spirit of the Act and because it involves a subjective element (that the authority is

satisfied) which will be difficult for the Information Commissioner to oversee. It remains to be seen whether this aspect is amended as per the CFI suggestion to a reasonably practicable test.

## Charging

As far as disclosures of normal datasets go (i.e. those not containing copyright material) the usual FOI charging provisions will apply as set out in Section 12 and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. This means that public authorities will only be able to charge photocopying, postage and any disbursements.

However when it comes to allowing re use of datasets containing copyright material, in what seems to be an amendment to the Act during its passage, Section 11A(4) states that nothing prevents a public authority “from exercising any power that it has by or under an enactment other than this Act to charge a fee in connection with making the relevant copyright work available for re use.” This means that if there are any other regulations or statute which allow for charging then FOI cannot be used to obtain free permission to re use a dataset containing copyright material. Note though that this only covers re use not access. Access to the dataset is still covered by FOI and the Fees Regulations (discussed above).

Section 11B also allows for regulations to be made to make provision about the charging of fees by public authorities in connection with making relevant copyright material in datasets available for re use. Section 11B(2) states that these regulations may:

- (a) prescribe cases in which fees may, or may not, be charged,*
- (b) prescribe the amount of any fee payable or provide for any such amount to be determined in such manner as may be prescribed,*
- (c) prescribe, or otherwise provide for, times at which fees, or parts of fees, are payable,*
- (d) require the provision of information about the manner in which amounts of fees are determined,*
- (e) make different provision for different purposes.*

Section 11B(3) also allows for the possibility of public authorities making a profit from charging for re use of datasets which include copyright material:

- (3) Regulations under this section may, in prescribing the amount of any fee payable or providing for any such amount to be determined in such manner as may be prescribed, provide for **a reasonable return on investment.** (my emphasis)*

This is a significant departure from the normal FOI charging principles as discussed above. It also mirrors the Re-use of Public Sector Information Regulations 2005 which came into force on 1st July 2005. The aim of these Regulations was to encourage the re use of public sector information by removing obstacles that stand in the way of re use. It requires those bodies



covered by it to consider requests for re use fairly and to impose fair and transparent conditions on re use. The main problems with the Regulations are they do not impose an obligation to allow re use, do not have a binding enforcement mechanism and do not apply to some organisations e.g. universities and cultural establishments. This has led to very few requests being made to public authorities for re use under these Regulations.

The amended FOI provisions relating to datasets will apply to all public authorities, will be obligatory and will be enforced by the Information Commissioner. Expect lots of complaints and decisions on the definition of datasets, what is a “reasonable return of investment” and what is copyright material.

### **New Section 45 Code**

Much of the detail about the dataset provisions will be included in a new Section 45 Code of Practice under FOI. Clause 92(5) amends section 45 (issue of code of practice) to insert a new requirement for the code of practice to include provision relating to the disclosure by public authorities of datasets held by them. Paragraph (b) sets out the different provisions relating to the re use and disclosure of datasets that may, in particular, be included in the code. Paragraph (c) amends section 45(3) of the FOI so as to provide for the possibility of making more than one code of practice under section 45, each of which makes different provision for different public authorities.

The new FOI obligations to be introduced by the Protection of Freedoms Act will no doubt mean more work for public authorities at a time when resources are scarce and staff numbers are being reduced. There will be a new code(s) of practice to implement as well as a new publication scheme to adopt. It will also be interesting to see the terms of the “specified license” and how much profit public authorities will be able to make from allowing re use of datasets containing copyright material. Public authorities need to start work now on identifying datasets and raising awareness amongst stakeholder departments.

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The Government recently began the online consultation for a new set of guidance to accompany the new dataset provisions planned to come into force in April 2013. This includes a new Code of Practice (datasets), which will sit alongside the existing Section 45 Code of Practice under FOI. The new draft code also outlines the licensing framework in which public authorities must use when making their datasets available for re-use.

The consultation ends on 10<sup>th</sup> January 2013. Details: <http://data.gov.uk/consultation>