

Welcome back to work after the long break. Information legislation is no respecter of seasonal activity and further guidance and orders have been issued regarding FOI while you've been away from your desk.

This newsletter contains links to other websites. We cannot be responsible for content or availability of other sites.

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Thanks for your support.

Hope you find something of interest in this newsletter

Paul Simpkins & Ibrahim Hasan

Act Now relaunches website

Act Now has upgraded its website to make it easier to navigate. There are many new links, downloads and articles. We also have full details of all our courses, online booking and newsletter subscription. www.info@actnow.org.uk

Act Now Spring Programme

Our Spring Programme of courses (January to June) is our biggest yet with over 30 courses on different aspects of information law and records management throughout the UK. We also have new courses such as contract drafting and Environmental Information Regulations. Click on <http://www.actnowtraining.co.uk>

In addition to this programme we can come to your site and deliver training tailored to your requirements. Train 50 people in house for the cost of sending 2 on a full day course in London. Contact us for details.

FREEDOM OF INFORMATION

1. The FOI Revolution Has Begun

The first FOI stories have started to appear in the papers: The Observer finds out who has visited Chequers and been wined and dined by the PM

<http://politics.guardian.co.uk/foi/story/0,9061,1382064,00.html>

Guardian obtains files about Murdoch and his lobbying

<http://politics.guardian.co.uk/foi/story/0,9061,1382420,00.html>

Patients and families will gain access to records despite the medical profession's worries. This is an interesting story. If doctors' records are disclosable what about records and salaries of public sector officers?

<http://politics.guardian.co.uk/foi/story/0,9061,1382138,00.html>

The BBC is encouraging people to make FOI requests promising to track the most interesting ones.

<http://news.bbc.co.uk/1/hi/magazine/4096563.stm>

2. Fees, fees guidance and DCA fees guidance.

The regulations setting out the fees which public authorities can charge when answering requests for information were laid before Parliament on 9th December 2004. They come into force on 1st January 2005. Guidance on the regulations has been published on the DCA website [here](#)

In summary, if it going to cost more than £450 to find the information requested a public authority does not have to supply the information at all. For central government this limit is £600. If it is going to cost less than this amount, the public authority has to supply the information and can only charge reasonable disbursements (photocopying etc.). As you would expect it's slightly more complicated with rules about aggregation of costs and supplying information over the limit.

We have produced a simple one page summary - click [here](#)

On the 23rd December, just when you thought you'd understood it, the DCA changed the guidance on VAT charges for FOI requests: The official guidance is [here](#) but to summarise:

If an authority was asked for information, and the information was only available from that authority or another public authority, any fees charged would not attract VAT.

If an authority was asked for information that was available from another source, any fees would attract VAT. This would still be the case even if the authority was obliged to supply the information because the cost of answering was below the appropriate limit. Fees charged for information that is provided in accordance with a public authority's publication scheme will attract VAT.

3. Logo

In case you haven't seen it the DCA has created a logo which can be used for your own material. The logo and its associated usage instructions can be found at <http://www.dca.gov.uk/foi/logos/foilogo.htm>

4. DCA guidance on processing requests

Subscribers might like to take a look at the guidance on processing requests for information and on FOI Act exemptions which DCA have published on their website today. <http://www.foi.gov.uk/guidance/index.htm>

5. Copyright

Readers may be interested in this slice from the DCA Guidance page, being

<http://www.foi.gov.uk/guidance/proguide/chap08.htm>

"Third Party Copyright

Public authorities complying with their statutory duty under sections 1 and 11 of the Freedom of Information Act to release information to an applicant are not breaching the Copyright, Designs and Patents Act 1988. The FOIA specifically authorises release of the information to an applicant, even if it is in such a form as would otherwise breach the copyright interests of a third party.

However, the Copyright Designs and Patents Act 1988 will continue to protect the rights of the copyright holder once the information is received by the applicant."

6. FOI around the World

Dai Davis, of Nabarro Nathanson solicitors, has written an article on FOI in jurisdictions around the world. If you would like a copy please email him – d.davis@nabarro.com

7. CIA Requests

A website of requests which the public have sent the CIA.

<http://www.parascope.com/ds/articles/ciaFOIAdoc.htm>

8. When does the 20 days start and finish?

The Information Commissioner's "Introduction to the Freedom of Information Act" pdf document, Section 2.7 Time for Compliance, states that... "this time limit applies irrespective of the geographical location of the applicant. It is the Commissioner's view that the duty to comply with section 1(1)(b) of the Act is satisfied when the information is posted or otherwise transmitted to the applicant". My emphasis. Given that we could be sending stuff all over the world, & we have no control over the postal service, our duty is to have sent/transmitted the information within the 20 working days, not for them to have received it. The Commissioner has also stated that in his view that the 20 days starts on the day following receipt of the request.

9. What's in a name?

There are strong views on both sides. Bulletin boards have been arguing about responding to Mickey Mouse and Donald Duck. Here's some views to mull over.

Section 8(1) states: any reference to a "request for information" is a reference to such a request which

- (a) is in writing
- (b) states the name of the applicant and an address for correspondence and
- (c) describes the information requested

Section 8(2) says a request is deemed made in writing if it is electronic & meets the requirements of S8(2). So let's be very clear – we need a name for the applicant & an address for correspondence. That is what the act says. There is no definition of "address" in the Act. Failing that, the rules on statutory interpretation point us at dictionaries.

Dictionary definitions refer to "the number, street name, and other information that describes where a building is or where somebody lives".

DCA's Guidance states:

Return address - There is no obligation to comply with a request for information if it does not give a return address. If a request is received by email and, although no postal address is given, the email address of the sender is included, then this should be treated as the return address

That makes sense, but is it what the act says....or possibly how it will be construed if the point is ever taken..... ?

I just wonder if we aren't making this hard work – perhaps we should be bolder & less timid about telling it just as the act says.....to be able to respond to a valid request, the requester should provide adequate contact details. If they want the information, we need the "name of the applicant and an address for correspondence" - anything less & it isn't a valid legal request. Those are the rules of the game, as set by parliament - when Parliament changes them, they change.

10. Recorded information – How far do you go?

More bulletin board minutiae. This time the argument is whether the public authority has to process for an individual or merely supply what it already holds.

"The Act refers to recorded information held by a public authority rather than to 'documents' or 'records'. Hence, if the information requested can be generated from your database, then you have a duty to fulfil the request subject to exemptions."

According to this argument, if someone asks how many toilet rolls are used per person per day, in his institution, would he have to supply that answer? We have a list of people at our authority and we probably know how many cases of toilet paper we order per month. HOWEVER we do not record, and no where is it recorded, how many toilet rolls we use per person per day. In the interest of good customer service, I would tell them how many people we employ and how much we spend on office supplies. If we had a specific figure for toilet supplies, I would give them that information. As we do not hold the recorded information of how many rolls of toilet paper are consumed per person per day, I would not supply that information.

A database, is simply that, a database. The recorded information that is available is the raw data. However, if you have run a report in the past that covers the information requested then you would have to supply that RECORDED information because it exists.

In other words, potential information is not recorded information. If that is not the case, why limit the point to databases, why not include all the archives because they are full of information?

The essential point is recorded information, not information that might come into being if I collated it, synthesized it, analyzed it and then wrote it down. Unless I have already done that, the information is not recorded.

11. Qualified Person – S36 Exemption

Section 36 of the FOI Act allows information to be exempt where disclosure would prejudice free and frank advice, deliberations or the effect conduct of public affairs. However the decision to claim the exemption has to be signed off by a Qualified Person within the public authority. The ODPM has confirmed that for local government this will be the monitoring officer and in his/her absence the Chief Executive. Other QP's are:

Universities - Vice-Chancellor or Chief Executive (depending on title used)

Further Education Colleges - Principal

Most non Departmental Public Bodies in the Education area have gone for the Chief Executive or equivalent

Two exceptions, QCA and CITB have gone for their "Executive Team".

For Maintained Schools it will be the Chair of the Governing Body.

12. FOI Decision Maker Workshops

Now is the time to train your FOI decision makers and advisers. We have developed an interactive workshop looking at the key decisions and issues to be considered. It is packed full of case studies and exercises to try and tease out and discuss all those difficult issues.

Last seasons courses were oversubscribed resulting in us having to run two courses in one day. We have improved the workshop and are joined by Tim Turner of Wigan Council who was an FOI policy officer at the Information Commissioner's Office.

Click [here](#) to download the flyer – warning those who book should be ready to work hard on the day!

13. Extensions to FOI Deadline

Schools are to get more time to respond to requests made under the Freedom of Information Act. An order laid before Parliament will also give extensions to the armed forces in some circumstances.

This new order, though, effectively allows extensions to the 20 day limit in permitting schools not to count school holidays when calculating their response times. This will apply to governing bodies of all maintained schools and nursery schools and schools maintained by the Ministry of Defence.

The Information Commissioner will also have discretion to extend the time-limit to up to 60 working days if a public authority is unable to meet the normal deadline because it needs to get information from someone involved in a military operation, or in preparations for a military operation or in cases where the authority needs to ask for information from abroad, including from foreign governments or its own staff.

14. The DCA has published FOI guidance at:

<http://www.dca.gov.uk/foi/guidance/index.htm>

Contains:

Procedural Guidance

A guide to processing information requests.

Introduction to Exemptions

An introductory guide to the use of exemptions.

Summaries of Exemptions

A summary of each exemption, highlighting the key issues.

Exemptions Guidance

Detailed guidance on the use of exemptions and factors to be taken into account when considering their application.

15. National Audit Office

<http://www.nao.org.uk/publications/foiguide.pdf>

16. ICO Guidance

www.informationcommissioner.gov.uk

No. 21 The Duty to Confirm or Deny guidance

No. 26 - Communication with Her Majesty and Awarding of Honours

17. How the FOI affects the work of Ofsted

<http://www.ofsted.gov.uk/foi/>

18. FOI, Contracts and Tendering

An article by Ibrahim Hasan discusses the relevant exemptions. You can download this from our website. Other useful documents in this area are:

The OGC advice on model terms for contracts

<http://www.ogc.gov.uk/index.asp?docid=1002400>

The EU Tenders database - search on UK and Freedom of information Act to see sample clauses

<http://ted.publications.eu.int/official/>

Contract Drafting Workshops

Dai Davis, a contract drafting expert and fulltime consultant at Nabarro Nathanson solicitors, will be running two contract drafting workshops for Act Now in March (York) and June (London). This is an ideal opportunity for lawyers and procurement professionals to brush up on their contract drafting and analysis skills.

More details on our website or click [here](#) to download a flyer

The Welsh Local Government Association have published a procurement toolkit for FOI.

<http://www.wlga.gov.uk/Procurement/Documents/FOI-advice.pdf>

FREEDOM OF INFORMATION IN SCOTLAND

1. Scottish decisions.

For information: the Scottish IC has recently issued a decision (under the Code of Practice on Access to Scottish Executive Information) regarding the withholding of information by the Scottish Prison Service in relation to a tendered contract for prisoner escort services. Although the Scottish IC accepts the withholding of some information, due to a contractual confidentiality clause, he criticises the use of such clauses, and makes comment about his view of their use under the FOI (Scotland) Act right of access.

For further details, see: <http://www.itspublicknowledge.info/decision.htm>

2. Scottish Information Commissioner's first report

This can be downloaded from the Scottish Information Commissioners website [here](#) and contains an overview of the work undertaken to support the implementation of the Freedom of Information (Scotland) Act 2002.

3. Ten things everyone should know about FOI - see the latest press release from the Commissioner.

4. Report of Scottish Public authorities' preparedness for FOISA

5. A series of briefings on the exemptions and key concepts of the Act:

Section 27: Information intended for future publication
Section 28: Relations within the United Kingdom
Section 29: Formulation of Scottish Administration Policy
Section 36: Confidentiality
Section 37: Court Records

6. Public Sector Procurement and FOISA Requests

This is a going to be a major area for FOISA requests. Those dealing with tenders and contracts as well as lawyers and FOI advisers need to be up to speed on the relevant exemptions and the public interest test. The Scottish Executive has produced a couple of guidance notes on this topic:

<http://www.scotland.gov.uk/Topics/Government/SPD/19468/21682>

<http://www.scotland.gov.uk/library5/government/osds-00.asp>

Ibrahim Hasan and Hazel Moffat have done an article on this topic. Click [here](#)

7. FOISA Decision Maker Workshops – Edinburgh

Act Now is running a series of FOISA workshops designed to explore the complex issues such as fees, exemptions and the public interest test. Hazel Moffat of Shepherd and Wedderburn solicitors will be on hand to talk about the commercial and procurement issues. Places are limited so book early to avoid disappointment. Details [here](#)

ENVIRONMENTAL INFORMATION REGULATIONS

1. Defra has published a list of exceptions which can be accessed at

<http://www.defra.gov.uk/environment/pubaccess/guidance/06.htm>

<http://www.defra.gov.uk/corporate/consult/eir-guidance/index.htm>

The EIR Code of Practice and Chapter 6 was updated on Tuesday 21st December. Don't forget these also came into force on 1st January 2005.

2. Draft Regulations

www.defra.gov.uk/corporate/consult/envinfo/annexc.pdf

3. Draft Code of Practice

www.defra.gov.uk/corporate/consult/envinfo

4. Guidance Note

www.sustainable-development.gov.uk/what_is_sd/eirguide.htm

5. Useful Info:

www.defra.gov.uk/news/2004/040722d.htm

Act Now has teamed up with Alan Stead, an EIR expert, to bring you seminars on FOI and EIR. These will look at the main provisions of both laws and examine strategies for compliance. This is being run in Manchester and London. Click [here](#) for full details

DATA PROTECTION

1. Commissioner's view on the Identity Card scheme [Click here](#)

2. Guidance from ICO and others on deceased individuals

Thank you for your email dated 11 November 2004.

As you are aware, the Data Protection Act 1998 only covers personal data relating to living individuals. Accordingly, a public authority will be unable to use the Personal Information exemption under section 40 of the Freedom of Information Act as justification for withholding information about a deceased person.

The Department for Constitutional Affairs ("the DCA") has indicated that section 38 (Health and Safety) and section 41 (Information Provided in Confidence) may be applicable to requests for information about deceased individuals.

In addition, section 44 (Prohibitions on Disclosure) may be relevant if there is existing legislation limiting the disclosure of certain information. For example, in the case of an Acute Trust you may find that medical records are already covered by guidelines which ensure that they remain confidential for a certain length of time. Requests for medical records relating to deceased patients will continue to be dealt with under the Access to Health Records Act 1990.

It may be helpful to learn that our office is in the process of compiling more detailed guidance on requests for information about deceased individuals. It is intended that this guidance will appear on the Information Commissioner's website shortly.

We hope that this advice is helpful. Yours sincerely, Anthony O'Reilly, FOI Compliance Officer

Another viewpoint

After the Hundred Year Rule: Guidance for Archivists and Records Managers on access to medical records under the Freedom of Information Act was published by the Society of Archivists on behalf of the Health Archives Group (we sent a copy of the guidance to the ICO).

The conclusions we came to about the records of deceased patients were that s.41 (actionable breach of confidentiality) seemed the main exemption that was likely to apply to these records. However as Anne indicated,

there are two issues which are still not clear and will only be resolved in time: a) whether releasing deceased patient information is really an actionable breach of confidence b) how long should the confidentiality last for.

In the absence of any concrete answer to b), we recommended that generally speaking current best practice be followed, i.e. that Archivists assume a lifetime of 100 years and calculate the duration of s.41 (the closure period, in effect) from the date of birth of the patient (if known). Of course it has to be borne in mind that FOI is flexible and so many decisions will have to be made on a case by case basis.

At a training course I was on the other day, the trainer mentioned that we could claim "the common law of confidentiality" to protect the records of deceased patients, and use exemption 41 as a back up. I'm not fully aware of the legal implications of "common law", however, I would have thought that we would have to claim an actual FOI exemption to justify keeping information closed.

There is one final point it is worth making about the Access to Health Records Act 1990, which was mentioned by the ICO in the letter Anne posted.

AHRA as amended gives a right of access to any deceased person's medical record which is limited as follows: The record must have been created on or after 1 November 1991, and the access application must have been made by the personal legal representative of the deceased subject of the record, or by any person who may have a claim arising out of the subject's death.

Therefore, after 1 January 2005 requests for information from medical records relating to deceased patients would only continue to be dealt with under the Access to Health Records Act 1990 if there is a right of access under AHRA. If there is no right of access under AHRA, the request must be dealt with under FOI.

In case anyone is interested "After the Hundred Year Rule" is available online for SoA members (www.archives.org.uk) and in hardcopy for £15 for non-SoA members (by emailing sales@dpmedia.co.uk)

For information about the Health Archives Group, see:
<http://www.archives.org.uk/groups/specialistrepositories/whoandwhatareouraffi/healtharchivesgroup.html>

3. The final Code of Practice on workers health has been published [Click here](#)

4. We are also planning a Data Sharing conference in June. More details soon

REGULATION OF INVESTIGATORY POWERS

1. RIPA : Spoc Accreditation Deadline 31st March 2005

Regular readers will know that from 5th January 2004 local authorities and other public authorities such as fire ambulance and the health sector can access certain communications data under the Regulation of Investigator Powers Act Access to Communications Data Order. If this is new to you see our RIPA alert which was issued earlier this year on the website or click [here](#)

All public authorities wishing to use these new powers must have a Spoc in place. This is a Single Point of Contact who will liaise with the communication Service Providers. All SPOCS need to do an approved Home Office training Course and pass an exam. **This must be done by 31st March 2005.** Only a handful of companies are approved by the Home Office to run this course. Act Now was one of the first.

We have now been running Spoc courses for a while in London. Feedback has been excellent and all the candidates passed the exam with flying colours

The next SPOC courses are 21st & 22nd Manchester and 23rd & 24th in London.
For more details click [here](#) to download a flyer.

2. RIPA/Spoc and Scotland

Whilst Scotland has its own RIPA known as RIPSAs for some kinds of surveillance, Scottish Public authorities still

have to follow RIPA for accessing Communications Data. Therefore the Scottish authorities can attend any SPOC course. However we are running a course for Scotland in Perth on 18th and 19th January. Just a handful of places are left so click [here](#) to download a flyer or see the website to book online.

3. Designated Person and Authorised officers Training

Whilst there is no legal requirement to train those who authorise activities under RIPA it is certainly recommended by the Home Office and the Surveillance Commissioners. With this in mind Act Now is running a course on RIPA exploring all its relevant provisions and the importance of human rights: Surveillance Law and RIPA on 27th April 2004 – Manchester. Details [here](#). This may be a good course to send investigating officers as well as those authorising officers. The website has full details including an online booking form.

We are also planning a surveillance law conference in June. More details soon

RECORDS MANAGEMENT

1. IEG starts asking for RM

The priority outcome G19 states that the authority will ensure: Adoption of ISO 15489 methodology for Electronic Document Records Management (ERDM) and identification of areas where current records management policies, procedures and systems need improvement to meet the requirements of Freedom of Information (FOI) and Data Protection legislation.

The priority outcome applies to all councils who, in order to fulfil this outcome must: "adopt the ISO 15489 methodology for Electronic Document Records Management (EDRM). Councils will also have to undertake a Freedom of Information (FOI) and Data Protection (DP) audit of their current systems, arrive at a gap analysis of the actions needed to fulfil these requirements and implement a programme to bridge that gap and achieve compliance within the statutory timescales."

Act Now offers an introduction to Records Management in London, Belfast, Edinburgh and Manchester and an advanced course on implementation of ISO15489. Click [here](#) for details

Disclaimer.

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Act Now Training, 64 Bradford Road, Dewsbury, WF13 2DU
Tel 01924 451054, Fax 01924 451129, info@actnow.org.uk