

Issue 1

Freedom of Information - A Time of Change

An Executive Briefing Paper

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Executive Summary

One of the most significant Acts of Parliament to affect the public's right to access information is about to open the door on the inner workings of Public Bodies in the UK.

The Freedom of Information Act 2000 which, starting November 2002 and progressively coming into force over the next three years, demands that Public Bodies publish information they have recorded or use, and provide information to individual members of the public on request.

This represents a sea change in the public's right to information. No longer will information be withheld or prised out of Public Bodies. The new emphasis will be on open government with information readily available, unless there is a specific reason for it not to be.

Public Bodies, such as the Central and Local Government, Parliament, Police, CPS, Serious Fraud Office, Health Service, Schools, Universities, the Armed Forces and The Welsh Assembly, will all face significant changes and challenges under the Act.

And for many, the effects of the Act, requiring information to be published on a regular basis and individual requests answered within 20 working days, will place additional pressures on internal processes and specifically on records and document management.

This paper looks at the implications of the Act for Public Bodies and suggests a way forward to enable these organisations to comply with the deadline for implementation, without fear of administrative or legal collapse.

Introduction

The past 20 years have witnessed a wholesale shift in the public's appetite and perceived right to information.

The original Data Protection Act of 1984 helped to raise awareness among the general public of the huge bank of information held electronically. This Act recognised the rights of individuals to see computer data held about themselves. A raft of media coverage championing the people's rights to access their medical records and other such information raised the stakes and started a movement towards a more open society more closely aligned to the freedom of information practiced in the US.

The original Act remained potent for a long time despite sweeping changes in technology and the wholesale adoption of IT by organisations to record and process data. This was because the Act dealt primarily in principles that remained relevant despite the changes in technology.

In 1998, the updated Data Protection Act extended individuals' rights to include collections or aggregations of data about themselves, data held on paper and the processes applied to data about them.

Meanwhile, the influence of the global village and in particular the attitude of the US, Canada and Australia to citizens' rights combined with some shocking examples of hidden injustice or negligence which went on to be exposed by the press, have brought further pressure on UK Government to operate more transparently.

Also, the citizen's willingness to accept the utterances of Public Bodies as authoritative and final was being eroded. Today, people demand a higher level of understanding and openness before they are prepared to trust in their decisions and processes.

There can be no doubt that while this is a positive evolution, the line between "in the public interest" and "in the interest of the public" has been blurred by increasing media demands for transparency in all aspects of government and public life.

The Freedom of Information Act draws a new line for accountability for Public Bodies with the emphasis heavily on the right of citizens to see all the information held by any part of the government - the exception being where the public's interest would be better served by the information remaining in camera. And that's the crux of the new Act. It's a reversal of the original "need to know" issuing of information. Today, it is taken for granted that the public should know everything apart from those things where there is a specific and established reason for us not to.

The Right to Information

In 2002 the very idea that a public body can hold secret information affecting you is almost guaranteed to raise the hackles of even non-cynics. In today's rights-conscious society we perceive that personal information, such as our medical records belongs to us, not our GP or the NHS. The 1998 Data Protection Act has gone a significant way to addressing these concerns.

Equally, we now expect decisions and processes that might affect our lives to be fully transparent. Local authorities processing planning applications, awarding grants or deciding on strategies that could impact us, should be open about the information, rationale and decisions involved. A "need to know" or "behind closed doors" basis of government is no longer tolerated. The new Freedom of Information Act defines what is to be published or accessible by anybody. Information remains inaccessible only where specified by the Act.

The impact of the Human Rights Act and the European Convention on Human Rights has yet to be fully appreciated, socially or legally, in the UK.

Transparency in Organisations

A citizen's demand for information from an organisation will often be centred on data about them personally or processes that affect them individually. Much of this is personal data - data identifying living individuals - and is covered and addressed by the Data Protection Act. The Freedom of Information Act is designed to open the door on a wider range of information - essentially everything not covered by the Data Protection Act. It reinforces the spirit of "open Government" by ensuring information is available unless there is a justifiable reason not to.

The Act defines two approaches for Public Bodies to provide information: Publication Schemes and Individual Rights of Access. Although the individual rights are a very powerful tool for any citizen - and potentially more newsworthy - the keys to transparency and openness are the publication schemes. This is where the initial effort has to be concentrated; it will be a learning experience for everybody.

Publication Schemes

Every public body has to adopt, maintain and review periodically a publication scheme specifying the types of information they publish, the form in which it is published and details of any charges. It is important to point out that the Act is not intended as a new revenue stream, so new charges will be limited and may not cover all costs; existing information charges will remain.

Publication schemes are specific to each type of organisation. Templates or model schemes are being defined where several bodies share the same or similar functions. Central Government departments differ and their publication schemes will have generic information only in common. Local Authorities are more similar, although there are important differences between a large metropolitan borough and a rural district council, so some tailoring of their model scheme is anticipated. However, it will be hard to argue that information should not be published when another authority does so. All schools are expected to use the same model.

Publication schemes must be approved by the Information Commissioner. The Information Commissioner is already working with various groups to provide guidance on what should be included in the publication schemes and to develop model schemes. The Freedom of Information Act and the Commissioner recognise the importance of media such as the web and encourages publication via this route where appropriate. It is also recognised that many citizens cannot use the web, or information is not in a form suitable for the web or for the disadvantaged citizen and alternative access methods will be needed.

Individual Requests

Individuals will be able to request any information from any public body. They have the *right* to be told if a particular type of information exists, the *right* to then receive that information and, where possible, the *right* to choose the format in which the information is provided. Note: personal data remains covered by the Data Protection Act.

Individuals do not have to give a reason for their request nor mention the Freedom of Information or Data Protection Acts. They need provide only sufficient information to allow the request to be satisfied. The public body can ask for clarification but cannot ask for details that an individual is unlikely to have. For example, it might be reasonable for a public body to ask an individual for the relevant dates but it is not reasonable to ask for an internal file reference. Public Bodies must also provide advice and assistance to applicants.

Requests must be made in a "permanent form" such as paper or email, and be satisfied within 20 working days. This period is extended where a fee is outstanding or the public interest test is applied. Where a body refuses to release the requested information or the request is repeated, then it must give the reason for its decision and inform the individual of their right of appeal to the Information Commissioner.

Exemptions and the Public Interest

Under the new Act there are instances where a public body need not publish information and can refuse to respond to an individual request - although in the latter case it must explain why. The exemptions available, many the same as under the Data Protection Act, fall into three main categories.

The first, most exemptions, is information subject to the “public interest test”. The Act states that information may only be withheld if the public interest in withholding it is greater than the public interest in releasing it and crucially, in the spirit of openness, the balance lies in favour of disclosure. The principle is now established that the information should be published unless there is a good reason for it not to be.

A recent High Court case ruled that a national security exemption applied under the Data Protection Act - which has a very similar categorisation - had to apply a finer-grained exemption rather than the blanket exemption previously relied on.

The public interest test also has to be reapplied each time information is republished or requested. So a contract to supply services to be public body can be published or accessed, possibly with some exclusions such as trade secrets, once the negotiation period is over. The Freedom of Information Act cannot be excluded by contract, although the parties to a contract may enter into confidentiality provisions that alter its effects on certain information held.

Secondly, within law enforcement and international relations a similar test, the “prejudice test” must also be applied to decide if material is exempt from disclosure. The information can only be held back if disclosing it would, or would be likely to, prejudice the activity.

With these two types of exemptions above, the time to respond to an individual request changes from 20 working days to “within a reasonable time”.

Finally, there are absolute exemptions to the disclosure rules. These are mostly what you would expect and include current investigations by Public Bodies, court records, information provided under terms of confidence, trade secrets and formulation of Government policy. Here there is no public interest test, only a process specific to each class of information to claim the exemption. For instance, in the case of Parliamentary Privilege, a certificate signed by the Speaker is sufficient.

Data identifying living individuals is also exempt because it falls under the Data Protection Act. In fact all information held by Public Bodies falls under the Data Protection or Freedom of Information Acts.

Information is also exempt if it is already accessible by other means. For example, a Local Authority is already required to tell its Council Tax payers how it is spending the money and so the Act does not apply; although an authority may decide to include this in its publication scheme.

The Time Frame for Implementation

Originally the Act was due to be implemented across the board on a given date but following close scrutiny of the demands placed on Public Bodies by the new Act, the Lord Chancellor's department took the decision to phase the rollout.

The Act has to be fully in force by 30 November 2005 but a series of milestones leading up to that date have been set. Once implemented, the Act applies to information even if it was acquired before the date when the Act comes into effect.

The Lord Chancellor's timetable for the publication schemes is:

Nov 2002	Central Government, Parliament, Welsh Assembly, Non-Departmental Public Bodies (except Crown Prosecution Service and Serious Fraud Office)
Feb 2003	Local Government
Jun 2003	Police, police authorities, Crown Prosecution Service (CPS), Serious Fraud Office, Armed Forces
Oct 2003	Health Service
Feb 2004	Schools, Universities and remaining Non-Departmental Public Bodies
Jun 2004	Remaining Public Bodies

The individual right of access follows in January 2005.

The Northern Ireland Assembly is discussing whether Public Bodies in Northern Ireland will apply publications schemes at the same time as their counterparts in England and Wales, or make alternative arrangements. The Scottish Parliament is considering its own, separate Freedom of Information legislation.

Enforcement of the Act

The independent Information Commissioner is responsible for the enforcement of the Freedom of Information Act, the Data Protection Act, and other Acts covering information handling and access.

The Information Commissioner reports directly to Parliament and explains appeals procedure and has the power to serve enforcement notices. If a Public Body fails to honour an enforcement notice, only then can the appellant go to court and put the Public Body at risk of contempt.

The Challenge for Public Bodies

Clearly, the Freedom of Information Act presents a significant challenge for Public Bodies. The Act could threaten to place an unbearable burden - both administrative and legal - on the Public Body that is not prepared for this shift. All this is taking place alongside the demands and timetable for electronic access to Government. So Public Bodies face two major hurdles.

The first is cultural. Previously information was often used as power and only disclosed on a "need to know" basis. There has been a considerable reluctance to share data - even within or across departments. It is widely recognised cultural issues are the most difficult challenges to overcome when affecting significant change. This hurdle and the time needed to overcome it should not be underestimated by those responsible for implementing Freedom of Information. In addition to changing the attitude of people within Public Bodies to openness, the way information and processes are managed may have to be re-examined.

Secondly, the Public Bodies face a practical problem in that apparently similar organisations are diverse in both style and organisation. Different bodies and departments will require flexible processes and systems all working towards a shared goal. This is particularly evident with electronic access to government.

The Information Commission has advised bodies to start by placing responsibility for information practices at high enough level - sharing the responsibility for Freedom of Information and Data Protection means an organisation can take a common approach to issues and their resolution, to identify areas of tension and have procedures to deal with them, to encourage a cultural shift to openness, and to produce a Publication Scheme.

The initial step for Public Bodies producing a publication scheme is to establish what information they actually have and organise it into an approved scheme. They then need to publish the information required by their scheme, supported by the processes controlling publication, and set up a system to review the scheme periodically.

In due course they will need to implement support for the individual right of access, and the procedures required to meet the 20-day timescale and to handle exemptions.

Much will depend on the Public Bodies' ability to manage its records efficiently and effectively. With emphasis on publication via the web, its technical resources and skills will also be under pressure. This point is reinforced by those responsible for implementing and enforcing the Act:

"The legally enforceable right of access to information held by authorities will only be workable in practice if a substantial amount of work is done to ensure their records are in good order. We were criticised for the time we took to implement the Human Rights Act, but this has proved to have paid off. I am confident that the time taken to introduce this fundamental change in the openness of public administration will also pay dividends in the long run."

Lord Irvine, Lord Chancellor, November 2001

“...there is going to be a crying need for more efficient records management in the public sector if they are going to have any chance of complying with Freedom of Information law... a very big imperative for public sector bodies is to make sure they can produce records promptly and efficiently of all kinds...”

**Elizabeth France, Information Commissioner
Engineering Conference, September 2001**

The Public Records Office (PRO) is helping to drive changes in readiness for both electronic access to government and Freedom of Information and has set a target of 2004 for all departments to manage their records electronically. This will dramatically improve the finding, retrieval and processing of records within the organisations.

Industry analysts have shown a staggering 32% of paper documents are unavailable when they are first required and the estimated cost of locating an unavailable document is between £40 and £85. On average each paper document is copied 9-11 times at a cost of £13 and costs a total of £34 over its lifetime. It is clearly not enough to deploy a scanning system or a records management system or a web system in isolation, all the various elements must work together holistically for the organisation to fully capitalise on its information.

Some Public Bodies are further down the track, particularly those who have been used to responding to media inquiries or moved voluntarily towards more open governance. With this in mind, Public Bodies will be under pressure to exploit technology to help meet the challenges presented by the Act - discovering, categorising and publishing the relevant information - and other initiatives, but will also have to meet the demands of “best value”.

The Solution

The obvious solution for Public Bodies is to tap the expertise of the companies that have developed integrated solutions for wide variety of public and commercial organisations. The skills learnt in the improvement of customer service and efficiency while keeping a close eye on costs and return on investment, now stand to benefit the Public Bodies with the management, publication and processing of information.

Integrated content and document management systems, with automated discovery and powerful search technologies, browser-based interfaces, and access to legacy systems can provide the technical basis of these solutions.

Electronic record management delivers many benefits. These include the careful control of access to documents, their versions and histories; audit trails; many users being able to access the same document at once; reduced storage requirements and a significantly faster rate of retrieval. Apart from reducing costs, these help protect the organisation from error and negligence.

The Public Records Office has set out standards for electronic management of records. These require that the solution consist of a hierarchy of folders, each of which supports both textual and numeric naming. A folder may contain either more folders or electronic parts but not both, so all records live in a specific fileplan location that can be addressed as a path. Folders and records can be reached via their metadata providing the powerful search facilities more usually found in document management systems, as opposed to the less powerful electronic records systems. Retention and disposal policies ensure that documents are stored for the correct length of time and that disposal is controlled automatically.

The solution must be secure and not compromise existing security systems. It must also fit the public body's organisational style and the image it wants to present.

In summary, technology and services can help liberate Public Bodies from the baggage of their current, often manual systems, streamline their approach to internal processes, and improve their relationship with the public through increased levels of communications and accountability.

Further Information

For further information visit:

- The Information Commission's website
www.dataprotection.gov.uk
This covers the Freedom of Information Act and Data Protection Acts.
- The Lord Chancellor's Department website
www.lcd.gov.uk
This sets out the Government's timetable and current thinking on policy.
- The Public Records Office website
www.pro.gov.uk
This sets out the policy on electronic records management and policy for when information becomes historic.
- The Fujitsu Services website
services.fujitsu.com
Further information on Integrated Document and Content Management.

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