The requester and the requested — a constructive relationship

Former leading specialist in using FOI for journalism at BBC News, consultant, trainer, lecturer, writer and author of the book, Freedom of Information: a practical guidebook, Martin Rosenbaum explains how requesters and public authorities can foster a cooperative and mutually beneficial relationship

Recently I received a useful phone call from an Information Rights Officer in a large public authority about a request I'd submitted. She indicated that she was well aware that the most efficient way to clarify a request when necessary was to discuss it on the phone. She then explained the context of a document I'd asked for, which I had misunderstood. The result of her quick call was to avoid a lot of to-ing and fro-ing by email, which would have been time-consuming and inconvenient on both sides, and probably rather frustrating.

Not only did this call save her organisation time and effort, it also left me better disposed towards it, as now I understood the reasons for what had happened. But to achieve this positive outcome, she had to defy its official policy — she told me that "we're told not to speak to requesters on the phone".

This is just one example of how in the author's view, public authorities can make the FOI process either easier or harder for themselves, depending on how they engage with requesters.

For sixteen years, I was the leading specialist at BBC News in using FOI for programme research and news stories. As well as making many requests personally, I advised and assisted lots of other BBC journalists. I therefore gained a wide range of experience of how the FOI system has been working in practice (and discussed it with plenty of FOI Officers along the way).

My recently published book, *Freedom of Information: A practical guidebook*, offers guidance on the FOI law and techniques for posing effective questions and challenging refusals. It describes the legalities of the Freedom of Information Act 2000 ('FOIA') and the various exemptions, explains the workings of the public interest test, and gives advice for all stages of the process, from how best to frame a request to how to complain to the Information Commissioner's Office ('ICO') and how to argue a case at the tribunal. It also covers the Environmental Information Regulations 2004 ('EIRs') and the position in Scotland.

Although this book is primarily aimed at requesters, it is my hope that FOI Officers and others working in the field will find it valuable for providing useful insights into the perspective of those seeking information. In the book, I advise requesters to pursue a positive relationship with FOI Officers; to treat them as a hopeful pathway to the desired information and not as a barrier; to be polite and not aggressive; to try to have constructive discussions; and to pay careful attention to, and learn from, whatever advice and assistance is provided. And I explain that FOI staff who know the law and precedents may sometimes want to release material, but find themselves overruled by senior management who wish to avoid an embarrassing disclosure (so in other words, don't shoot the messenger).

I'm well aware of course that some requestors truly are vexatious, but my philosophy has always been to encourage requesters to abide by these principles when pursuing information. The corollary is that FOI Officers should also adopt a helpful and constructive approach, and here I have found over the years that this applies to some public authorities and their staff much more than it does to others.

Advice and assistance

One important tone-setting opportunity when it comes to responding to requests is in fulfilling the duty to provide advice and assistance. FOI Offices should supply genuinely useful guidance. This includes explaining how record systems are structured and how they can be searched; what kind of information is kept for how long; what is the correct jargon or terminology; and which similar requests have already been answered. In line with section 16(1) of FOIA), authorities should be prepared to provide such advice to individuals before an FOI request it made, not just after one has exceeded the cost limit.

Over the years, I've spoken to numerous FOI Officers who have been happy to do this. I've also dealt with numerous FOI departments where no one seems willing to do anything of

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the sort. It is the former approach which in the long term saves effort and frustration for everyone, and avoids the processing of a flow of pointless and futile requests that consume time but achieve nothing to contribute to the public interest.

Unnecessary redactions

My experience making requests while at the BBC also taught me that there are other ways in which some authorities could improve the efficiency and productiveness of their FOI procedures, which would be advantageous to themselves as well as requesters.

> ***"Requesters may from time to time be excessively suspicious, pedantic and persistent, but they are encouraged to behave in that way if public authorities are dilatory, obstructive and misleading."***

Probably everyone in the broad FOI community was on a steep learning curve when the new law came into force in 2005, but it was striking how some authorities imposed extra unnecessary burdens on themselves when dealing with requests.

One example was that of authorities which devote time and effort to completely unnecessary redactions. An early request I made was to a university, which replied with a large quantity of heavily redacted material. When we printed it out, the redactions disappeared and the information underneath was revealed. (These kinds of errors, which used to be quite common, are now much rarer, as staff have a better understanding of redaction software).

The university itself realised it had failed to make the redactions properly. It contacted us a few days later, asking us not to publish details of research labs redacted for reasons of health and safety (which we complied with), but making no mention at all of the substantial passages redacted under several other exemptions. And there was no complaint when we did report some of that other material.

The incident stands out in my memory because it was the first time I learnt the lesson that there are some details which authorities (rightly) really want to protect, and a lot of other information which they aren't concerned about, but still spend time and effort trying to redact. I've seen this happen repeatedly.

Futile attempts to resist disclosure

A much greater misuse of public money occurs when authorities squander substantial resources over long periods on futile attempts to prevent disclosures that clearly will have to be made in due course when the case is decided by the ICO or a tribunal. As well as wasting a great deal of staff time and possibly expensive legal fees, the consequence is usually also that any resulting news story is more embarrassing, since it will doubtlessly report this process as (in journalese) an attempted cover-up.

Going back again to the early years of FOI, I had an eighteen-month battle with a Department for Transport agency over the release of data about which makes and models of cars were most likely to fail MOT tests. This was refused to me on the basis of protecting commercial interests, although I thought the public interest in informing the car-buying public of these facts was clearly overwhelming.

The agency's very weak case was dismissed by the ICO and this information is now published regularly as open data. It had spent eighteen months contriving arguments for why secrecy was required for this material which the government now proactively makes easily available.

A very similar example is that of the food hygiene scores which are now displayed on food outlets and released on the Food Standards Agency website. In the initial phase of FOIA, some local authorities bizarrely tried to prevent the outcome of their food hygiene inspections being known to the public who had to decide where they wanted to eat.

Similarly, in one dispute I had with the Cabinet Office about access to some fairly anodyne historical policy documents, which continued for nearly two years, it eventually caved in just three weeks before the matter was to be heard by a tribunal — presumably because the Cabinet Office had realised that its chance of success at the tribunal was minimal. In another Cabinet Office case, a convoluted EIRs dispute lasting almost three years, I had to make four separate complaints to the ICO, which each time ruled in my favour, before obtaining the relevant information.

All requesters who regularly take complaints to the ICO and the First-tier Tribunal become accustomed to this kind of experience. The Cabinet Office and other authorities who behave like this would save a considerable amount of public money and time of their own staff if they supplied the information initially, rather than being dilatory and obstructive. I do sometimes have to wonder whether some public authorities give enough consideration simply to the sensible and prudent use of public money before they decide to issue FOI rejections.

Appeals

At the BBC, I was often asked by colleagues whether it was worthwhile taking a refusal to internal review, ICO or tribunal, and this is a frequent dilemma for requesters which I address in detail in my book.

My answer consistently is that it depends entirely on the quality of the rejection. Some refusal notices are weakly argued, with a public interest test lacking in evidence or justification, or expressed in speculative, formulaic and blanket terms which do not consider the nature of the information requested. Some ignore ICO

guidance or ICO and tribunal decisions, or even contain clear legal errors. All these are asking to be appealed, and that clearly involves the authority in a great deal more work, particularly bringing in more senior management as well sometimes as external legal advisers. On the other hand, other refusal notices are well argued with strong legal justification and concrete supporting evidence, possibly reinforced by reference to ICO decisions or tribunal judgments, and do take specific account of the actual material involved. Appealing these is likely to be pointless, even if the requester is disappointed by the outcome. While there may be some campaigning requesters who want to make a point about establishing that a certain piece of information is secret that in their view should not be, my approach has always been against devoting effort to appealing against well-founded refusals.

Information 'not held'

There are other ways in which authorities can behave which may or may not invite suspicion among requesters and prompt a barrage of further questions. A classic instance, which arose quite often in my BBC experience of advising fellow journalists, is the use of an 'information not held' response. Requesters can find this implausible in certain circumstances. Where it may be in any way surprising, authorities should explain to the requester why nothing is held, whether it is because the material is old and has been deleted; the authority has no business need to collate the information; it lies outside the authority's responsibilities; or it is purely held for party political purposes and not on the authority's behalf, etc.

Conclusion

The relationship between FOI requesters and public authorities will inevitably contain a certain degree of tension. Requesters will seek information that authorities will refuse to reveal. Sometimes one side will be clearly correct; on other occasions, there will be reasonable arguments on both sides, and the overall balance is difficult to judge.

Requesters may from time to time be excessively suspicious, pedantic and persistent, but they are encouraged to behave in that way if public authorities are dilatory, obstructive and misleading. I hope that in a small way and at least some of the time, my book will encourage a more constructive relationship.

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