Information Commissioner's Office

Intellectual property rights and disclosures under the Freedom of Information Act

Freedom of Information Act

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1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

2. An overview of the main provisions of FOIA can be found in The Guide to Freedom of Information.

3. This is part of a series of guidance, which goes into more detail than the Guide to FOIA to help you as a public authority to fully understand your obligations, as well as promoting good practice.

4. This guidance sets out the Commissioner's approach to intellectual property rights and explains to public authorities that intellectual property rights do not restrict disclosures under FOIA.

Overview

- Much of the information held by public authorities will attract intellectual property (IP) rights, but this will not prevent its disclosure under FOIA.

- The two forms of IP rights most relevant to freedom of information requests are copyright and database rights. Together they extend to a wide range of recorded information.

- There is also copyright in databases. Whereas database rights protect the time and effort in gathering the material to be included in a database, copyright in the database protects the creative process of selecting and arranging that content.

- The protection they afford is set out in the Copyright Design and Patents Act 1988 and the Copyright and Rights in Databases Regulations 1997.

- Both pieces of legislation provide that these IP rights will not be infringed where an act is authorised by an Act of Parliament. Responding to a freedom of information request is an act authorised by Parliament and so disclosures under FOIA will not infringe IP rights.

- However, once disclosed, the information is still protected by IP

rights.

- The ‘fair dealing’ provisions allow sufficient public comment and criticism of the disclosed material for it to be considered a disclosure to the world at large.

- Although there can be a link between IP rights and commercial interests, in many cases the information will have no commercial value.

- When the information is a commercial asset and has a commercial value, IP rights may adequately protect that value once the information has been disclosed.

- When IP rights will not protect commercial interests, a public authority should consider the application of section 43 of FOIA.

- When considering the public interest under section 43, a public authority should take account of any public interest in favour of disclosure, even if it could only be realised by infringing IP rights.

- IP rights can be used to protect the credibility and integrity of both the information disclosed and the public authority which created it.

- The existence of IP rights is not a reason for refusing to communicate information via an email address which would result in the automatic publication of the material on a website.

- There are specific provisions in FOIA relating to the re-use of datasets. In certain circumstances, when providing a dataset in response to a FOIA request, public authorities have to make it available in a re-usable form and with a licence permitting re-use. The public authority must also make the dataset available for re-use in its publication scheme unless it is not appropriate to do so.

- When information protected by IP rights is included in a publication scheme, it makes sense to draw the public’s attention to the existence of those rights.

Introduction

5. The scope of intellectual property (IP) rights is wide. This paper will focus on the IP rights that most commonly attach to information requested under FOIA. These are copyright and database rights. The guidance will explain why the existence of these rights does not restrict the information that can be disclosed under FOIA. The paper relates to both a public authority's own information and to information protected by the IP rights of third parties.

What are intellectual property rights?

6. There are various forms of IP rights which protect assets such as discoveries, inventions, literary and artistic works, designs and performances. In many cases the IP rights arise automatically when they work is created. For example, an author will own the IP rights to the novel he writes. In other cases the IP rights have to be registered before an asset can be protected. For example, patent protection for a new invention will not apply until a patent has been granted by either the Intellectual Property Office or the European Patent Office. The owner of the IP rights has exclusive control over how the asset is used. The owner of the IP rights may sell his rights or issue licences allowing others to make use of an asset. For example, the author and copyright owner of a play may license the rights to perform that play to a theatre company. If copyright is infringed the copyright owner can seek damages or an injunction to prevent further infringements.

7. The two pieces of legislation most relevant to IP rights are the Copyright Designs and Patents Act 1988 (CDPA) and the Copyright and Rights in Databases Regulations 1997 (Database Regulations).

Copyright

8. Most people are familiar with the idea of copyright attaching to written work, but under the CDPA it extends to a wide range of recorded information:
   - original literary, dramatic, musical or artistic works;
   - sound recordings, films or broadcasts; and

- the typographical arrangement of published editions (eg how text is arranged on the page).

9. Literary works are defined in the CDPA as being "any work, other than a dramatic or musical work, which is written, spoken or sung" and can include:
   - a table or compilation other than a database;
   - a computer program;
   - preparatory design material for a computer program; and
   - a database.

10. Artistic works include:
    - a graphic work (eg painting, drawing, diagram, map, chart or plan), photograph, sculpture or collage - irrespective of artistic quality;
    - a work of architecture - a building or a model for a building; or
    - a work of artistic craftsmanship.

11. The author or creator of a work owns the copyright, except where it is made by an employee in the course of their employment, in which case the employer is the owner of the copyright, subject to any agreement to the contrary. In the case of a Crown body, which includes government departments, the information will be protected by Crown copyright. This applies "where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties"[1]. Parliamentary copyright applies "where a work is made by or under the direction or control of the House of Commons or the House of Lords"[2] and will include works made by an employee of either of the Houses of Parliament.

12. Copyright is infringed when the work is used without the permission of the copyright owner, for example, it is copied, issued, lent or rented, performed or communicated to the public. However there are the 'fair dealing' provisions which permit, amongst other things, the reproduction of material for the purposes of non-commercial research, private study, criticism, review and news reporting. This will be discussed later under 'What an applicant can do with copyright material'.

[1] Section 163 Copyright Design and Patents Act 1988
[2] Section 165 Copy Right Design and Patents Act 1988

Copyright does not prevent information being disclosed under the Freedom of Information Act

13. Much of the information held by a public authority will be protected by copyright, owned either by the Crown, Parliament, the public authority itself or a third party. It may be thought that disclosing information in which the IP right is owned by a third party would infringe copyright and that therefore copyright would prevent disclosure, however, this is not the case. Copyright does not act as a statutory bar to disclosure for the purposes of section 44 of FOIA. This is because section 50 of the CDPA provides that where the copying or publishing of information is specifically authorised by an Act of Parliament copyright will not be infringed. Providing information in response to a request made under FOIA constitutes an act specifically authorised under an Act of Parliament. Consequently disclosing information under FOIA will not infringe copyright.

Copyright remains after disclosure

14. However, copyright will still apply to the information once it has been disclosed under FOIA. The person who receives the information under FOIA is still obliged, by law, to respect the rights of the copyright owner. If they do not, the copyright owner can seek damages or an injunction in the same way as they could for any infringement of copyright.

15. So, although the disclosure under FOIA does not carry any restrictions, the restrictions imposed on the further use of that information by the CDPA still apply.

Example
In *The Office of Communications v Information Commissioner and T-Mobile (UK) Limited (EA/2006/0078 4 September 2007)* the Information Tribunal considered a request for information protected by IP rights. The request was for environmental information and although it was dealt with under the Environmental Information Regulations the Information Tribunal's comments are relevant to disclosures under FOIA.

The Information Tribunal stated:

"It is accepted by all parties that the release of

information under either EIR or FOIA does not involve an implied licence to exploit it commercially or to do any act which would constitute an infringement if not authorised. Any person to whom the information is released will therefore still be bound by an obligation to respect any intellectual property rights that already subsist in it." (paragraph 51)

The case was appealed on a number of points but the Information Tribunal's position on the continued existence of IP rights was accepted by both the High Court and the Court of Appeal.

16. It may not be apparent to recipients that the information is protected by copyright. Therefore when a public authority wishes to protect its own copyright, or the copyright is owned by a third party, it should advise the applicant that the information remains copyright protected.

17. Many public authorities will license certain information they disclose via FOIA under the Open Government Licence (OGL). The OGL allows the use and re-use of the information available under the licence freely and flexibly, with a small number of conditions. The UK Government Licensing Framework recommends the OGL as the default licence for public sector information. The framework and OGL are developed by the National Archives. The Commissioner also encourages public authorities to consider use of the OGL.

Example
The Commissioner's position was set out in a decision notice FS50140374 concerning a request for course material made to University of Central Lancashire:

"The Commissioner's view however is that public authorities complying with a duty to disclose information under the [Freedom of Information] *Act are not breaching the Copyright, Designs and Patents Act 1988. However, where such information is disclosed under the* [Freedom of Information] *Act, the public authority is entitled to make the applicant aware that the information is copyright protected and is able to protect*

its intellectual property." (paragraph 96)

What an applicant can do with the copyright material

18. As mentioned earlier, the fair dealing provisions allow information to be used in certain ways without infringing copyright. These provisions are set out in Chapter III of the CDPA. The most relevant ones are listed below and they provide ample scope for the contents of information disclosed under FOIA to be debated publicly. This is important if such disclosures are to serve the public interest of increasing accountability and transparency. Of particular importance is the provision which allows the criticism, review or news reporting of copyright information. The following activities are amongst those that will not infringe copyright:

    - using a literary, dramatic, musical or artistic work for non commercial research or private study, so long as the work is acknowledged;
    - altering the typographical arrangement of a published work for research or private study;
    - criticism, review or news reporting;
    - things done for non commercial instruction or education;
    - copying of public records open to inspection; and
    - public readings or recitations.

19. When someone relies on these provisions they must give sufficient acknowledgement to the creator of the work.

20. The Commissioner is aware that at first it may appear that there is a conflict between copyright and the principle that disclosures under FOIA are free from conditions and are to the world at large. But it is important to recognise that no restrictions are placed on the use of the information in order to facilitate its disclosure under FOIA. The copyright restrictions already subsist in the information at the time of the request.

21. As far as a disclosure being to the world at large, the fair dealing provisions mean that the information disclosed under FOIA can feed any public debate. Furthermore, if a public authority releases information to one person, then anyone else will be able to obtain that information under FOIA. So, although copyright may place some restriction on the dissemination of the information by the original recipient, a disclosure under FOIA should still be regarded as being to the world at large.

Copyright and section 43 - commercial interests

22. Although there can be a link between copyright and commercial interests, this will not always be the case. Much of the information held by a public authority will be subject to copyright, but it does not automatically follow that there is any commercial value in that information.

> **Example**
> A government department holds a routine meeting dealing with the management of one of its sections. The minutes of that meeting will automatically be subject to Crown Copyright. However there is unlikely to be any commercial value in or sensitivity over the contents of those minutes.

23. There will of course be situations where the requested information is covered by copyright and does have a commercial value. In these circumstances copyright may prevent disclosed information being used in a way that would prejudice a commercial interest and therefore will actually serve to facilitate its disclosure.

> **Example**
> The Commissioner's decision notice FS50115636 dealt with a request to, what is now, the Ministry of Justice (MoJ) for an electronic version of the public authority's library of current statute law. The information was covered by Crown Copyright. The MoJ believed the information had a significant commercial value which it intended to exploit with a private partner.
>
> The decision notice acknowledged the commercial value of the information but found that the copyright would effectively prevent anyone being able to exploit its commercial value in competition to the MoJ's own business plans.
>
> The decision notice stated that:
>
> > *"… the MoJ has a method for protecting its commercial interests in the requested information – either by refusing to issue a licence, or by realising a financial benefit through the provision of a Value Added Licence.*

In these circumstances, the Commissioner considers that the MoJ is able to take steps to eliminate any potential commercial prejudice from disclosure." (paragraph 21)

It should also be noted that in this case the Commissioner also found that the MoJ would have no problem policing its IP rights. This is because in order for anyone to commercially exploit the information they would have to make its availability highly visible via the internet.

24. However, there will also be situations where copyright will not protect commercial interests following the disclosure of information. In these situations the existence of copyright will be irrelevant to the application of section 43 – commercial interests.

Example
In preparation for a major procurement exercise a public authority holds a number of meetings to discuss priorities and the maximum budget that it could make available. The public authority owns the copyright to the minutes of those meetings. Clearly this is commercially sensitive information because the public authority's bargaining position would be undermined if a potential bidder had access to it.

When the tendering exercise is announced, the public authority receives a freedom of information request for the minutes.

The harm to the public authority's bargaining position depends on the information being used by a potential bidder. There is always the chance that the initial requester could be a potential bidder, but in any case, once disclosed the information can enter the public domain because of the fair dealing provisions. The engagement of section 43 would be dependent on the public authority being able to demonstrate that placing this information in the public domain would prejudice its commercial interests in the normal way.

Public interest under section 43

25. When considering the public interest in disclosure, a public authority can take into account a use that would breach copyright.

26. In *The Office of Communications v Information Commissioner [2009] EWCA Civ 90* the Court of Appeal considered a request for a database of mobile phone masts. Since the information related to the emission of radio waves it was deemed to be environmental information and the case was considered under the Environmental Information Regulations (EIR). Furthermore, the information constituted a database and attracted database rights. However, the Commissioner is satisfied that the same principle is applicable to other forms of IP rights, such as copyright, when considering the public interest test under either FOIA or the EIR.

27. Importantly with database rights, non commercial research is only permitted where the database has already been made public. In the Ofcom case, the database had not been made public and therefore using it for research would breach the database right.

28. However, the Court of Appeal found that in weighing the public interest, account could be taken of the value of the proposed medical research that the disclosure would facilitate, despite the fact that this research would breach IP rights.

Non commercial reasons for enforcing copyright

29. A public authority may wish to enforce copyright to protect the integrity of the material it produces or to avoid the public authority itself being misrepresented.

Example
A regulatory body has responsibility for regulating certain legislation and has produced guidance to assist those who work with the legislation

Clearly the regulator wants to encourage as many people as possible to access the guidance. However, it is important that

the regulator's standing in this area of law is not undermined. Therefore it wants to ensure that the guidance is not altered or reproduced in a way that would change the intended meaning.

It is also possible that the guidance has some commercial value because someone could package all the guidance together and market it as a definitive guide. But if the regulator has no intention of exploiting the commercial value in the information, it has no commercial value to them. However allowing the guidance to be marketed by a third party could frustrate its objective of making the guidance available free of charge.

So, although the regulator would not be able to withhold the information under section 43, and would actually want the information disclosed as widely as possible, once it had been published it could use copyright to ensure the integrity of the guidance is not undermined and that its policy objectives are achieved. This could include licensing under OGL and enforcing, if those terms were breached.

Database rights

30. The CDPA defines what a database is, but it is the Copyright and Rights in Database Regulations 1997 (Database Regulations), which implement EU Directive No 96/9/EC, and amends the CDPA, which provides the protection afforded to databases:

31. Section 3A of the CDPA defines a database as follows:

> (1) In this Part "database" means a collection of independent works, data or other materials which -
>
> (a) are arranged in a systematic or methodical way, and
> (b) are individually accessible by electronic or other means.

32. So, databases relate to existing information that has been gathered together and presented in a way that makes it more useful. The database is then protected by the Database Regulations, which recognise that the effort in gathering the material to be included in the database, and subsequently maintaining the database, warrants protection.

33. Regulation 13 of the Database Regulations provides that:

> 13 – (1) A property right ("database right") subsists, in accordance with this Part, in a database if there has been a substantial investment in obtaining, verifying or presenting the contents of the database.

34. Regulation 16 provides that the database right is infringed when someone extracts or re-utilises all, or a substantial part of, the contents of the database without the consent of the owner.

35. The repeated and systematic extraction or re-utilisation of insubstantial parts of a database may ultimately amount to the extraction or re-utilisation of a substantial part of the contents.

36. The leading case from the European Court of Justice on what constitutes an infringement of database rights is *The British Horseracing Board Ltd and Others v William Hill Organisation Ltd [2004] EUECJ C-203/02 (09 November 2004)*. The judgement focussed on the importance of the investment in obtaining the material for the database, as opposed to the effort taken to produce those materials in the first place. Similarly, the investment in verifying the contents was found to refer to the effort spent verifying the accuracy of the material at the time it is gathered and included, and then monitoring their continued accuracy. Any resources invested in verifying the accuracy of the material which was undertaken when the material was originally created is not relevant.

Uses that do not infringe database rights

37. Some use of the protected material is permitted and will not infringe the database right. This is similar to copyright, but the permitted uses of databases are more limited. Regulation 20

provides that there will be no infringement when the database has been made available to the public and part of it is extracted by a 'lawful user' and used for such things as an illustration for teaching or research, but not for any commercial purpose. The source has to be acknowledged. A 'lawful user' is someone who has already been granted a licence or has a right to use the database in some way.

38. There are other exemptions from the infringement of database rights set out in Schedule 1 of the Database Regulations which include the reporting of parliamentary and judicial proceedings and the proceedings of a Royal Commission. Nor will database rights be infringed if the database is contained in a public record as defined by the public records Acts and the record is open to the public.

39. Also, insubstantial elements of a database can be disclosed and re-utilised without the risk of infringing database rights. This is because under regulation 16, database rights are only infringed when a substantial part of the database is re-utilised.

Disclosure of databases under FOIA

40. Importantly, Schedule 1 of the Database Regulations also provides that there will be no infringement when an act is carried out under statutory authority. As with copyright, providing information in response to a freedom of information request is an act specifically authorised under an Act of Parliament. Consequently disclosing information under FOIA will not infringe database rights.

Copyright in databases

41. Databases also attract copyright protection. Whereas database rights protect the investment of effort in gathering the contents and maintaining the database, copyright protects the creative process of selecting the contents and deciding how best to arrange them to maximise the database's usefulness.

42. In one of the leading cases on database rights, *Football Dataco Ltd & Others v Brittens Pools Ltd (in Action 3222) and Others [2010] EWHC 841 (Ch) (23 April 2010)*, the court considered the relevance of the quality of the database to the copyright in

the database. The court found that the existence of the database right does not depend upon the quality of the final product: "*… the author must have exercised judgement, taste or discretion (good, bad or indifferent) in selecting or arranging the contents of the database*" (paragraph 86). The exercising of judgement is an essential requirement for the copyright in the database to exist but where such judgement is exercised the right will arise automatically upon the database's creation in much the same way as copyright arises upon the creation of other works.

43. However, when there is no room for exercising judgement there will be no right in the database. This was illustrated by a German court case *Pharma Intranet Information AG v IMS Health GmbH & Co. OHG [2005] ECC 12*. The court found, "If the selection or organisation is determined by the nature of the thing or is predetermined by purposefulness or logic, then there is no room for individual creative work …". Although this is decision by a German court it is persuasive because it relates to legislation implementing the same European directive as our Database Regulations are based on.

44. The copyright in databases provides protection in the same way as copyright does for any other literary work. The copyright can be infringed in the same way, there are the same remedies for infringements, and the same permitted uses of the copyright work.

45. It follows, therefore, that the existence of copyright in a database has the same impact on disclosures under FOIA as it as does on any other copyright material. Essentially this means that disclosure under FOIA will not infringe copyright. The copyright protection will continue following disclosure. Where the copyright protects the database from further uses that could prejudice the copyright owner's commercial interest, it may serve to facilitate disclosure. But if copyright will not effectively protect commercial interests, a public authority should consider the application of section 43 in the normal way, by establishing the causal link between the disclosure and the harm to the commercial interests.

Other forms of intellectual property rights

46. The forms of IP rights that are most likely to apply to information requested under FOIA have already been discussed. Other IP rights include design rights, patents, trade marks, publication rights and performers' rights. It is not anticipated that the existence of any of these rights will act as barriers to disclosure. The purpose of some of these IP rights is to prevent the misuse of information which is already in the public domain, rather than to prevent its dissemination. Some of these other forms of IP rights are discussed in the annex to this guidance.

Disclosures to websites resulting in the automatic publication of copyright material

47. Sometimes email addresses provided to respond to a request will automatically publish responses to a website. However this is not a reason for refusing the request.

Example
In the Commissioner's decision notice FS502766715 a request was made to the House of Commons through the What Do They Know website. The address given for responding to the request was an email address linked to the same website, which meant any response would automatically appear on the website pages.

The House of Commons was happy to disclose the information but not to reply to the email address because the automatic publication that would follow would be in breach of Parliamentary copyright. It therefore advised the applicant that if he were to provide an alternative address it would send him the information. The applicant refused to do so and made it clear that it was his intention to publish the information on the internet in any event.

The applicant complained to the Commissioner that the House had failed to provide the information to the address he had provided.

Under section 8 of FOIA a valid request must include an address for correspondence and the Commissioner found that

the What Do They Know website address satisfied this requirement.

The relevance of section 11 of FOIA was also considered. Section 11 requires a public authority to communicate the information in an applicant's preferred form unless this is not reasonably practicable. The House had originally argued that the breach of copyright that would result from the information being published on the What Do They Know website meant that it was not reasonably practicable to communicate the information in an electronic form.

However the Commissioner found that the test in section 11 is whether there is a problem in providing the information in a particular form, not whether there is a problem with the address.

Having found that there were no grounds for refusing the request under section 8 or 11 the Commissioner ordered the House to disclose the information to the What Do They Know website.

48. As demonstrated by the above example, the Commissioner will not accept the automatic publication of information in breach of copyright as grounds for refusing a request under FOIA.

49. However, if a public authority faced with the same situation was able to demonstrate that the disclosure would for example prejudice its commercial interest and so engage section 43 of FOIA, the public authority would have grounds for withholding the information (subject of course to the public interest test). The issue is not whether a disclosure to a particular address would engage an exemption, but whether a disclosure to anyone, at any address, would engage the exemption. The application of the exemption does not depend on the applicant or their address.

50. The test for applying section 43 would not consider the existence of copyright, but how, in reality, the disclosure would impact on the copyright owner's commercial interests. In the above case the House failed to demonstrate that there would be any commercial loss resulting from disclosure.

Re-use of Public Sector Information Regulations 2005

51. A disclosure under FOIA does not give the recipient permission to use the information (unless the information is a dataset, as explained in the next section). The Re-use of Public Sector Information Regulations (RPSIR) 2005 established a framework for obtaining such permission so that, where appropriate, information can be re-used without infringing IP rights. These regulations do not apply to all forms of IP rights but do include copyright and database rights.

52. The system established by these regulations can only grant permission when the copyright or database right is owned by a public authority and does not remove a recipient's obligation to respect any rights of third parties.

53. Further information and guidance is available from the Office of Public Sector Information (OPSI), part of the National Archives. OPSI is responsible for adjudicating on complaints under the RPSIR, and for regulating the information trading activities of the government trading funds. The National Archives are also responsible for policy and standards for information re-use, including the UK Government Licensing Framework and the OGL.

54. The RPSIR implement European Directive 2003/98/EC on the re-use of public sector information. This has now been amended by Directive 2013/37/EU. The provisions of the new Directive will be transposed into UK law in due course.

Re-use of datasets

55. Although FOIA does not generally give the requester any right to re-use information, there are specific provisions in FOIA which are intended to encourage the re-use of one particular type of information, namely datasets. The term 'dataset' is defined in section 11(5) of FOIA. In general terms, it is a collection of factual, raw data, in electronic form, that a public authority gathers as part of providing services and delivering its functions. Under section 11(1A) of FOIA, if a public authority is providing information in response to a request and it holds that information as a dataset, and the requester has asked for an electronic copy, then the public authority must, so far as reasonably practicable, provide it in a re-usable form. This

normally means an open format such as a CSV (comma separated value) file.

56. The public authority's duties are not limited to providing datasets that are technically capable of being re-used; they can also extend to providing them under licensing conditions that permit re-use. If the dataset is a 'relevant copyright work' and the public authority is the only owner of the copyright or database rights, then the public authority must make the dataset available for re-use within the terms of a 'specified licence'.

57. A 'relevant copyright work' is a copyright work or a database subject to a database right, but for these purposes it does not include Crown copyright or Parliamentary copyright works.

58. A specified licence is one specified in Part V of the datasets Code of Practice issued under section 45 of FOIA. This encourages public authorities to use the OGL for datasets that can be re-used without charge. If the OGL is not appropriate, there is also a Non-Commercial Government Licence if the dataset can only be re-used for non-commercial purposes, and a Charged Licence if the public authority is charging a fee for allowing the re-use of the dataset. All of these licences are available in the UK Government Licensing Framework

59. There is a detailed explanation of the datasets provisions in FOIA in our guidance document on datasets.

IP rights and publication schemes

60. Public authorities can identify which information in its publication scheme is protected by copyright, or any other IP right, and alert the public to information they can re-use and if there are any restrictions on it. The Commissioner would encourage public authorities to make use of the OGL, where appropriate, in their publication scheme.

61. Much of the information in a public authority's publication scheme will be covered by copyright, belonging to either the public authority itself or a third party. However the fact that the information is included in the publication scheme would suggest that the information is not sensitive. Obviously, the public authority would not have the authority to waive the IP rights belonging to third parties.

62. It would therefore be good practice for a public authority to explain the main issues around copyright in relation to its publication scheme. It would also be helpful to both the public authority and the users of the publication scheme to identify the information within the scheme:

- that is available for re-use under licence eg the OGL;
- that is not licensed and where full copyright is retained by the public authority; and
- which is protected by copyright owned by a third party.

63. The public authority should advise the public if a license to re-use the information is available under the Re-use of Public Sector Information Regulations 2005.

64. Section 19 of FOIA contains provisions relating specifically to the re-use of datasets in publication schemes. A public authority must make available under its publication scheme any dataset that it has received a request for, unless it is 'not appropriate' to do so. Furthermore, if the dataset is a relevant copyright work and the public authority is the only owner of the rights, then it must make the dataset available for re-use in the publication scheme under a specified licence, just as it has to in response to a request.

65. There is a further explanation of these provisions in our guidance document on datasets.

Other considerations

60. Under the Environmental Information Regulations there is a specific exception for IP rights. Information can only be withheld if is disclosure would adversely affect those IP rights. Please see:

    Intellectual property rights (regulation 12(5)(c))

More information

61. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are

often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

62. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

63. If you need any more information about this or any other aspect of freedom of information, please Contact us: see our website www.ico.gov.uk.

Annex: Other forms of IP rights

Design Rights

S.1(2) of the Registered Designs Act 1949 defines a design as "the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation".

The design can be anything such as an industrial or handicraft item (other than a computer program), packaging, get-up, graphic symbols, typographic typefaces, and parts of products intended to be assembled into a more complex product.

There are three different protections available specifically for designs:

- Unregistered UK rights;
- Registered UK rights; and
- Unregistered community rights.

In all cases the owner of the right is the creator of the design unless it was commissioned on behalf of someone else or it was created in the course of employment.

As with copyright, a design right owner can license the use of his design.

Unregistered U.K. rights

Unregistered design right gives automatic protection for the internal or external shape or configuration of an original design (i.e. one that is not copied or commonplace). It allows the owner of the right to stop anyone from copying the shape or configuration of the product, but it does not give protection for any of the 2-dimensional aspects, for example patterns. However, these may be protected by copyright or registered design rights. This automatic design right only gives protection in the United Kingdom.

This design right lasts either 10 years from the first marketing of products that use the design, or 15 years from the creation of the design, whichever is earlier.

For the first 5 years the owner of the right can stop anyone from copying the design. After that time the design is subject to a "License of right", which means that anyone is entitled to a licence to make and sell products copying the design.

Registered U.K. design rights

This right is not automatic and depends upon registering the design with the Intellectual Property Office. Registration gives monopoly protection for 25 years from registration, although the registration must be renewed every 5 years.
The right protects the overall appearance of a design of individual character, except for features that are dictated by function.

Although this is a U.K. right, it can be extended to cover certain other (mainly Commonwealth) countries.

Unregistered Community rights

This is an automatic right giving exclusive protection within the EU against copying of the design. The protection applies to the overall appearance of a design excluding features dictated by technical function and lasts for a period of 3 years from the date the design is made available to the public.

Patents

A patent protects new inventions and covers how things work, what they do, how they do it, what they are made of and how they are made.

In order to qualify for patent protection an invention must be new, inventive such that it is not obvious to someone with knowledge and experience in the subject, and capable of exploitation in some kind of industry.

Patent protection in the U.K. does not apply until a patent has been granted either by the Intellectual Property Office or the European Patent Office. The protection must be renewed every year after the 5th year, up to a maximum of 20 years.

A patented invention is published after 18 months so that anyone can take advantage of the invention after the patent ends.

The owner of the patent can prevent others from making, using, importing or selling the invention without permission.

Trade Marks

Trade marks are symbols or logos that distinguish particular goods or services. They can be protected by registering them with the Intellectual Property Office at the Trade Marks Registry for U.K. protection, or you can apply through the Office for Harmonisation in the Internal Market (OHIM) for more international cover or register it separately in countries signed to the Madrid Protocol.

Registrations must be renewed every 10 years from the date the original application was received but there is no maximum length of protection.

Owners of a registered trade mark can license the use of their trade mark, sell it or sue if it is used or largely copied by someone else. If a trade mark is not registered, the owner of the mark can still seek to sue the user of a similar mark using the common law offence of "passing off".

Publication rights

The owner of this right is the person who publishes for the first time a literary, dramatic or artistic work or film in which copyright has expired.

The owner has the equivalent of copyright for 25 years from the year of publication.

Performers right

Performers have rights in their performances and any recordings, film or broadcasts of those performances. This could include, for example, recordings of the delivery of a lecture.

A performer has both non property rights (the right to control the recording of, or broadcasting to the public of, his/her live performance), and property rights (the right to require their consent for the copying of any recording of their live performance and to demand remuneration for the rental, broadcast, making available to the public of any such copies).

A performer also has moral rights in his performance.

The exceptions to the rights are broadly the same as those for copyright.