Information Commissioner's Office

Determining whether information is held

Freedom of Information Act
Environmental Information Regulations

Contents

Introduction....3
Overview....3
What FOIA says....4
What the EIR say....4
Issues relevant to both FOIA and the EIR....5
  Differences between FOIA and the EIR....6
Extracting and compiling information to meet a request....6
  Lists and schedules....6
  Summarising the information from the building blocks....7
  The skill and judgement required to extract information....7
  Business needs of the public authority....11
  Incomplete or inaccurate records....11
Deleted records....13
  Information in a recycle bin....13
  Information deleted from a recycle bin....13
  Backup....14
Third party online databases....15
  Read only access....16
Information on the properties of electronic documents (metadata)17
Information held at the time of the request....17
  Freedom of Information Act....17
  The EIR....19
The Commissioner's approach to complaints....20
  The search....21
  Other explanations....22
Costs of dealing with a request....22
  Locating, retrieving and extracting the building blocks....23
  Recovering deleted information....23

Other considerations 24
More information 24

Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities. The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities.

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

3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.

4. This guidance explains to public authorities how to determine whether they hold the information that has been requested. It covers three main issues:

   - the extent to which a public authority is obliged to extract information from their records to compile information in response to a request;
   - how a public authority should deal with deleted records; and
   - the searches for information that a public authority is expected to conduct.

5. The issues are relevant to both FOIA and the EIR.

Overview

- A public authority will hold information if it holds the building blocks required to generate it and no complex judgement is required to produce it.

- Information held electronically that has been deleted but is still retained in a recycle bin **is** held.

- As a general rule, information that has been intentionally deleted from a recycling bin but not yet overwritten is **not** held, despite the fact that it could still be recovered.

- Only information that has been selected and downloaded, or printed off from a third party database will be held by a public authority.

- A public authority may take account of routine amendments which occur between the receipt of a request and the public authority's response.

- When a public authority claims the information is not held, the Commissioner will decide whether this is the case on the **balance of probabilities**. He will reach a decision based on the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held, such as there being no business need to record it.

- When information is held, the cost of retrieving the necessary building blocks or recovering information from a backup may mean that responding to the request will exceed the appropriate limit or the request is manifestly unreasonable.

What FOIA says

6. Section 1(1) states:

> **1.**—(1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.

What the EIR say

> Regulation 5(1) states:
>
> Subject to paragraph (3) and in accordance with

paragraphs (2),(4),(5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation12(4) states that a public authority may refuse to disclose information to the extent that –

(a) it does not hold information when an applicant's request is received.

Issues relevant to both FOIA and the EIR

7. When a public authority receives a request, its first task is usually to determine whether it holds the requested information. In many cases it will be simple to locate information, particularly if the public authority practices good records management. However, there will be occasions when a public authority has difficulty in determining whether it holds the information.

8. This guidance will consider the following issues which are relevant to requests under FOIA and the EIR:

- requests which can only be satisfied if the public authority extracts information from the records it holds and compiles these building blocks into a list or schedule;
- the extent to which public authorities are expected to exercise skill and judgement when selecting the relevant building blocks or manipulating them in some way, for example, applying mathematical calculations to the data;
- the extent to which a public authority holds deleted information. Electronic records may have been deleted as far as the public authority is concerned but those records may still be held on the computer somewhere;
- a public authority's access to third party data online; and
- the Commissioner's approach when investigating whether a public authority has conducted sufficient searches for the information.

Differences between FOIA and the EIR

9. Once a public authority has determined whether it holds the requested information there are differences in how it should respond to a request. Under FOIA, the public authority is required under section 1(1)(a) to confirm or deny whether the information is held. Denying information is held does not involve applying any exemptions or issuing a section 17 refusal notice. Whereas under the EIR, advising the applicant that the information is not held is achieved by issuing a refusal notice in accordance with regulation 14 and citing regulation 12(4)(a) which provides that a public authority is not required to disclose information it does not hold.

10. All the exceptions under the EIR are subject to the public interest test, including regulation 12(4)(a). However, the Commissioner can see no practical value in applying the test where information is not held and he does not expect public authorities to do so.

Extracting and compiling information to meet a request

Lists and schedules

11. Public authorities may receive requests for lists or schedules.

Example

"Please provide me with a schedule of all correspondence between the council and company X between 3 September 2011 and 8 August 2012 inclusive. Please identify the sender and recipient, their position within the council or company X and the date of the correspondence."

12. If the public authority had already produced a list for its own business needs, the information is clearly held. However, usually the public authority will not hold an actual list. It will hold the correspondence referred to in the request and the information required to produce the schedule will be contained in that correspondence. It is simply a case of extracting the relevant information (the individual building blocks) from the correspondence and organising them into a schedule. The extraction of existing information and presenting it as a schedule is not the creation of new information.

Example

The first decision notice issued on this subject by the Commissioner, FS50070854, concerned a request for information about discussions between the UK and the US on energy policy and oil production. The initial request was for the information on the discussions itself. This was followed up with a request for a schedule of documents falling within the scope of the original request. In respect of the schedule the Commissioner stated that:

"The information already exists: the public authority cannot be said to be creating it. And, while producing a list of the documents in which the relevant information is contained may be a new task, it is not creating new information; it is simply a re-presentation of existing information…"

Although the Commissioner was satisfied that the requested information was held, he went on to find that the schedule was exempt under section 27 – international relations and section 35 – formulation of government policy.

Summarising the information from the building blocks

13. In the previous example the applicant wanted a summary of the contents of each document. This is not information that could be directly lifted from the documents in the same way as dates or the name of the document's author. However, under section 11 of FOIA, a public authority is obliged to comply with a request to present the information as a summary or digest if the applicant expresses this preference from the outset and it is reasonably practicable to do so.

14. Public authorities are also required to provide summaries for environmental information when requested, so long as it is reasonably practical to do so. This issue will be discussed in more detail in the guidance on 'Form and format – regulation 6' which the Commissioner will publish in due course.

The skill and judgement required to extract information

15. In the first example of a request for correspondence between a council and company X, identifying the building blocks of the schedule and extracting them is very straightforward. In other cases it may not be as simple to identify the building blocks or

to retrieve them. Once retrieved it could be necessary to manipulate the building blocks in some way to present the information in the way requested.

16. What is involved in carrying out these tasks will have a bearing on whether the information is held.

Example

In Michael Leo Johnson v the Information Commissioner and the Ministry of Justice (EA/2006/0085 13 July 2007), the Tribunal considered a request relating to the number of cases dismissed in the High Court. In particular, the applicant sought the number of claims that were struck out by each of the Queen's Bench Masters for the years 2001, 2002, 2003 and 2004.

The Ministry of Justice (MoJ) had not collated this information at the time of the request. After establishing that the electronic database used by the MoJ did not contain all the building blocks needed, the question of whether the information was held focussed on the contents of the MoJ's manual records. In particular, the Tribunal considered whether the work needed to identify, retrieve and then manipulate the raw data constituted the creation of new information.

To find out how many cases each Queen's Bench Master had struck out, the MoJ would have needed to go through thousands of files and identify those where a case had been struck out. To complicate matters there was no consistent way in which a strike out was recorded, for example some files may simply have referred to a case being struck out, others could have referred to there being 'no arguable case'. In all, four means of recording a strike out were commonly used.

The MoJ argued that there was a need to exercise some judgement as to what files recorded a strike out and that even once this raw data had been extracted it had to be further manipulated, ie the strike outs had to allocated to the different Masters and then added up to give a total for each Master. The MoJ argued that this was the creation of new information.

The Tribunal said at paragraph 49 that:

> "… we accept …that the degree of skill and judgement that must be applied to the building blocks may well have a bearing on whether the information is held or

> whether what is being sought is more properly construed as being new information …"

However, the Tribunal found that identifying references to a strike out was not difficult, it would be easy to brief someone on the four terms commonly used. Nor did the Tribunal consider that the need to perform some simple mathematical calculation involved the creation of new information. The Tribunal therefore found that the information was held.

Example

In Home Office v The Information Commissioner (EA/2008/0027 15 August 2008), the applicant wanted to know the total number of work permits obtained in 2005 and 2006 by nine named employers in the IT sector.

The Home Office accepted that it held the raw materials necessary to answer the request in its electronic database but it would need to create a new computer program to extract the raw data. It argued that the skill and judgement required to produce that program meant that answering the request involved the creation of new information.

The Tribunal dismissed this argument. It found that the database contained records of each work permit issued and which employer had obtained them. The Tribunal concluded that the information was held, stating, at paragraph 12, that information was already contained in the database and "… no new information needs to be collected in order to obtain the information by running the new report."

And at paragraph 13 the Tribunal stated:

> "… the fact that the total number of permits is not recorded anywhere as a *number* is in our view irrelevant: the number is implicit in the records…"

17. The Commissioner accepts that the level of skill and judgement required to answer a request will determine whether information is held. It is not always easy to distinguish between the use of a skill and the exercise of judgement. But certainly skill can include a competence or technique that can be learnt.

Such skills include the application of mathematical calculations and the writing of basic computer programs to extract information from a database.

18. Anyone competent in the required skills will obtain the same results when applying them to the same data. When thought of in these terms, the Commissioner considers the level of skill needed to identify, extract or manipulate the building blocks does not determine whether information is held.

19. In most cases when information is held in electronic files and can be retrieved and manipulated using query tools or language within the software, that information is held for the purposes of FOIA and the EIR. The use of query tools or languages does not involve the creation of new information. Their use should be viewed simply as the means of retrieving information that already exists electronically.

20. What is important when determining whether information is held is the level of judgement exercised.

Example

A request is made to a public authority which produces economic forecasts for different countries. It collects numerous economic and demographic facts and figures and puts them through a complex economic model.

A request is received for the forecast of country C. However, at the time of the request the public authority has not produced a forecast for country C. The public authority may hold all the data that it would use when producing the forecast, but the question is whether it holds the actual forecast.

This will depend on the level of judgement required. For example, the public authority would have to interpret facts held about the political situation in country C. That interpretation would be a judgement based on expertise and experience. Values based on those judgements could then be fed into the economic model.

The production of the forecast is not solely dependent on the raw data already gathered.

In this hypothetical example, the Commissioner would find that the requested information was not held.

21. The example above demonstrates that if answering the request involves exercising sophisticated judgement, the information will not be held. But if only a reasonable level of judgement is required to identify the relevant building blocks, or manipulate those blocks, the information will be held.

22. The Commissioner takes support for this approach from comments made by Lord Hope in the House of Lords decision Common Services Agency v Scottish Information Commissioner [2008] UKHL 47. The case concerned whether a Scottish public authority held statistics on rates of leukaemia. Referring to similar provisions in the Freedom of Information (Scotland) Act 2002 in respect of information held, Lord Hope commented that, "This part of the statutory regime should … be construed in as liberal manner as possible" (paragraph 15).

Business needs of the public authority

23. In the examples at paragraph 16, neither the Home Office nor the MoJ needed to produce the statistics that had been requested for their own business needs. Nevertheless a public authority will hold the information, if it holds the necessary building blocks and they can be identified, retrieved and manipulated using only a reasonable level of judgement.

Incomplete or inaccurate records

24. In the case about the number of work permits obtained by particular employers, the Home Office could not be certain that its records were completely accurate. Therefore, it could not say with confidence, precisely how many permits had been obtained. It argued that this meant it did not hold the requested information. In rejecting this argument, the Tribunal clarified that under FOIA the right of access is to "the information which is held, not information which is accurate" (paragraph 15).

25. The Home Office had a business need to record which companies had obtained work permits. The issue was the possibility that human error had crept into the record keeping and as a result it was possible that the records were not completely accurate. There will also be situations where, although the public authority has no business need to collect the information that forms the necessary building blocks, there is evidence that staff members do so on a discretionary basis.

In these situations the information recorded is likely to be of variable quality and only provide a partial picture of events. Nevertheless, if the information forming the building blocks is held, then so is the information that can be produced from those blocks.

Example

A local authority has a number of maintenance teams responsible for the town centre's street furniture. The role involves planned maintenance as well as identifying other jobs through inspections and responding to reports from the public. On occasions engineers and, depending on the profile of the job or its cost, senior management and finance staff may need to be consulted.

For each job the team manager records, as a minimum, the type of street furniture worked on, for example a bench, the cost and the time taken. It will be down to the discretion of the team manager what additional information is recorded, such as his liaison with other members of the council. Although many jobs involve some interaction with other officers, particularly engineers, most managers only record what they consider to be significant meetings.

A request is then received for the number of times maintenance staff consulted with engineers for the last two financial years when installing bollards. The council has recorded information on the number of jobs involving the installation of bollards. However, only a limited number of files record that engineers were consulted. Although this is unlikely to present the whole picture, the council is obliged to provide the requested statistics based on those records.

26. In the above example it would be advisable for the public authority to explain to the applicant that the information was not very reliable.

27. So even if the information forming the building blocks is incomplete or inaccurate, the information is deemed to be held. However, if one of the building blocks is absent altogether, ie the information has never been inputted into the database, then information that could only be constructed using that building block will not be held.

Deleted records

28. The deletion of paper records is straightforward, files can be shredded or incinerated and the information permanently destroyed. It is not as easy with electronic information where deletion is usually a three stage process. Firstly, information is moved to a recycle bin or wastebasket. It is then deleted from the recycle bin. The space it occupies on the computer is then designated as free which means it can be overwritten by new information. It is only once it has actually been overwritten that the information is completely erased. The Commissioner's view on when electronic information is deemed to have been deleted and so is neither held by, nor in the possession of, a public authority for the purposes of FOIA and the EIR respectively is set out below.

Information in a recycle bin

29. Information that is still held in a recycle bin cannot be overwritten and is still held by the public authority.

Information deleted from a recycle bin

30. Although information deleted from a recycle bin can still technically be recovered until it has been overwritten, the Commissioner considers that this information is no longer held, but only if the deletion was intentional. This is despite the fact that the information could be recovered using specialist staff or software.

31. There are situations where information that is still required for a business purpose is mistakenly deleted through user error, virus or disaster. In these circumstances, the public authority will intend to recover the information for its own purposes and so the information should still be regarded as held by the public authority.

32. As a general rule, information that is capable of being overwritten and has been intentionally deleted will not be held.

33. The Commissioner recognises that this position does not follow the approach of the Tribunal in Paul Harper v the Information Commissioner and Royal Mail Group Limited (EA/2005/0001 15 November 2005). In this case, the Tribunal found where information has been deleted from a recycle bin but not yet overwritten the public authority should "consider whether the

information can be recovered and if so by what means" (paragraph 21). Rather than looking at the practicalities of restoring the information, the Commissioner's approach focusses on the intentions of the public authority. Public authorities are entitled to delete information they no longer require, and indeed they should do so in accordance with good records management practice. If information was still said to be held when it had been intentionally deleted in line with the public authority's disposal schedule it would undermine the principle of good records management.

Backup

34. Backing up is the process of making copies of data and storing it separately from the main computer. The main purpose of backup is disaster recovery, ie to restore a computer to an operational state after a disaster such as a fire or flood. It is also possible to recover a small number of files if they have been accidentally lost. It is likely that restoring information from a backup would require specialist staff and software.

35. The Lord Chancellor's code of practice on the management of records issued under section 46 of FOIA states that "A record cannot be considered to have been completely destroyed until all copies, including back-up copies, have been destroyed, if there is a possibility that the data could be recovered" (paragraph 12.12).

36. However, as a general rule, the Commissioner considers that information contained on a backup is not held. This is because, generally, the public authority will have no intention of accessing the information on the backup. Again the Commissioner's focus is on the intention of the public authority rather than whether the records can actually be recovered. There are, as always, exceptions. Where data has been lost from the main computer and the public authority intends to use the backup to restore that data, the Commissioner considers that the information is held. There have also been situations where, in the absence of a proper records management policy, the backup has been used for all intents and purposes as an archive.

Example

In Dr Don Keiller v Information Commissioner and the University of East Anglia (EA/2011/0152 18 January 2012), the appellant had requested certain emails that related to research into climate change.

The information in question had been deleted from the recycle bin and was now only held on the backup tape. It transpired during the proceedings that the university had no fixed policy on the deletion and reuse of the backup tapes. It appeared that rather than using the backup tapes as a safeguard against disaster, it was, in practice, using them as a means of archiving records.

Although this issue is not discussed in the decision, the Commissioner considers that this lead to the Tribunal concluding that the information was held.

Third party online databases

37. The information available through online databases is a valuable resource for the many public authorities that subscribe to them. The question is, does the fact that a public authority has access to this information mean that it holds it?

Example

In *Glen Marlow v the Information Commissioner (EA/2005/0031 15 August 2006)*, the Tribunal considered the extent to which information in an online legal library was held by the local authority that subscribed to it. The Tribunal differentiated between the information that the public authority had selected for use and all the other information held within the database.

It found that information selected, downloaded and saved to the public authority's own computer was held, as was information printed off from the database. However, the remainder of the information on the database was not held by the public authority.

38. In reaching its decision in the above case the Tribunal took account of the public authority's subscription to the database. In this case, the terms of the public authority's license were quite restrictive. The Tribunal did not rule out the possibility that a public authority would hold the entire database it subscribed to, if it had a completely unrestricted right to use and exploit the contents. However, in practice this is unlikely to be the case and generally information from a third party's database will not be held unless it has been downloaded, saved or printed out.

Read only access

39. The Tribunal has considered the related issue of access to third party information.

> **Example**
>
> In Alan Dransfield v the Information Commissioner and Devon County Council (EA/2010/0152 30 March 2011), the applicant sought information held in the maintenance manual for a school constructed under a private finance initiative. The developer was responsible for building and then maintaining the school. The manual was held remotely and the public authority only had access to the manual to check that the developer was honouring its contract by updating it and maintaining the school properly. The public authority had no other right of access and could not download or copy the manual.
>
> The Tribunal found that the public authority did not hold the manual and that it was held by the developer for its own purposes.

40. Similarly there could be situations where a number of public authorities have contributed information to a central, electronic repository and could access each other's information, but on a read-only basis. For the purposes of FOIA and the EIR, only information that the public authority had put into the repository would be held.

41. If a public authority received a request for the contents of the entire repository, it would at the very least be expected to transfer the request to the other public authorities involved. And if the public authority was confident that the information would not be exempt under either piece of legislation, it would

be good practice to also communicate the information provided by the other public authorities. This is an issue public authorities could agree on when establishing repositories.

Information on the properties of electronic documents (metadata)

42. When an electronic document is created and subsequently worked on, information about its properties is automatically generated and stored. This information records details such as the author, dates, editing history, size, file paths, security settings and any email routing history. It is commonly known as metadata. Metadata is recorded for the business purposes of the public authority and is used in their records management. The Lord Chancellor's code of practice on the management of records issued under section 46 of FOIA promotes the recording of metadata at paragraph 9.3(e). For the purposes of FOIA and the EIR this information is held by public authorities.

43. In addition, when an electronic document is produced information on its formatting such as the fonts used, headings and other style settings is also automatically recorded. Such information can be viewed in the relevant format menus of the software program. As with metadata, this information is held for the purposes of FOIA and the EIR.

44. If an applicant specifically requests information on the properties of an electronic document, public authorities will be obliged to provide it, subject to other provisions in the relevant legislation. However, if it is not requested there is no expectation that public authorities will provide it.

Information held at the time of the request

Freedom of Information Act

45. Section 1(4) states that the information to be communicated to the applicant under subsection 1(1)(b)

> … is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is communicated under section 1(1)(b), being an amendment that would have been made regardless

of the receipt of the request.

46. This means that for requests made under FOIA, a public authority can continue to amend, update and delete records as normal whilst it is dealing with a request. However, deleting or amending records to avoid having to communicate information that has been requested is an offence under section 77 of FOIA.

Example

The Department for Works and Pension (DWP) receives a request for the number of people claiming a particular benefit. The request is received on Friday 20 July 2012. The total is regularly updated on the first of every month, and so eight working days after receipt of the request, on Wednesday 1 August, the public authority will produce the new total for those claiming the benefit.

If the DWP does not respond to the request until Friday 3 August it can provide the new updated statistics.

In this example the public authority's normal course of business is not interrupted and that the applicant receives the most current figures available.

47. In many cases both the original and updated versions of the information will still be held at the time the public authority answers the request. For example, the DWP may retain a copy of previous months' figures of those claiming the benefit in question, or even if it deletes the previous totals, the information may still be held in a recycle bin. In *Paul Harper v the Information Commissioner and Royal Mail Group Limited (EA/2005/0001 15 November 2005)*, the Tribunal pointed out that section 1(4) provides that a public authority may take account of any routine amendment, it does not state that a public authority must take account of such an amendment. It recommended, and the Commissioner agrees, that where both the amended and the original information that existed at the time of the request are still held, the public authority should provide the original information.

48. Generally the starting point when determining whether information is held is to consider what was held at the time of

the request. However, the Commissioner acknowledges that, in reality, it is seldom possible to deal with requests on the day that they are received. Section 1(4) enables public authorities to consider the information held at the point it actually starts to deal with the request, providing that is within the statutory time for compliance. This will sometimes be advantageous to applicants because information generated between the date the request is received and the date it is processed will be considered as part of the public authority's response.

49. However, there will be occasions when an applicant is disadvantaged by a routine amendment. For example, it may be that the requested information is about to be deleted completely. In which case, assuming it is deleted from a recycle bin in the manner described earlier, the public authority will no longer hold any information within the scope of the request. There will be other situations where an applicant wants to verify what information was held at a particular time and so information amended since then would not meet their needs. An applicant can always specify a particular date, so in the DWP example above the applicant could have requested the figure for those claiming benefit as of the 20 July 2012.This would not prevent the public authority carrying out its planned amendment. But the amended figure would no longer meet the description of the information requested and the public authority would need to look at whether the previous total was still held or whether it had been deleted.

The EIR

50. The situation with environmental information under the EIR is different in this regard as there is no equivalent to section 1(4) of FOIA. Regulation 5(1) requires a public authority to make information that it holds available on request, and regulation 12(4)(a) provides an exception for information not held at the time the request is received. A public authority should therefore determine whether environmental information is held at the time of the request.

51. However, as explained above, the Commissioner recognises that often it is not possible to respond to requests as soon as they are received. Where a public authority can demonstrate that it was not in a position to respond immediately and/or to preserve information as it existed at the date of the request it can determine whether the information exists at the point that it deals with the request provided that this is within the statutory timescale. In such circumstances planned

amendments or deletions will inevitably have to be taken into account. Any amendment or deletion must be planned and not an attempt to avoid disclosing information. Altering records with the intent of preventing disclosure is an offence under regulation 19. Regulation 19 mirrors section 77 of FOIA.

52. The EIR are also different because of regulation 5(4) which states that,

> … where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the authority believes.

53. This provision only applies to factual information such as scientific measurements that a public authority is collecting on an ongoing basis for its own business needs.

> **Example**
>
> A public authority needs to measure levels of air pollution caused by vehicles outside a school. The measurements are taken every Monday and Wednesday morning. If a request is received for those measurements it is obliged to correct any figures that it knows to be wrong and to ensure that the figures are up to date.
>
> Although it is obliged to provide up to date figures, this does not mean the public authority needs to take a measurement of pollution levels at the precise time the information is disclosed. However, it does mean that the public authority is required to ensure that the readings are taken each Monday and Wednesday as prescribed and that all the readings that have been taken are included in the information disclosed.

The Commissioner's approach to complaints

54. The guidance has considered specific factors that will determine whether a public authority holds the requested information. However, there is a more basic issue about what happens when a public authority claims it is unable to find information captured by a request.

Examples

A public authority receives a request for a report into an incident that occurred several years ago and is now unable to locate any existing copies of the report.

A public authority receives a request for all information held about a current issue but is only able to locate a few documents containing relevant information. The applicant is convinced more information is held.

55. When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, ie he will decide on the balance of probabilities whether the information is held. This was established in a case concerning a request for environmental information, *Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072 31 August 2007)*. In applying this test the Commissioner will consider:

- the scope, quality, thoroughness and results of the searches; and, or
- other explanations offered as to why the information is not held.

The search

56. The scope of the search will depend on the analysis and interpretation of the request. The public authority will first need to understand what it is looking for. Only then can it decide where it is most logical to search. Once the Commissioner has established that the public authority is searching for the right information, in the right places, he will consider whether the searches conducted have been reasonable and thorough. This will take account of whether the public authority has correctly applied the factors discussed earlier, for example whether it has searched its recycle bins.

Other explanations

57. If a public authority is able to demonstrate that it has never had a business need to record the information, the Commissioner is more likely to be persuaded that no information is held. For example, if the requested information does not relate to matters that the public authority is responsible for, it is unlikely to hold the information.

58. Alternatively, even though it has responsibility for the matter, the public authority's staff may have found through experience that there is no practical need to record the sort of information captured by the request. For example it may not be common practice to make a note of every phone call or every site visit.

59. However, if there are statutory duties or practical reasons to hold the information, the Commissioner will need more evidence to convince him that it is not held. Also the Commissioner will consider any internal records management policies that suggest the information should be held.

60. When a public authority accepts that the information was held but has now been destroyed, the Commissioner will initially look at the public authority's destruction schedules and the age of the information. He will also take account of the importance of the information to the public authority. The more important the information is, the more unlikely he will consider it that the public authority would have chosen to destroy it. In some circumstances the Commissioner will require the public authority to conduct searches to ensure that the information is not held or to demonstrate that it is adhering to the retention policies.

Costs of dealing with a request

61. The cost of determining whether information is held and providing it if it is, has a bearing on a public authority's obligation to respond to a request under either FOIA or the EIR. Under section 12 of FOIA, a public authority is not obliged to comply with a request if the cost of certain activities, including locating, retrieving and extracting the information would exceed the appropriate limit. The Commissioner has published detailed guidance on section 12 titled *Requests where the cost of compliance with a request exceeds the appropriate limit*. There is no appropriate limit under the EIR, but a public authority may refuse a request under regulation 12(4)(b), on

the grounds that it is manifestly unreasonable to carry out the work needed to either determine whether the information is held or to make that information available.

Locating, retrieving and extracting the building blocks

62. In the example at paragraph 16 the information on the number of times a Queen's Bench Master struck out a case could only be obtained by searching through thousands of manual files. Although the Tribunal found the information was held, it went on to conclude that the cost of retrieving the required building blocks would exceed the appropriate limit. If the retrieval of environmental information involved a similar amount of the work, the public authority would have grounds for claiming the request was manifestly unreasonable.

63. The extraction of the building blocks from electronic records may involve the use of specialist staff or software. Under FOIA, public authorities can only calculate staff time at a cost of £25 per person per hour. This is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, SI 2004 No.3244. This rate has to be used regardless of the actual cost incurred, for example the cost of external contractors obtaining the information. However, the cost of any software that the public authority purchases to locate, retrieve or extract the information can be taken into account when estimating whether complying with the request would exceed the appropriate limit.

Recovering deleted information

64. Generally, when looking at information that a public authority has deleted from electronic records, it is only information still retained in a recycle bin that is held. This information can easily be retrieved. The recovery of information that has been deleted from a recycle bin or is held in a backup will be more difficult and is likely to involve the use of specialist staff or software. However, this information would only be deemed to be held if the public authority still has a business need for the information, for example it was deleted accidentally and so needs to be restored, or a disaster has occurred which requires the recovery of information from the backup. In both these situations the public authority would expect to incur the cost of retrieving this information regardless of any request. Therefore the Commissioner would not accept the recovery costs being included in any estimate under section 12 of FOIA or when

considering the application of regulation 12(4)(a) under the EIR.

65. The other situation where information on a backup is still deemed to be held is where the backup is being used as an archive. If the only reason to retrieve information from such an archive is to respond to the request, the public authority can include this cost when considering the appropriate limit or whether the request is manifestly unreasonable. As before, a public authority can only calculate the cost of any specialist staff at £25, per person, per hour, for the purposes of the appropriate limit under FOIA. However, it can take full account of the cost of any specialist software it has to purchase.

Other considerations

66. Additional guidance is available if you need further information on:

- Requests where the cost of compliance with a request exceeds the appropriate limit

67. Other guidance which will be published shortly includes:

- Manifestly unreasonable requests
- Retention and destruction of requested information
- Information held by public authorities for the purposes of EIR
- Providing access to both information and documents

More information

68. 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.

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

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