

Information held by a public authority for the purposes of the Freedom of Information Act

Freedom of Information Act

Contents

Overview	2
What FOIA says	2
Held otherwise than on behalf of another person	2
Held by another person on behalf of the authority	7
Practical considerations	10
Other considerations	10
More information	11

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](#). 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 to promote good practice.
3. This guidance explains the circumstances in which information is considered to be held by a public authority for the purposes of FOIA.

Overview

- When a public authority holds information solely on behalf of another person it does not hold the information itself for FOIA.
- When a public authority holds information principally or partly on behalf of another person but exercises control over the information, it will also hold the information itself.
- When information is held by another person on behalf of a public authority, the information is held by the public authority for the purposes of FOIA.

What FOIA says

4. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of FOIA.

- 3.**
 - (2) For the purposes of this Act, information is held by a public authority if—
 - (a) it is held by the authority, otherwise than on behalf of another person, or
 - (b) it is held by another person on behalf of the authority.

Held otherwise than on behalf of another person

5. When information is solely held by a public authority on behalf of another person, it is not held for the purposes of FOIA. However, the information will be held by the public authority if the authority is holding that information for someone else but also holding it to any extent for its own purposes.
6. Each case needs to be viewed individually to determine whether a public authority holds information for its own

purposes or solely on behalf of another person. There are various factors that will assist in determining whether the public authority holds the information for the purposes of FOIA. The weight attached to each one will vary from case to case. In some circumstances, one factor may outweigh all the others.

7. Factors that would indicate that the information is held solely on behalf of another person include:
 - the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - the authority is merely providing storage facilities, whether physical or electronic.

Example

The First-tier Tribunal (Information Rights) decision in *Digby-Cameron v Information Commissioner* ([EA/2008/0010, 16 October 2008](#)) concerned a request to a local authority for a transcript of a Coroner's hearing. Although the Council provided funding and administrative support for the Coroner's Service, the Tribunal decided that the Council held the information solely on behalf of the Coroner. The Coroner had sole control of the information, having statutory authority (via the Coroner's Rules 1984) to determine who had access to it. The Tribunal concluded that "the decision whether or not to disclose information was for the Coroner, not the Council." It went on to say that "'ownership' of and control over this information lay both in fact and law with the Coroner."

In this particular case it was the sole control of the Coroner over the information which, having a statutory basis, was the only factor that needed to be considered.

8. The example emphasises that it is the circumstances of each case that will determine whether information is held for the purposes of FOIA. There will be cases when a local authority may hold information originating from the Coroner in its own right. For example, it is possible that following a road traffic accident a local authority could obtain a copy of the Coroner's

report in order to consider, in its capacity as highways authority, whether any road safety measures are necessary.

9. Factors that would indicate that the information is also held by the public authority include:
 - the authority provides clerical and administrative support for the other person, whether legally required to or not;
 - the authority controls access to the information;
 - the authority itself decides what information is retained, altered or deleted;
 - the authority deals with enquiries about the information; or
 - costs arising from holding the information are included in the authority's overall budget.

Example

The First-tier Tribunal (Information Rights) decision in the case of *McBride v Information Commissioner and Ministry of Justice* ([EA/2007/0105, 27 May 2008](#)) concerned a request for information from the Privy Council Office about the Visitor of the University of London. The Tribunal decided that the Privy Council Office held the information on its own behalf. Although the role of the Visitor was carried out by the Lord President of the Privy Council on behalf of the Sovereign, as the Privy Council Office performed all the administrative and management functions for the Visitor from its own budget, it held the information itself.

10. The Tribunal in the *McBride* case stated that "the question of whether a public authority holds information on behalf of another is simply a question of fact, to be determined on the evidence....".
11. It also clarified that this question is not determined by who owns the information, whether there are exclusive rights to the information or whether there is a legal basis for holding the information.
12. It is also important to note that the five factors listed above are only indicative of whether information is held by a public authority for the purposes of FOIA. Public authorities should not adopt an overly formulaic approach in considering whether information is held for the purposes of FOIA by virtue of section 3(2). This was confirmed by the First-tier Tribunal (Information Rights) in the following example:

Example

In the case of the British Union for the Abolition of Vivisection v Information Commissioner & Newcastle University ([EA/2010/0064, 3 March 2010](#)), the public authority argued that it did not hold the information because certain criteria were not met. The Tribunal noted that these tests appeared to derive from the decisions in *Digby-Cameron* and *McBride* and stated at paragraph 49:

"We do not accept this submission. Depending on the particular facts of a case, the features referred to in those cases may be useful matters to consider when looking at whether the public authority holds the information, but they should not be read as if they had been intended as definitive tests of whether information is 'held'...."

13. Whilst the suggested 'tests' might well indicate that an authority holds information, they do not provide the whole picture. For example, where a public authority uses information for its own purposes, but there are restrictions on what it can do with the information, it will be deemed to hold the information for FOIA.
14. The following are some further examples which illustrate the principle:
15. **Charity trustees** – public authorities, usually local authorities, can be trustees of charitable trusts. For example, assets such as playing fields and community halls may be held by a local authority on trust for the benefit of local residents. As trustees must act only in the best interests of the charity, and not in their own interests, this means that any information held by an authority only in its capacity as a trustee is not held by it for the purposes of FOIA (in accordance with section 3(2)(a) it is held on behalf of the trust). Nevertheless, an authority may hold information about the charitable trust for its own purposes. For example, the charity may make a report to the authority, or the authority may provide administrative support to the charity and hold information about this. It is therefore important to consider requests for information about such a charity on a case by case basis, and it is recommended that authorities should make a clear distinction between information held solely on behalf of a charity and their own information.

16. **Official receivers** – Official receivers are statutory officers and as such are not public authorities for the purposes of FOIA. However, they are also civil servants employed by the Insolvency Service, an executive agency of the Department for Business, Innovation and Skills. This means that when they act in that capacity, any information they create or obtain will be subject to FOIA. This could include information relating to staff management or where the official receiver is acting on behalf of the Secretary of State. In circumstances where information is held in both capacities, it will be regarded as held for the purposes of FOIA in accordance with section 3(2)(a) because the information is held by the public authority to some extent for its own purposes. However information which, for example, is stored on Insolvency Service systems, but was created or obtained by an official receiver acting solely as a statutory office holder, is not held for the purposes of FOIA as it is held by the Insolvency Service on behalf of the official receiver.
17. **District auditors** – auditors appointed by the Audit Commission (even those who are officers of the Commission) exercise their powers personally and not on behalf of the Commission and are not themselves public authorities for the purposes of FOIA. The Audit Commission is a public authority, but any information it holds on behalf of an appointed auditor is not held for the purposes of FOIA as it is held by the public authority 'on behalf of another person'.
18. Non-official communications within a public authority are not held for the purposes of FOIA, if they are not created by a member of staff in the course of his or her official duties; for example, trade union communications. The public authority has neither created the information, nor does it retain the material for its own purposes, but simply holds it on behalf of, and as a service to, the trade union. Similarly, in most circumstances, private emails sent or received by staff in the workplace via the public authority's email system would not be held by the authority for the purposes of FOIA.
19. If a public authority does not hold the information requested because it is held on behalf of another person, it should tell the requester that it does not hold the information.
20. If information is held solely on behalf of another public authority, the section 45 Code of Practice advises that good practice requires the public authority to:

- transfer the request to that other authority, if this is what the requester wants; or
- inform the requester where to re-direct the request.

Held by another person on behalf of the authority

21. There are several circumstances in which information is held by another person on behalf of the public authority and therefore held by the public authority for the purposes of FOIA, for example:
22. **contracted document storage** – this is a relatively common arrangement and includes complex storage and retrieval systems as well as arrangements for the keeping of legal documents by a firm of solicitors. In these situations the stored documents will be held on behalf of the public authority.
23. **local archives and record offices** – public authorities will often store documents in these locations and, as with contracted storage, the information in these documents is held on behalf of the public authority. Even though the records offices are themselves likely to be public authorities, the responsibility for dealing with requests for the information remains with the public authority which holds the information for the purposes of FOIA.
24. **contractual arrangements** – where information is held by a third party as a result of contractual arrangement, the provisions of the contract may indicate whether or not the information is held on behalf of the public authority.

Example

Both the public authority and the contractor agreed that the following applied to a market research project:

“Leeds City Council and its authorised officers will have the right to inspect hard and soft copy data at any time during the contract period. Thereafter, and when the contract is spent, all hard and soft copy data must be given over to the Council, with no copy remaining – electronic or paper – external to the Council. The Council has full ownership of the data...”

The Information Commissioner decided that data generated by the

contractor falling within this provision was held on behalf of the council.

[ICO Decision Notice FS50118044](#)

25. **information held by solicitors** – in cases where legal advice has been sought by a public authority client, the question is whether the file held by the solicitor is held on behalf of the public authority or whether the solicitor holds the information in its own right, in which case it would not be held for the purposes of FOIA. In general, documents held by a solicitor in connection with instructions received by the solicitor are held on behalf of the client.

Example

The First-tier Tribunal (Information Rights) decision in the case of Francis v Information Commissioner and South Essex Partnership Foundation NHS Trust ([EA/2007/0091, 21 July 2008](#)) concerned requested information relating to the death of the complainant's son, which included legal advice from three firms of solicitors. The Tribunal found that information held for the solicitor's own administrative purposes as well as the solicitor's own working file of papers, including annotated documents, were not held on behalf of the public authority client. However, the distinction is not always clear-cut and it is likely that client files will contain some information that is held on behalf of the client and some that belongs to the solicitor. For example, clean copies of documents passed to the solicitor by the public authority client are held on behalf of the client.

26. **other situations creating an agency arrangement** – these include anyone acting in a professional field who is recognised as acting as their client's agent. This may also extend to situations where another body carries out the functions of a public authority, either through statute or contractual arrangements. When an agency arrangement exists, the situation regarding information held by the agent on behalf of the public authority client is similar to that between solicitor and client.
27. **information held on behalf of a public authority as a result of partnership or consortia arrangements** – when public authorities work in partnership or in a consortium (ie

those arrangements which do not have the legal status of a body or organisation separate to the individual partners), they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards. Examples include:

- local strategic partnerships
- road safety partnerships
- local environment partnerships
- economic partnerships

28. In general terms, information that is brought to the partnership by one of the partners is regarded as being held by or on behalf of all partners. As there is a variety of partnership arrangements it is not possible to provide guidance that will cover all of them. Much will depend on the individual arrangements of the partnership as to whether or not all information is held by all the partners or whether some is held by the partners solely on behalf of one of them.

Local councillors

29. Having discussed the two legal principles set out in FOIA at section 3(2)(a) and (b), it may be useful to consider the position of councillors in local government because information held in relation to them can involve both these principles. This derives from the fact that elected members of a council are likely to have a number of different roles. Some will relate to their function as elected members (for example, corresponding with residents in their ward, discussing council business with fellow members in the context of voting strategy or campaigning on behalf of a political party) and some will relate to the functions of the local authority (for example, being a cabinet member and having executive responsibility for a service area, carrying out administrative functions or representing the authority, such as on a regional forum).

30. Information produced or received by councillors may be held on their own computers or in their own homes or offices, or it may be held on local authority premises or computer systems. However, the purpose of the information and the capacity in which it is being held is more helpful when deciding whether information is covered by FOIA.

31. Local authorities are public authorities for the purposes of FOIA, but individual elected members are not. Therefore, information held by councillors for their own purposes will not be covered by FOIA, but information they hold on behalf of, or as part of, the local authority will be covered (section 3(2)(b)).
32. Information created or received by a councillor but held on a local authority's premises or computer system will be covered if it is held by the authority on its own behalf (section 3(2)(a)). It will not be covered by FOIA if it was produced by the councillor for private or political purposes and the authority is just providing storage, office space or computing facilities (ie the authority is not holding the information to any extent for its own purposes).

Practical considerations

33. In order to comply with the requirements of FOIA, public authorities clearly need to know what information they hold for the purposes of FOIA. This means they need to be aware of information they are solely holding for another person and information that is being held on their behalf by other persons.
34. With regard to the former, public authorities need to know the basis on which they hold information that is in their possession, and with regard to the latter, authorities should know what information is held on their behalf by another person and also have arrangements in place which allow them to retrieve the information in the event of a request for information being made for it.
35. Good records management is important in this context. Public authorities are advised to follow the good practice which is set out in the Lord Chancellor's Code of Practice under section 46 of FOIA. This includes, for example, a section on records that are shared with other bodies or held on their behalf by other bodies.

Other considerations

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

37. Holding information

- ⇒ see [Official information held in private email accounts](#)
- ⇒ see [Freedom of information legislation and research information: guidance for the higher education sector](#) (section on information held)

38. Records management

- ⇒ see the [Code of Practice under section 46](#)

More information

- 39. 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.
- 40. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
- 41. If you need any more information about this or any other aspect of freedom of information, please [Contact us: see our website \[www.ico.gov.uk\]\(http://www.ico.gov.uk\)](#).