



briefing

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Freedom of information in the NHS

The Freedom of Information (FOI) Act was introduced in 2000 to boost the transparency, accessibility and public accountability of all public sector organisations. In the words of the Information Commissioner's Office (ICO), the Act was designed to change the "default position from the need to know to the right to know."

It applies equally to central and local government, the police, educational

bodies and the NHS, and entitles anyone from anywhere in the world to access all types of recorded information. The Act applies to everyone in an organisation – not just the officer responsible.

This *Briefing* comes in response to the increasing number and complexity of requests NHS Confederation members are receiving under the FOI Act. It is intended to be used as

a practical guide to help NHS organisations fulfil the spirit of the legislation in the most timely and efficient way.

Introduction

FOI is undoubtedly making the NHS more accountable to the public it serves, and prompting closer internal scrutiny of strategic operations and process. In the sharing of information, it can help organisations learn from one another and improve their own performance.

But it has also had unintended consequences, some of which could undermine the benefits of the legislation, if not addressed.

In November 2008 the NHS Confederation received 163 responses to a survey of NHS organisations on FOI. A significant proportion of respondents report a steep increase in both the number and complexity of FOI requests received, resulting in a

Key points

- The incidence of Freedom of Information (FOI) requests made to NHS organisations is increasing and demand is likely to grow between now and the next general election.
- A clear process for dealing with FOI requests saves time, energy and money.
- Making more information publicly available on the web and via a publication scheme reduces the need for requests to go through the FOI process.
- NHS organisations need to consider whether specific FOI requests have communications and reputation implications, particularly if they are to be presented as part of a national picture.

'NHS organisations need a systematic approach to deal with increasing numbers of requests'

significant workload. This trend is likely to continue as the public become increasingly familiar with the terms of the Act, and in the run-up to the general election.

The absence of restrictions on how FOI information can subsequently be used means that fulfilling requests from the media has the potential to backfire, if not dealt with appropriately. Negative and often misleading news stories generated from FOI requests can undermine the reputation of individual trusts, as well as that of the NHS as a whole.

Given that FOI is both growing and a legal requirement, NHS organisations need a systematic approach to deal with increasing numbers of requests. Relatively simple steps can make a big impact on how the process is managed, avoiding some of the obvious pitfalls and minimising the workload associated with compliance.

Receiving FOI requests

Key points

- NHS organisations received an average of 173 FOI requests in 2008, with the largest number of requests coming from journalists¹.
- FOI requests can be made to every type of NHS trust and to any member of staff.
- The requester does not have to specify why they want the information or how it will be used.

FOI requests can be made to every type of NHS trust and any member of staff. They can also be made to:

- GP practices
- independent sector treatment centres (ISTCs)
- voluntary or third sector organisations providing NHS services
- commercial companies providing NHS services.

But when it comes to non-NHS contractors working for the NHS, only the public aspects of that organisation's business come under FOI. Requesters don't have to refer to the Act, so it may not always be obvious that the request falls under FOI. As a rule of good practice, organisations may choose to treat any request for information as an FOI request. However:

- requests must be made in writing by post, fax or email
- the name, email or postal address of the person making the request must be included
- they must include a description of the information requested – you can ask for clarification if this is not clear.

Applicants are entitled to be told in writing whether the information they have requested is held, and to be provided with an explanation if their request is rejected. For more details on when FOI requests can be refused by organisations see section **Turning down requests** on page 4.

Our survey of members shows that the largest single category of FOI requests comes from journalists. In 2008 46 out of 163 organisations said that the media comprised one in five to half of their FOI requests. One survey respondent said their

organisation had received four requests from one newspaper in the same day, with an average of 12 questions in each request.

Political party representatives formed the bulk of requests for 31 organisations, making around one in four to half of applications. One organisation received more than 100 requests from one political party worker alone. Businesses, including pharmaceutical, marketing, publishing and recruitment companies, were the next largest category.

Requests also came from:

- the public/patients
- other NHS and public sector organisations
- voluntary sector organisations
- solicitors and complainants
- campaign and lobby groups
- students and researchers.

The average number of requests made over the past year to organisations responding to our survey was 173, but ranged from as few as 25 to as many as 437, with 26 organisations reporting a 'dramatic increase' in activity. One trust reported a 400 per cent increase in the number of requests over this timeframe.

The amount of detail requested is often a further cause for concern. This year, for example, many NHS organisations received the same FOI request on dentistry – which required over 50 types of information – and another on cancer requiring 23 separate pieces of information.

One request we heard of asked to see all emails sent to and from the medical director and associate

¹ NHS Confederation FOI Survey: 163 NHS organisations responded.

director of clinical governance at the trust, as well as all documents including briefing papers, letters and memos published within a specified five-month period. The trust concerned calculated that this would involve reviewing approximately 27,000 emails, all of which would have to be looked at for data protection and sensitivity issues.

Organisations responding to the survey also reported that the same people or organisations repeatedly ask for the same information every few months to update their records.

“The volume of FOI requests continues to increase, and the complexity and time-span of some of the information sought is daunting,” commented one organisation responding to our survey. “Clinical staff often respond to these requests in their private time as they are unable to take time out from patient care.”

Remember:

- the email address may not necessarily tell you who is requesting the information – you can’t ask for further identification
- the requester does not have to specify why they want the information, or how it is to be used
- there is no limit on the amount of information that can be requested at any one time.

Appraising FOI requests

Key points

- **Not every FOI request falls under the Act.**
- **A high-quality publication scheme will reduce the need for requests to go through the FOI process.**

‘A high-quality and comprehensive publication scheme can substantially reduce the amount of time and effort required to fulfil FOI requests’

- **The bias should always be towards disclosure of information, but requests can be turned down for a number of reasons defined by the Act.**

Not every FOI request falls under the Act. A well-trained FOI officer should be able to distinguish between the different categories of request, but if in any doubt, a call to the press office and/or a senior manager should help. If a request is not an FOI, it should be handled according to the organisation’s agreed procedure. Some requests can be handled as routine correspondence. Others can be more appropriately referred to:

- the organisation’s website/publication scheme
- the strategic health authority (SHA)
- another public sector body.

If an organisation refers the request on to another public sector organisation, it will need to check with that organisation first that the information requested is held and advise the requester of the action taken, supplying the contact details in question.

Publication schemes

Referring requesters to information that the organisation already makes publicly available can reduce the need for requests to go through the FOI process.

All public bodies are required to have a publication scheme that is available on their website and, since January

2009, the ICO has produced an approved model scheme which must be adopted by all public bodies. The model is available on the ICO website and, as the model is pre-approved, there is no need for organisations to submit their scheme for further approval.

The ICO’s model publication scheme identifies seven classes of information that organisations should proactively publish:

- who we are and what we do
- what we spend and how we spend it
- what our priorities are and how we are doing
- how we make decisions
- our policies and procedures
- lists and registers
- services we offer.

The aim of publication schemes is to spur public sector organisations into proactively making as much information available as possible, in keeping with the spirit of the Act. A high-quality and comprehensive publication scheme can substantially reduce the amount of time and effort required to fulfil FOI requests. It will also often be a faster route for the requester to obtain the required information. A publication scheme should also be considered alongside the development of a clear web communications strategy.

Commenting on the importance of a high-quality publication scheme, one organisation responding to our survey said: “As well as helping to achieve the central aim of FOI – to make us more open and accountable – doing so also has the potential to reduce the number of FOI requests we receive.”

The inclusion of a full FOI disclosure log, charting requests and responses, can also save a great deal of time. One organisation, which has done this, told us: "Many requests cover issues already raised, and allowing people to see all requests and all responses does save time and effort, and is very much in keeping with the spirit of the Act".

A clear and easily navigable website is also part of an effective communications strategy, and readily accessible information about FOI and the content of the publication scheme is integral to that. But it needs to be regularly updated.

Finally, getting up to speed on other legal requirements can also save time. For example, one FOI request flagged up in our survey asked for a considerable amount of detail on workforce ethnicity data. Most of this information should be contained in the organisation's race equality scheme, details of which trusts have a statutory duty to publicise on their websites in accordance with the Race Relations (Amendment) Act 2000.

Turning down requests

The bias should always be towards disclosing information, but the Act specifies two types of exemption – absolute and qualified. Examples of absolute exemption include information that is:

- accessible by other means
- provided in confidence
- personal except where it relates to the individual questioner.

Organisations do not have to provide information subject to absolute exemption. Qualified exemptions are less straightforward. They include information:

- intended for future publication (and therefore in draft form or under embargo)
- relating to investigations and legal proceedings
- relating to health and safety
- of commercial interest.

Qualified exemptions are subject to a public interest test. This means weighing up the balance between whether the public's interest is best served by maintaining the exemption or by disclosing the information. An organisation cannot withhold information on the grounds that it is either incomplete or too complicated to be understood properly.

Organisations may also be able to turn down a request for a number of other reasons including if it:

- is new information that would have to be created
- is likely to exceed 18 hours to comply with it – however, you should try and get the requester to narrow down their request
- involves information about employees, which breaches the Data Protection Act
- is considered 'vexatious' – defined as frivolous, likely to cause distress without justification, or aimed at disruption or harassment of the public body
- is repeated by the same person, before a 'reasonable interval' has elapsed.

But all requests should be considered on a case-by-case basis. If an organisation is turning down a request it needs to write a clear refusal notice and include information about the right to appeal. Properly drafted and fully explained refusals can help avoid reviews and complaints.

The bias should always be towards disclosing information, but the Act specifies two types of exemption – absolute and qualified'

Responding to FOI requests

Key points

- **Given the reputation implications, organisations should have a clear internal approvals process in place, so that key senior people know about and are appropriately involved in requests.**
- **Proactively publishing information on your website or press releasing will help limit inaccurate reporting which can lead to unfair negative media coverage.**
- **FOI requests should not be seen in isolation from good communications, including public engagement, political relations, media and web.**

Organisations have 20 working days to respond to the request from receipt of the application. But this time limit can be extended if a request needs to be refined or if the trust intends to charge for supplying the information and issues a fee notice.

Organisations should also have a clear internal approvals process in place, so that key senior people know about requests. They can step in to prevent information backfiring and/or advise people who may be affected by its release, including those who are the subject of the disclosure and staff who may be asked to comment on any resulting news stories.

'NHS organisations need to consider whether specific FOI requests have communications and reputation implications'

Requests with media/political implications

FOI requests are frequently used by journalists, politicians and campaign groups to:

- generate news stories about individual trusts
- provide a snapshot of the NHS regionally or nationally
- support a particular policy line.

The resulting stories can often undermine the reputation of individual trusts and the NHS as a whole. It won't always be obvious that the requester is working for a media outlet or political party, so clear procedures for handling FOI requests, not only from an information perspective but also from a communications angle, are therefore essential.

NHS organisations need to consider whether specific FOI requests have communications and reputation implications and involve the board and communications team as appropriate. To ensure that information is accurate and up to date, organisations should have a clear internal approvals process in place so that key senior people are appropriately involved in responding to and signing off responses to certain requests.

It is important to remember that proactively publishing information on an NHS organisation's website or press releasing will help limit inaccurate reporting which can lead to unfair negative media coverage.

Fees and costs

Organisations can charge for providing certain types of information, where it can be justified, although the organisation itself must bear the majority of the cost. Costs such as photocopying, printing or postage are also chargeable. Public authorities are advised to cost out staff time for answering FOI requests at an hourly rate of £25. The Act also sets a £450 limit for public authorities

to deal with an FOI request – equivalent to 18 hours – beyond which they are entitled to refuse the request or charge for it.

It is clearly not easy for the NHS to calculate the amount it spends on dealing with FOI requests, as figures vary depending on the complexity of each request, as well as the number received. Anecdotal evidence from those organisations that did calculate

Dealing with FOI requests – a checklist for the NHS

- Adopt the ICO's model publication scheme and make sure it is clearly signposted on your website and regularly updated – it will save you a great deal of time and energy.
- Be proactive – think about what sort of information would be of public interest and publish it.
- Publish an FOI disclosure log on your website.
- Develop clear procedures, including named staff, for handling and approving FOI requests.
- If you think the request has media or political potential, involve your communications team early on.
- If a story has the potential to undermine the reputation of your organisation or the NHS as a whole, refer the matter to the board/chief executive.
- Make sure that FOI contacts in each directorate are properly trained in the various aspects of the legislation.
- Don't be afraid to turn down a request if the information is already publicly available or if it exceeds the £450 cost limit, but give clear reasons for doing so.
- Be aware that requesters don't need to state their request is an FOI for it to be an FOI request.
- Talk to requesters to help them refine their requests or direct them to alternative sources of information – it will save you time and it will foster greater transparency.
- If you are not sure about how to handle a request, get help from the ICO. The Ministry of Justice website also has a range of useful sample letters.
- Don't look for excuses to opt out of compliance; instead, enter into the spirit of the Act.
- Use the Act to help improve your performance and bolster public accountability.



'A high-quality publication scheme and an easily-navigable website can save organisations time and energy'

FOI expenditure for the purposes of our survey suggests that each request costs an estimated £175, which would amount to an average annual spend of £30,275 per organisation.

Conclusion

The introduction of the FOI Act has undoubtedly had a positive impact on increasing openness, transparency and accountability in the NHS and other public bodies. However, the growing number and complexity of some FOI requests, combined with the reputation implications, make it very important that NHS organisations have clear procedures in place to ensure they are dealing with requests effectively and appropriately. Simple measures, such as a high-quality publication scheme and an easily-navigable website, can

save organisations time and energy. As awareness of FOI legislation grows and scrutiny of the NHS increases, not least due to the forthcoming general election, it is important that NHS organisations ensure they have

the right processes in place to deal with FOI requests effectively.

For more information on the issues covered in this *Briefing* contact joanna.clason@nhsconfed.org

Further information

About the Act:

Information Commissioner's Office (ICO): www.ico.gov.uk

Includes helpline and useful guidance notes on various aspects of FOI legislation, including the approved model publication scheme.

Ministry of Justice: www.justice.gov.uk

Includes standard templates for responding to FOI requests.

Office of Public Sector Information: www.opsi.gov.uk/advice/psi-regulations/advice-and-guidance/psi-guidance-notes/index

This includes guidance relating to the implementation of Reuse of Public Sector Information Regulations 2005. The first of the guidance documents on this page covers the links between access and reuse and includes some sample wording about reuse.

Useful examples of publication schemes:

Care Quality Commission: www.cqc.gov.uk

Department of Health: www.dh.gov.uk

General Medical Council: www.gmc-uk.org

Metropolitan Police: www.met.police.uk

NHS Purchasing and Supply Agency: www.pasa.nhs.uk

University College London: www.uclh.nhs.uk

The NHS Confederation

The NHS Confederation is the only independent membership body for the full range of organisations that make up today's NHS. Our ambition is a health system that delivers first-class services and improved health for all. We work with our members to ensure that we are an independent driving force for positive change by:

- influencing policy, implementation and the public debate
- supporting leaders through networking, sharing information and learning
- promoting excellence in employment.

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