GPC

General Practitioners Committee

BMA

Freedom of Information Act 2000 – Frequently Asked Questions

This guidance is only relevant to England, Northern Ireland and Wales. Separate guidance relating to the law in Scotland will be available shortly.

Important: In the absence of a legal precedent, this opinion is based on the advice available from the Information Commissioner and other legal analyses, rather than case law.

Basics

1. What is the Freedom of Information Act?

The Freedom of Information Act 2000, which came about as a result of one of the major commitments in the Labour Party's 1997 manifesto, creates new rights of public access to information held by public authorities, as defined under the Act. The Act only applies to England, Wales and Northern Ireland. A separate Freedom of Information Act applies to Scotland.

The Act specifically defines GPs as public authorities. The Information Commissioner, who regulates the Act, has ruled that GPs may act co-operatively within their practice structure to discharge their obligations under the Act.

2. What does this mean for GPs?

From January 2005, the Act will oblige each practice to respond to requests about the information that they hold and have recorded in any form and will create a right of access to that information. Practices must:

(i) Have a publication scheme in place. The deadline for publishing the publication scheme was 31st October 2003.
(ii) Respond to individuals' requests for information **from 1st January 2005**.

3. What is the Publication Scheme?

Practices should have a publication scheme in place. This is basically a list or index of;

- the types of information that a practice holds
- a description of how it can be obtained
- an explanation of any charges that might apply (regulated by the Act)
- and an explanation of the types of information that the GP holds but cannot make available (and why).

The NHS set up a Freedom of Information Act project team to give advice and guidance to the NHS on its duties under the Act. This team worked with the BMA, through its medico-legal committee, to produce a model publication scheme for GPs.

The model publication scheme can be access on the Information Commissioner's web site: http://www.informationcommissioner.gov.uk/

The NHS Freedom of Information website now has available an online publication scheme tool for independent practitioners: http://www.foi.nhs.uk

There is an example of how to customise the model on Wessex LMCs' web site at
http://myweb.tiscali.co.uk/lmclive/genguide/ifoi/ifoi.html

Procedures

4. Who can request information?

From January 2005, any individual, anywhere in the world, will be able to make a request to a practice for information. An applicant is entitled to be informed in writing, by the practice, whether the practice holds information of the description specified in the request and if that is the case, have the information communicated to him. An individual can request information, regardless of whether he/she is the subject of the information or affected by its use.

5. How should requests be made?

Requests must:

(i) be made in writing (this can be electronically e.g. email/fax)
(ii) state the name of the applicant and an address for correspondence
(iii) describe the information requested

A practice must comply with a request within 20 working days. Where a fee is required (see below), the deadline will be extended until the fee is paid.

If the practice transfers the request to another public authority, for example, the PCT, then the PCT also has 20 working days from receipt of the request to respond.

The applicant can request a copy of the information, ask to inspect the information or request a summary of the information. The Act requires practices to try and provide the information in the requested format. **A practice is not obliged to comply with repeated or vexatious requests for information. Therefore a practice can refuse to supply identical or substantially similar information to any one person if a reasonable time has passed since the previous request**.

6. If a member of the public requests information, but their request is unclear and the practice has to contact the applicant to clarify the information requested, does this affect the 20 day rule?

Yes. If a practice subsequently has to contact an applicant to gain further information regarding the content of the request, then the 20 day response period is deemed to have started when the practice are quite clear of the information they are being asked to provide, not from the time of the original request.

7. What happens if GPs do not comply with the Act?

GPs can only refuse to comply with the Act if one of the exemptions applies (see question 11).

If a person has made a request to a GP for information, and that information has not been forthcoming from the GP under the Freedom of Information Act, then that person may have the right to apply to the Information Commissioner on a decision as to whether or not the request has been dealt with according to that Act. In response the Information Commissioner may serve a decision notice on the GP and set out any steps that the GP is required to comply with in terms of compliance with the Act.

If a GP is therefore uncertain whether or not certain information can be disclosed to a particular individual, and reasonably certain that the information sought falls within one of the exemptions, especially if that information is of a personal nature, best practice would probably be that the GP does not reveal that information and awaits direction from the Information Commission.

If a practice needs time to consider whether a public interest test applies, then the 20 day rule is extended for a reasonable period.

If a practice fails to respond to a decision notice, an enforcement notice will be served and non-compliance could be regarded as contempt of court, for which a judge may impose an unlimited fine or imprisonment. An appeals process is included in the Act.

8. Are practices required to forward information to PCTs in order to fulfil requests made to the PCT under the Freedom of Information Act?

On receiving a request for information any public authority must first ask whether or not it holds that information. If the authority has reason to believe that it does not hold the information, but that it is held by another public authority (e.g. the practice) then it is not obliged to obtain the information from the practice for the applicant. The PCT should forward contact details to the applicant for the relevant authority.

In some cases the authority may consider it appropriate to transfer the request to the relevant public authority. For further information please refer to Section 45, Part III, transferring requests, paragraph 19. If this is the case, then the receiving authority has another 20 working days from receipt to respond to the request.

9. If we publish certain data annually, can we refer requests to this, rather than respond to the individual request?

If the request matches the information already published, then the authority can refer the applicant to the material already published or about to be published.

<u>The information – should it be disclosed or is it exempt?</u>

10. What information must GPs make available?

The majority of the information requested should be covered in the practice publication scheme. Information which can be obtained elsewhere does not need to be disclosed, for example information which is on the Department of Health website. Also if an individual makes a request for information that is included on the practice publication scheme, the request can be declined. Practices will therefore save themselves time by ensuring arrangements are in place to ensure that their publication schemes are up to date.

11. What information can GPs withhold?

Some types of information are exempt from the requirement to make them available. These include:

Absolute exemptions – this includes but is not limited to:
- personal information, the handling and disclosure of which is regulated by the Data Protection Act 1998

Qualified exemptions – this includes but is not limited to
- information whose disclosure would harm the commercial interests of the public body or of a third party

If a qualified exemption applies, the next step is to decide whether the disclosure satisfies the Public Interest Test:

The Public Interest Test

- information whose disclosure would harm the public good to an extent that is greater than the presumed public good of releasing it.

It generally appears that the public interest will outweigh non-disclosure where

i) There is a transparency in the accountability of public funds
ii) There is proper scrutiny of government actions in accordance with published policy, and;
iii) The public money is being used effectively

However, only the exempt part of the document can be withheld. The rest of the document must be released when requested.

Any use of the exemptions under the Freedom of Information Act should be properly communicated to the applicant in a refusal notice. This should state whether the information is held and why it is believed to be exempt from disclosure under the Act.

It is important to note that in all instances where exemption is used and information is not disclosed, the applicant will be able to challenge this decision primarily through the Complaints Procedure of the Public Authority and then via the Information Commissioner.

12. We have been asked to provide information on the number of cases of mumps, measles and rubella, and also on the uptake of the MMR jab by a local newspaper. We only hold this information in individual records. We could find out this information, but are we required to extract it under the Act?

If a practice holds raw data and receives a query for analysis it is not required to extract this information in order to provide it to the applicant. The Act only requires practices to provide information in the format in which you hold it. In the above scenario, the Data Protection Act would prevent all of the personal records from being disclosable. The time it would take to anonymise all of the records in order to provide the information in the format in which it is held would almost definitely take the cost over the appropriate limit, which means that the practice could refuse to provide this information.

13. What is a vexatious or repeated request?

The Freedom of Information Act also allows practices to refuse to fulfil a request for information in cases where it is deemed to be ‘vexatious’ or ‘repeated’. It is necessary to apply this exemption fairly and consistently as practices may need to defend their decisions.

The term ‘vexatious’ is not clearly defined in the Act, but the Information Commissioner has published guidance on the IC website, and in Awareness Guidance No. 22, on which the following is based.

A request maybe vexatious if:

- The applicant makes clear his or her intention is for the purpose of annoying the practice in retaliation/annoyance then this would be grounds for refusal.
- The request does not have any serious purpose or value. If a patient was making a complaint about a doctor’s treatment, and asked for information regarding similar complaints, this could be a valid request. If said patient sought information regarding every complaint levied at the practice, including other doctors, the cleanliness of the cloakroom etc, such information may

be seen to have no serious purpose or value in relation to the initial complaint, and hence may be seen as vexatious.

- The request can fairly be characterised as obsessive or manifestly unreasonable. This is a very difficult category to define, but it is possible that practices will get repeat perpetrators of vexatious requests, and it is possible that the practice will have had continued contact with the applicant. This is not to say that the request is for the same information each time, (which could be refused as a repeated request), however, over a period of time a practice may decide that the number of requests from one person is designed to be a nuisance and so choose to refuse information for this reason.

These are by no means exhaustive, but a rather designed to aid practices in the interpretation of Section 14.

14. Who decides if a request is vexatious?

It is to be decided within the practice whether or not a request is vexatious, however, GPC would recommend that even when a competent staff member has decided that a request is most likely vexatious, it is advisable to refer the decision to a senior staff member/partner, given that the judgement may be contentious and have to be defended.

15. What is the difference between disclosures under the Data Protection Act and the Freedom of Information Act?

Put simply, the Data Protection Act covers personal data, the Freedom of Information Act covers any other information held by the practice e.g. procedures, governance etc. If an applicant asks to see personal data or third party information, this would be exempt under the Freedom of Information Act. The applicant would need to submit a subject access request under the Data Protection Act.

16. Do individuals have a right to access information held about themselves under the Freedom of Information Act?

If the applicant is requesting personal information **about themselves or another person** then there is **no right to know** under the Freedom of Information Act. However, such requests may become requests under the Data Protection Act and should be treated accordingly.

17. Do internal emails need to be disclosed under FOIA?

The FOIA relates to <u>recorded information,</u> in the opinion of the GPC this is information which has been collated, filed and stored together: it does not give an automatic right to access records. This means that emails, negotiation notes etc. related to the formation of a policy or record may not be included in the Act and may not form part of a record for the purposes of disclosure.

This does not mean that emails are categorically non-disclosable: if to fulfil the request would mean sorting through your inbox and sent items, by both subject and sender, and collating the results to answer the request, then that would not be necessary, as you would be **forming a record**. However, if you already had a folder containing all of the emails and correspondence in one place, then this would **constitute a record** and would be disclosable. Do not forget that some of the information contained in the emails may be exempt, and other information may be supplementary to the boundaries of the request. Such information does not need to be disclosed.

However; in the unlikely event that the final agreement on policy was contained in an email alone and nowhere else, then it would be necessary to disclose the email. Any information that was contained in the email which was exempt would remain so, the relevant information alone could be transferred to a word document and disclosed as such.

18. If a member of the public requests information regarding a work in progress, / do we need to disclose this information e.g. draft documents/meeting notes if a decision is yet to be made?

The Freedom of Information Act relates to recorded information. Draft documents and emails made in the course of forming a decision are not necessarily 'records' for the purposes of the Act in the opinion of GPC.

19. We are receiving requests for QoF data? Should we disclose this information or is it exempt?

As with any information request, it is necessary for the individual practice or PCT to consider disclosure and whether any exemptions or exception apply. In the absence of case law it is not yet possible to give a definitive answer to this question, however, the following guidelines may help.

It is not thought that QOF information would be exempt under Section 41, Confidential Information, because disclosure of the information would be unlikely to give rise to an actionable breach of confidence. If information was withheld under this section, the GPC are not confident that this would be upheld after appeal to the Information Commissioner.

Under Section 43 of the Act, it is possible to withhold information which if disclosed would prejudice the commercial interests of any person. There is an argument that the release of QoF data could harm the commercial interests of a practice, either through patients choosing to register at another practice, or by damaging the reputation of the practice. However, even where this exemption is arguable it is still subject to the public interest test (see question 11 above), and it seems unlikely that the application of Section 43 would negate the requirements of the public interest test.

A managed publication process is being planned in collaboration with the Department of Health to remove the present burden of releasing QoF data away from practices.

Information will be published annually, most likely in July, by the Primary Care Organisations, with the support of the Health and Social Care Information Centre. As part of the publication scheme, the information on each practice would also contextualise the data, so that the figures available can be clearly understood and not merely left open for interpretation. GPC negotiators will be involved in the agreement of a national framework to ensure this.

Until this time, GPC are advising that to withhold QoF data could be viewed as detrimental to the profession and that it would be more beneficial to be seen as publicly accountable. However, it is a priority of the GPC to ensure that this information, when disclosed, is qualified.

In the absence of a legal precedent, this opinion is based on the advice available from the Information Commissioner and other legal analyses, rather than case law.

Financial Questions

20. Does this mean that GPs will have to make their income public information?

There is a particular expectation that public authorities will account for how they spend public funds. There can be no argument about the fact that a practice's NHS funding represents public money, as does the expenditure on drugs prescribed by the clinicians in the practice. Only if a practice can make a cogent case that its commercial interests would be harmed by disclosing details of the public money it is responsible for spending would it be justified in not disclosing that information.

It should be noted that the level of disclosure agreed for the publication scheme would not allow an individual GP's personal income to be calculated. When completing the model scheme practices may

prefer to use the phrase "total practice funding", rather than "total practice income". Clearly the more information that appears in the publication scheme the fewer requests for specific pieces of information the practice may have to respond to after 1 January 2005.

It is not necessary for GPs to disclose information personal to themselves, for example, their private income or pension contributions. Such information is exempt under the Data Protection Act. Personal information about someone other than the applicant is referred to as **third party data.**

The Information Commissioner addresses this issue in his Awareness Guidance, No.1

"In thinking about fairness, it is likely to be helpful to ask whether the information relates to the private or public lives of the third party. Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection…. The exemption should not be used as a means of sparing officials embarrassment over poor administrative decisions".

21. Will GPs be able to charge fees for access to information?

GPs will not be able to charge **fees** for access to information unless it costs more than £450 to retrieve and collate the information. GPs will, however, be able to charge any reasonable costs for copying, printing, postage and other disbursements. If the practice calculates that it will cost more than £450 to determine whether the information is held and to locate, retrieve and extract the information, then the authority can charge up to £25 per hour per staff member. If the costs are less than this £450 limit, then the authority can charge for the photocopying and postage of the information, but not the retrieval.

The GPC recommends that postage and photocopying should be charged at cost. If the cost of providing the information is estimated to cost over £450 then the authority is not obliged to provide the information, it can refuse to comply or charge the appropriate fee.

It is the duty of the practice to inform the applicant of the costs before providing the information, and the information can be withheld until the fee is received. If the fee has not been received within three months of notification then the request is seen to have lapsed.

Further Guidance

22. What are Sections 45 and 46?

The Lord Chancellor has produced two additional codes of practice entitled Section 45 and Section 46.

Section 45 sets out the practices which public authorities should follow when dealing with requests for information. The following five areas are covered:

- the provision of advice and assistance to persons making requests for information
- transferring requests for information
- consultation with third parties
- freedom of information and confidentiality issues
- complaints procedures

Section 46 gives guidance in Part I on good practice in records management. Part II gives guidance on the review and transfer of public records to Public Records Offices and to places of deposit.

Sections 45 and 46 can be found at http://www.dca.gov.uk/foi/codesprac.htm

23. Where can I access further information?

Further information is available online at the following websites:
Information Commissioners Website:
http://www.informationcommissioner.gov.uk/

NHS Freedom of Information Website:
http://www.foi.nhs.uk

Department of Constitutional Affairs guidance:
http://www.dca.gov.uk/foi/guidance/index.htm

The Freedom of Information Act 2000 Regulations:
http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm

Government White Paper Your Right to Know: http://www.archive.official-documents.co.uk/document/caboff/foi/foi.htm

Freedom of Information Act 2000 – GPC Quick reference table and flowchart

1.	FOIA makes a distinction between recorded information and non-recorded information. In the majority of circumstances it is recorded information forming part of a public record that is disclosable.
2.	Recorded information is information that forms part, or should form part of a record of a particular policy, function or document of a public authority.
3.	E-mails, correspondence, letters and minutes **may** be disclosable if they form part of or should have formed part of a particular record. It is appreciated that where e-mails sit in a person's in-box some of those e-mails are part of a record (albeit a formal filing system has not been created), and some of those e-mails are not.
4.	The Lord Chancellor has issued a Code of Practice on the management of records including electronic records, and it is advisable for every public authority to adhere to an effective filing system which creates **authentic** records and is able to track those records and dispose of those records as a normal course of business. The fact that somebody has not created a proper filing system, whether electronic or not, is not a justification for non-disclosure.
5.	The rule of thumb is that all correspondence, e-mails, minutes etc. are disclosable if they form part of a record. Anything that would not normally go into a filing system such as, for example, ordinary discussions about a particular subject which would not in the ordinary course of business be filed away and kept for reference may not be disclosable.

When a request is received GPC suggest the following procedure is followed:

A	Consider whether the request covers information which **would** be disclosable under the Freedom of Information Act i.e. information forming part of the record or the record itself
B	If the above does not clearly apply, does the information requested fall within one of the absolute exemptions? If so, then it is not disclosable and a refusal notice should be issued stating the reasons for non-disclosure.
C	If it does not fall within an Absolute Exemption, is it caught by one of the Qualified Exemptions? If so, then the Public Interest Test must be considered. When the public authority is considering this test and/or obtaining legal advice as to its application, the public authority may inform the requester and will be allowed "reasonable time" to revert back to the requester outside of the 20 day period. If it is within the public's interest that the information be disclosed then it is disclosable. This is usually the case where public spending is concerned, although there are other criteria. If it is considered that it is not within the public interest, then it is non-disclosable and a refusal notice giving full reasons must be issued and sent to the requester.
D	If the request is vexatious i.e. is repeated or is substantially similar to a previous request and/or is designed to inconvenience the recipient or cause annoyance or distress and/or is irrelevant, a refusal notice can be issued on these grounds.
E	If the information cannot be identified or located without further information, then the

	public authority must ask for further clarification from the requester and then the 20 day time limit does not begin to run until that information is received.
F	If you have disposed of the information within the ordinary course of business whilst clearing your papers and emails then this is not disclosable. However, emails should not be deleted with the intention of evading disclosure. This is a criminal offence carrying a maximum £5000 fine and prosecution in the Magistrate's Court.
G	If the estimated cost exceeds the limit set by the Secretary of State, the information need not be disclosed. However, the public authority may charge for it if it so wishes.
H	A refusal notice must clearly set out the grounds upon which the public authority relies on refusing as these grounds may be considered by the Information Commissioner on the receipt of a complaint. A public authority should have in place internal complaints and review procedures where a disgruntled requester can reapply for his/her request to be reviewed and reconsidered. It is only after these procedures have been exhausted that the requester may approach the Information Commissioner and he may intervene with a decision.
I	The General Practitioners Committee strongly recommend that practices organise internal review complaint procedures whereby a refusal to disclose is reassessed on application by the requestor.