

## **Freedom of Information and Research Data**

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### **Abstract**

Research data produced in both universities and the NHS is subject to the Freedom of Information Act 2000. This article examines the practical and ethical implications of freedom of information for research data, arguing that increased openness is both here to stay and is ethically justifiable. Researchers need to learn how best to cope with this.

### **Introduction**

The Freedom of Information Act 2000 (hereafter FOIA) aimed to make the workings of government and other public authorities more transparent. Since then, the drive towards openness and transparency has only grown stronger - witnessed for example by the recent setting up of a high level Public Sector Transparency Board, and the increasing use of FOIA by journalists and campaigning organisations.

Both universities and NHS bodies are public authorities within the meaning of the FOIA. Private industries engaged with research are not. This article examines the practical and ethical implications of FOI for research data, arguing that increased transparency is here to stay and that researchers need to learn how best to cope with this.

### **What FOI requires with respect to research data**

FOIA gives anyone the right to request recorded information held by a public authority. Freedom of Information (FOI) requests must be dealt with in a way that is "applicant blind" and "motive blind": who is asking for the information, and what they intend to do with it is not allowed to enter into how the public authority deals with the request, unless there are specific reasons for thinking that the request is vexatious.

Public authorities include government departments, local government, the NHS and universities. The vast majority of FOI requests to universities and to the NHS have so far focused on topics other than research data: but a number of recent cases have made clear that research data, and other working materials such as emails and drafts are all covered by FOIA. Public bodies must respond to FOI requests within 20 working days, stating whether they have the information requested, and providing this information unless the body can provide a justification within the terms of the Act for not doing so. [1]

Some of the most pertinent grounds for refusal are:

(1) Doing so would be too costly. If it would cost more than £600 for central government, or £450 for any other public authority to meet the request, it can be refused. However in this case the institution has an obligation to “help the requester re-frame the request in a way that could be satisfied.” [2]

(2) The request is “vexatious” or repeated. [3]

(3) The request falls under a defined FOI exemption. [4]

Defined exemptions are either absolute or qualified exemptions. Absolute exemptions include (a) personal data, (b) information provided in confidence, and (c) data reasonably accessible through other means,

Information which is personal to the requester falls under the Data Protection Act 1998, and is exempt from FOIA for this reason. Where personal data is about other people, there is an absolute exemption from FOIA if releasing the information would contravene the Data Protection Act. Information provided in confidence includes for example, patient records and unanonymised interview transcripts, though an institution cannot simply claim that information is confidential without being able to justify this. [5] If information is either published elsewhere, or is listed as part of a public authority’s publication schedule, then this information is exempt from FOI. For this exemption to be usable in a research context (as I discuss below) there have to be firm plans to publish the whole dataset, not merely articles based on those datasets.

Qualified exemptions need to be justifiable as in the public interest on a case-by-case basis. Such appeals to public interest can only be based on the qualified exemptions in the Act, and not on the basis of more general considerations of public interest. [6] Whilst the Information Officer’s Office provides some guidance on determining public interest, the concept remains vague, and it is only as a body of decisions emerges from the ICO that it is beginning to become clarified. [7]

### **What is FOI For?**

In thinking about FOI and research in universities and the NHS, it is helpful to step back a bit and ask what purposes FOI is supposed to serve, and whether these purposes are well served by a regulatory environment in which FOI requests for research data become common. Perhaps the best way to do this is to examine the effects of FOIA where it has been most used – in government.

In a review of FOI role of in government, Ben Worthy argues that the following goals were originally touted for FOIA:

1. Increasing transparency and openness
2. Increasing accountability
3. Improving the quality of government decision-making
4. Improving public understanding of decision-making
5. Increasing public participation

## 6. Increasing public trust.

He argues that only the first two goals have plausibly been achieved [8]. Only a very small percentage of people (much less than one percent) make an FOI request in any year, so it is simply not credible to think that FOI has much of a direct effect on the public's understanding of decision-making, or on public participation [9]. Rather, FOI must be justified by the more indirect benefits it brings to citizens: by changing the culture so that more information is made available as a matter of course, and by journalists and other campaigners making the information gained through FOI requests available to the general public.

FOI legislation has if anything *decreased* public trust in government. Worthy ran an empirical study on people who had made FOI requests, and found that the process of making an FOI request had decreased rather than increased their trust in the system. "Requesters who responded to our survey were also distrustful as a result of FOI. Very few (3%) felt FOI increased trust in government with 40% feeling it had decreased their trust. Requesters indicated a lack of trust and confidence in central government, with one typical comment being 'FOI has eroded it completely . . . the culture of secrecy is an absolute disgrace'" [10]

Alasdair Roberts suggests some theoretical reasons why we might expect this: "[T]here is good reason to think that FOI will cause suspicion of government to worsen. One obvious reason is the steady supply of news stories about mismanagement or abuse that will be produced by FOI. [Second,] the law creates a process that guarantees ongoing, high-profile conflict over access to government documents. Every year there will be thousands of instances in which government officials deny access to information, and hundreds of cases in which the information commissioner is asked to rule on those denials. The entire process will work to reinforce the perception of secretiveness—even if more information is, in fact, released." [11]

## What are the main controversies with FOI and research?

### 1. Time and resources taken up by FOI requests

Complying with FOI requests takes time and resources. Any individual researcher who is operating in a controversial area such as climate science could easily be swamped by FOI requests for data. Some of these requests may be refused under the category of vexatious or repeated requests, but where an area of science raises issues of genuine public concern it is not hard to imagine that there could be enough legitimate requests to be extremely time-consuming for researchers. It is not clear that this is a current problem for many researchers, but it could become one in the future. JISC report that "Currently FOI/EIR requests for research data are running at significantly less than 1% of all FOI/EIR requests to research universities. The number of requests does appear to be increasing by around 50% per year, however." [12]

## **2. Many researchers resist revealing datasets which they have laboured hard to create**

Some researchers are reluctant to provide access to full datasets which they have laboured hard to create. These researchers may feel that they have a proprietary interest in the academic use and exploitation of such datasets. This sense of proprietary interest in data was at least partially what lay behind Queen's University Belfast's attempt to refuse repeated FOI and Environmental Information Regulations requests for their tree ring data in a recent case (as well as the fear of the data being misused by climate change sceptics) [13].

FOIA allows refusal on the grounds that the full dataset will be published in the future. It does not allow refusal on the grounds that articles based *on the data* will be published in the future. Therefore, researchers need a solid plan to deposit the full dataset in a repository in order to be able to refuse a FOI request for data. FOIA thus creates a strong presumption towards sharing of data [14].

Given that FOIA must be interpreted in a way that is motive blind and application blind, there is nothing to prevent researchers from one university making FOI requests for the data of researchers at other universities. Of course, researchers share data sets all the time, but this is usually done by mutual agreement. FOIA, however, gives researchers (and anyone else) the legal power to demand research data from other researchers; and this must be complied with unless the data falls under one of the reasons for exemption. [15]

The central ethical question is whether it is legitimate for researchers or universities to take a proprietary interest in datasets, given that datasets are public goods which can benefit the whole research community. If taking a proprietary interest in datasets is not legitimate, then the fact that FOIA allows access to these datasets should be not thought of as an ethical problem with it.

I have argued elsewhere that creating or developing an intellectual product does not give the creator an intrinsic moral right to exclude others from its use. Where allowing creators to restrict access is justifiable, this is because allowing creators to exclude others from their creations provides incentives for them to create, not because creators have a pre-existing moral entitlement to exclude others. [16]

Similar considerations apply in the case of research data. There is also an additional argument for open access if the research has involved experimentation on human beings who have consented to be subjected to risks for the benefit of the public (as in the case of medical research), or the research has been done at public expense (as in the case of research funded by Research Councils).

## **3. Data/information gained by FOI requests is decontextualised and unhelpful, and can be misused**

Some researchers argue that it would be better to exempt research data obtained from FOI, on the grounds that data revealed by FOI requests is decontextualised, will not necessarily be that helpful to the information requester, and that the data may also be subject to misuse or misinterpretation.

These claims will often be true. But it is unclear that it follows that research data should be immune from FOI requests. For the same worries about lack of context and potential misuse seem to apply to *all* data release under FOI (including data on

the workings of local government for instance). So the problem is not specific to the university or NHS research context. Worries about decontextualised data could equally as well be thought of as arguments in favour of proactive and contextualised disclosure by researchers, as arguments against a duty to disclose.

#### **4. Chilling Effects of FOIA on Research Culture and Practices?**

A last concern would be that FOI may have a chilling effect on research culture and practices: researchers may be unwilling to express themselves clearly in emails, for instance, or may delete data or emails in order to prevent people from discovering them through FOI requests [17].

As FOI is such a new issue in academic research, there is no evidence of any such chilling effects. However, as research collaboration between industry and the universities increases, we could find that more contracts are drawn up to store raw data of a commercially sensitive nature in the private rather than the public sector in anticipation of any FOI interest.

Rather, FOI must be justified by the more indirect benefits it brings to citizens: by changing the culture so that more information is made available as a matter of course, and by journalists and other campaigners making the information gained through FOI requests available to the general public.

FOI legislation has if anything *decreased* public trust in government. Worthy did an empirical study on people who had made FOI requests, and found that the process of making an FOI request had decreased rather than increased their trust in the system. "Requesters who responded to our survey were also distrustful as a result of FOI. Very few (3%) felt FOI increased trust in government with 40% feeling it had decreased their trust. Requesters indicated a lack of trust and confidence in central government, with one typical comment being "FOI has eroded it completely . . . the culture of secrecy is an absolute disgrace"

#### **Conclusion**

There is a growing awareness that there is a strong public interest in the publication of datasets, so that these can be validated and built on by other researchers. A recent report by the National Academy of Sciences puts it as follows: "All researchers should make research data, methods, and other information integral to their publicly reported results publicly accessible in a timely manner to allow verification of published findings and to enable other researchers to build on published results, except in unusual cases in which there are compelling reasons for not releasing data. In these cases, researchers should explain in a publicly accessible manner why the data are being withheld from release."

It is difficult to resist the ethical case for greater access to datasets – particularly where these have been funded at public expense. However FOIA is not an optimal mechanism for allowing this to occur: widespread use of FOI requests for research data is likely to decrease public trust in science, will be time-consuming for research scientists, and will do little to increase public understanding of science. But given the current shift towards greater transparency, FOIA is here to stay, and we can if anything expect it to be expanded in the future. The smart thing for researchers to do will be to find a way of making data available to others in a way that will be more fruitful for all concerned: proper publication of datasets would obviate claims for access under FOIA, and would allow optimal reuse of data. In short, as Corner and Bell argue:

Science needs to learn to live with FOI, regardless of whether it can deliver a meaningful assessment of scientific knowledge to the public. But the key challenge is for scientists to find ways of increasing openness that are more proactive and less confrontational than the FOI process... accessing science through FOI legislation is unlikely to lead to a satisfactory outcome for scientists or the public.” [19]

## Notes

[1] The Information Commissioner’s Office provides a guide to this at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/timeforcompliance.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/timeforcompliance.pdf)

[2] <http://www.jisc.ac.uk/FOIresearchdata>

[3] [http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/information\\_request/~media/documents/library/Freedom\\_of\\_Information/Practical\\_application/VEXATIOUS\\_REQUESTS\\_A\\_SHORT\\_GUIDE.aspx](http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Freedom_of_Information/Practical_application/VEXATIOUS_REQUESTS_A_SHORT_GUIDE.aspx)

[4] [http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/information\\_request/reasons\\_to\\_refuse.aspx](http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/reasons_to_refuse.aspx)

[5] [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/confidentialinformation\\_v4.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/confidentialinformation_v4.pdf)

[6] Bellamy v the Information Commissioner and the DTI, (EA/2005/0023, 4 April 2006).

[7] The ICO summarise their advice on public interest follows: “something which is ‘in the public interest’ may be summarised as something which serves the interests of the public. The public interest test entails a public authority deciding whether, in relation to a request for information, it serves the interests of the public either to disclose the information or to maintain an exemption or exception in respect of the information requested. To reach a decision, a public authority must carefully balance opposing factors, based on the particular circumstances of the case. Where the factors are equally balanced, the information must be disclosed.”

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/fep038\\_public\\_interest\\_test\\_v3.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep038_public_interest_test_v3.pdf)

[8] “More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government”, *Governance* 23.4 2010: 561-582.

[9] As Worthy points out, there is a paradox at the heart of FOI legislation: FOI aims to empower individual citizens to find out information about the workings and internal data flows of public bodies, by giving each person an entitlement to request a wide range of information. However, complying with each request takes time, and there are seldom any extra resources allocated to deal with FOI requests. So, as things stand, the FOI system will only be workable if not many people in fact make use of it. If each adult UK citizen made one FOI request per year, national and local government would have to cope with more than forty million FOI requests, and would be completely paralysed.

[10] “More Open but Not More Trusted? The Effect of the Freedom of Information Act 2000 on the United Kingdom Central Government”, *Governance* 23.4 2010: 561-582 at p.576

[11] Alasdair Roberts, “Free to Distrust”, *Prospect* 20 Feb 2005. On this topic, see also Onora O’Neill *Autonomy and trust in Bioethics* (Cambridge: Cambridge University Press 2002).

[12] [http://www.jisc.ac.uk/FOIresearchdata\\_FAQ\\_17](http://www.jisc.ac.uk/FOIresearchdata_FAQ_17)

[13] The Information Commissioner ruled against Queen’s University Belfast, in this 2010 case. Notice though that the case was not brought under FOIA, but under the EU Environmental Information Regulations (Council Directive 2003/4/EC). For the judgment, see [http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs\\_50163282.pdf](http://www.ico.gov.uk/upload/documents/decisionnotices/2010/fs_50163282.pdf)

[14] FOIA provides access to the data, but any underlying intellectual property (IP) rights in the data remain with the IP owner. Collections of facts are as such not usually captured by copyright law, but in the EU there is a sui generis IP right called a Database Right which covers databases, and which could provide protection for some research data. If the IP owner holds an IP right in the data, this places limits on the possibility of the FOI requester publishing the data.

[15] I am not aware of any cases in which researchers have yet used FOIA against rivals in this way: most researchers I have spoken to consider that it would be unethical to do so.

[16] James Wilson, (2009). “Could there be a Moral Right to Own Intellectual Property?”, *Law and Philosophy* 28(4): pp. 393–427. James Wilson (2010) “Ontology and the Regulation of Intellectual Property”, *The Monist*.

[17] It is illegal to delete or destroy information about which an FOI request has been made, but it is not illegal to destroy data or information before it has been requested. <http://www.jisc.ac.uk/FOIresearchdata>, FAQ 19

[18] Committee on Ensuring the Utility and Integrity of Research Data in a Digital Age, Committee on Science, Engineering, and Public Policy, *Ensuring the integrity, accessibility, and stewardship of research data in the digital age* (National Academies Press: Washington DC, 2009), recommendation 5.

[18] Adam Corner and Alice Bell, "There's more to a story than facts and figures", *Times Higher Education* 25 November 2010.  
<http://www.timeshighereducation.co.uk/story.asp?storycode=414350>