Making Open Data Real: A Public Consultation Response from the Information Commissioner

Introduction

The Information Commissioner has responsibility for promoting and enforcing the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR), the INSPIRE Regulations 2009 and the Data Protection Act 1998 (DPA). He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

General comments

The Information Commissioner welcomes this consultation and many of the initiatives proposed, which should improve the full flow of information and data to citizens. The consultation presents significant opportunities to improve transparency and accountability. The existing open data initiatives that are detailed in the consultation and have already been realised are significant developments that the Information Commissioner has welcomed. He agrees that publishing data about service outcomes and other aspects of public service delivery can produce significant benefits for citizens.

The concept of open data is an important addition to the well established concept of Freedom of Information. The Information Commissioner believes it is important that the relationship between freedom of information and open data is clearly defined and that they are not seen as completely parallel concepts. A complimentary approach is important. In the view of the Information Commissioner a modern freedom of information and transparency regime must have open data as a core component, alongside other key, longstanding principles of freedom of information legislation.

The recent International Conference of Information Commissioners made a declaration that called for “states and international agencies to make greater use of the Internet for this purpose and to make

information available in a proactive, structured and user-friendly way"[1].

In the Information Commissioner's view FOIA should be updated, as part of the initiative to enable citizens to realise the opportunities offered by open data and web 2.0. He therefore supports the amendments to FOIA in the Protection of Freedoms of Bill that add further rights to request datasets in open formats under licence terms that allow re-use. He also supports the amendments in the Bill that add further requirements for requested datasets to be added to publication schemes. These new provisions will enable the Information Commissioner to start to promote and enforce a "right to data".

The Information Commissioner believes that the concept of publication schemes (under section 19 FOIA) is a vital mechanism for delivering accountability through proactive disclosure, including open data. His enforcement powers, ability to monitor compliance[2] and promote good practice[3], related to publication schemes, are all vital tools to deliver greater transparency and accountability.

The Information Commissioner has welcomed the introduction of the Open Government Licence (OGL) and the proposal in the consultation paper that open data should be made available under the OGL except in very specific circumstances. He is also agrees it is important that data it is currently freely available in terms of access and licensing remains so.

It is clear that some open data initiatives can be resource intensive and the Information Commissioner would stress the importance of a long term view of open data, which can enable proactive disclosure practices to be fully embedded in public authorities. It is important that open data is not seen as a one off initiative but that public authorities see it as a sustainable commitment they can maintain over time.

When the Freedom of Information Act was first introduced proactive disclosure and publication schemes were sold as a way of reducing the number of the requests received. Seven years into implementation, experience indicates the position is more nuanced and it is clear that simply publishing more information will not

[1] Resolution - 7th International Conference of Information Commissioners/ Ottawa: More transparency is an international task http://www.oic-ci.gc.ca/eng/DownloadHandler.ashx?pg=0caaded6-843f-426e-8519-7e4a6b1c43cd&section=ac86f03b-4d74-49c1-bb0d-a9ee40818f75&file=Resolution_+EN.doc

[2] http://www.ico.gov.uk/what_we_cover/monitoring_compliance.aspx

[3] http://www.ico.gov.uk/for_organisations/freedom_of_information/publication_scheme.aspx

always reduce requests received. The benefits from publishing information will only be derived from sustained commitment to publication over time, which will then improve public trust. Proactive disclosure will often be most effective in reducing FOI requests when it is based on an understanding of what citizens are interested in, dialogue with stakeholders and good awareness of key public interest issues, which will change over time.

The Information Commissioner acknowledges the benefits that open data can bring in terms of accountability, transparency and economic growth. However, it is important that further research is undertaken to consider the nature of these benefits, many public authorities need tangible examples to convince them of the benefits of investing in open data.

When considering how an open data policy can be implemented across the public sector it is important to recognise the diversity and size of public authorities covered by the Freedom of Information Act. Thought must be given as to how open data can be implemented in a sector such as Higher Education, noting that Universities are subject to FOIA and EIR.

The Information Commissioner would also like to stress the importance of a joined-up approach to open data and transparency policy initiatives across government. The public data principles are a useful overarching concept, however the Information Commissioner would welcome a National Information Policy that draws together different strands of information-related policy. The new Office of the Australian Information Commissioner has taken on such a role.

A key benefit of the current FOIA and EIR regime is the fact that it comprehensively covers public authorities across England, Wales and Northern Ireland. In terms of access to information the public only have to use one regulator and FOIA/EIR whether they make a request to a central government department, a local hospital or local council. Whilst the Commissioner strongly supports the drive towards greater openness and transparency in the local government sector he is concerned that the recently announced proposal to make the Code of Recommended Practice for Local Authorities on Data Transparency legally enforceable will create a fragmented and potentially duplicated regulatory framework.

It is important not to lose sight of the transparency and accountability benefits that stem from access to a wide range of information and not just open data. The ability to request unstructured information such as reports, memos, emails, policy documents is also key to deliver accountability and transparency.

For the UK to become the most transparent country in the world it will require a combination of proactive disclosure (including open data), a strong request based regime and effective joined-up regulation.

In responding to this consultation the Information Commissioner is also aware of the proposed post legislative scrutiny of FOIA, which will be conducted by the Justice Select Committee in 2012. Some of the issues raised here may also be relevant for the scrutiny process as well.

1. Glossary of key terms

1. Do the definitions of the key terms go far enough or too far?

It is important that the terms related to open data are clearly defined and there is common understanding across all the public sector. The Information Commissioner has previously commented about the clarity of the dataset definition used in the Protection of Freedoms Bill and how the definition must be workable and not interpreted too narrowly[4]. The definition of dataset used in the glossary does not clearly align with the definition in the Protection of Freedoms Bill. It is unclear what an "unstructured" dataset is.

2. Where a decision is being taken whether to make a dataset open, what tests should be applied?

Focus should be placed on the public interest in making the dataset open and the different types of benefit which may be derived from it being open – these could include greater citizen involvement in service delivery, holding public authorities to account for decisions they make, how their activities impact on the environment, enabling the public to better understand health and safety. It is important that all these different interests are considered and different benefits are weighed up.

It is important that the benefits of making datasets open are reassessed on a regular basis as the public interest can often change over time and also the costs of publishing data can fall over time.

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4 http://www.ico.gov.uk/~/media/documents/library/Corporate/Detailed_specialist_guides/protection_of_freedoms_bill_ic_evidence.ashx

The Information Commissioner would also accept that it is important not to prejudge what datasets the public may want and sometimes public bodies should pilot or test the water by publishing datasets to see how they are used, particularly if the costs of publication are low.

Dialogue with key stakeholders is clearly important. A multistakeholder approach is useful and the Information Commissioner would highlight the work done by Richard Calland (University of Capetown) in this area[5], connected to transparency initiatives. Multistakeholder approaches can add real value to decision making around proactive disclosure and open data.

3. If the costs to publish or release data are not judged to represent value for money, to what extent should the requestor be required to pay for public services data, and under what circumstances?

The Information Commissioner accepts that publication of certain data will not be cost-effective and in some circumstances it may be appropriate to charge for certain data. It will be important to clarify whether there would be a charge for accessing data or re-use. While he generally advocates that datasets should be available free of charge under both aspects he would favour charging for re-use rather than access if a charge is appropriate. This should not be confused with an application fee for an FOI request, which would have different implications.

As noted in the consultation the Freedom of Information Act contains a provision under section 12 that allows a public authority to refuse a request for information if the costs of retrieval would exceed a set limit. At present the Freedom of Information Act contains no obligation for public authorities to consider making information available for a fee if the cost limit is reached. There is clearly a case, in respect of datasets at least, for reviewing this provision in the Act.

If costs of publishing are an issue for public authorities the Information Commissioner would encourage public authorities to produce data publication plans, which may allow for staged publication and the costs of publication could be spread over

[5] For example see Multistakeholder Working – Lessons from the Frontline: Challenges & Opportunities
http://www.constructiontransparency.org/view/document.shtml?x62680-xvritry

time. The data publication plans should be available to the public and be consulted on.

4. How do we get the right balance in relation to the range of organisations (providers of public services) our policy proposals apply to? What threshold would be appropriate to determine the range of public services in scope and what key criteria should inform this?

Defining a provider of a public service requires careful consideration and the Information Commissioner would be concerned if this was drawn too narrowly. He has previously commented that FOIA coverage must keep pace with reforms to public service delivery, as new providers are given public service responsibilities.

At present all the obligations in FOIA apply to a clearly defined list – a focus on providers of public services may not match up with bodies covered by FOIA. The concept of public services and public functions are often contested legal terms and it is important that any open data requirements are clear in their application. In the Commissioner's view it is important that a gap does not emerge between bodies with open data obligations and FOIA/EIR obligations.

The Information Commissioner considers that this question must be considered alongside any work the Ministry of Justice does on extension of FOIA. There is strong case that bodies such as Network Rail and the Public Utilities are included under FOIA and EIR, and by extension open data obligations.

The Information Commissioner strongly believes that the provisions in FOIA must be universal but he can accept that some very specific open data obligations may only be viable for certain sectors.

5. What would be appropriate mechanisms to encourage or ensure publication of data by public service providers?

The Information Commissioner would propose a mix:

- Clear and enforceable legislation and Codes of Practice, with a limited number of bodies with regulatory responsibility. Sanctions should be available.
- Leadership, standards and guidance from government

- Leadership and some elements of self-regulation by sector-based bodies through sector based standards and guidance.
- The involvement of the public is vital as they can drive up compliance by placing pressure on public bodies to comply. "Crowd sourcing" could be an important tool.

8. Policy Challenge Questions

1. An enhanced right to data

1. How would we establish a stronger presumption in favour of publication than that which currently exists?

The Information Commissioner would welcome a general presumption in favour of publishing open data in the face of FOIA legislation but he also believes that this should be added to the Freedom of Information Act in respect of all information. He therefore suggests that this issue should also be considered by the post legislative scrutiny process for FOIA.

The proposals on pages 23 and 24 of the consultation related to costs limits have considerable merit and are worth exploring but the Information Commissioner believes that this may be more appropriate as part post-legislative scrutiny of the FOIA. He accepts that the burden of such changes will need to be carefully assessed.

The Information Commissioner would welcome the introduction of statutory time limits for internal reviews under FOIA but he would prefer this to be considered alongside a wider review of FOIA in the post-legislative scrutiny. For example it will also be important to consider introducing a time limit for considering the public interest test under section 2.

The Information Commissioner believes that further reform of publication schemes should be considered to improve the mechanisms for proactive disclosure and how it is regulated. The Information Commissioner is aware that many members of the public do not recognise the term publication scheme and relabeling the concept, particularly for signposting purposes on websites could be important. From the monitoring work the Information Commissioner has done he has found that many public authorities do not focus on proactive disclosure as a regular activity. He therefore believes that the publication scheme provisions in the

legislation need to do more to encourage regular publication. This is also something the Information Commissioner will consider in future versions of the model scheme and guidance he issues.

The current amendment to section 19 FOIA in the Protection of Freedoms Bill is useful but could go further – additional amendments could be made to section 19 to ensure that public authorities focus on open data as an important component of their publication scheme. Section 19(2)(b) could be amended to create a wider obligation to publish datasets in open formats, and available under a specified licence.

It is important that the Information Commissioner retains the ability to set publication scheme requirements using a model scheme and accompanying guidance but he also acknowledges that there may be some benefit in having a stronger mandate for information and data that all public authorities or public authorities in certain sectors should publish. This could be in section 19 or in a Code of Practice.

The Information Commissioner is currently running a consultation on what improvements should be made to publication scheme requirements in the short to medium term. The consultation will close on 21 December. The consultation asks questions on the following areas:

- Integrating sector-based initiatives into sector based requirements
- The ICO's model publication scheme and definition document guidance for sectors
- Adding new classes of information to publication schemes
- Open data formats and information published in publication schemes
- Guidance on re-use of information in publication schemes
- Awareness and findability
- Monitoring

2. Is providing an independent body, such as the Information Commissioner, with enhanced powers and scope the most effective option for safeguarding a right to access and a right to data?

As outlined above, the Information Commissioner believes that it is important that legislation or other initiatives related

to open data are closely related to the Freedom of Information regime.

The Information Commissioner would like to highlight several section 50 FOIA decision notices where he has ordered the disclosure of significant datasets:

- FER0072933 Decision to order disclosure of mobile phone mast location data
- FS50214210 Decision to order disclosure of MOT data
- FS50298307 Decision to order disclosure of data related to international aid projects
- FER0280033 Decision to order disclosure of climate data held by University of East Anglia
- FS50166599 Decision ordering disclosure of work permit data held by the Home Office

The Information Commissioner already has strong powers under the Freedom of Information Act – he can issue binding decision and enforcement notices, and can issue an information notice if he needs information for an investigation. Key aspects of the regulatory regime for open data should be enforceable by the Information Commissioner, linked to these powers. This would enable the Commissioner to order the disclosure of datasets, or publication in certain circumstances.

The Information Commissioner believes there should be greater linkage between his powers under section 50 and publication scheme obligations. One option is that his powers under section 50 could be enhanced to enable him to order publication of the requested information, via the public authority's publication scheme, in addition to communication to the applicant, which is the step that would be ordered in a decision notice under the current provisions.

The other area where the Information Commissioner believes his powers could be enhanced is audit powers. Section 47(3) FOIA could be amended to allow the ICO to carry out non-consensual audits of public bodies under FOIA, as they can under Data Protection (section 41A DPA). Under the DPA these powers currently cover government departments. The Information Commissioner has found that the existence of non consensual audit powers has considerably improved take up of consensual audits under DPA.

The relationship between access to information and re-use regimes is important; the Information Commissioner only has responsibility for the former. It is clear that the concepts are

starting to converge, whilst remaining distinct. He welcomes the potential role the Protection of Freedom Bill gives him in relation to re-use. This will give the Information Commissioner some ability to resolve basic issues around re-use for the end user.

He does not propose that regulatory responsibility for access and re-use need to be completely converged but the implications of convergence must be considered. It is important that a clear service is available for the end user, who may increasingly want access and re-use complaints about datasets resolved as a joined up process. The knowledge and expertise required to regulate re-use are quite different to access in terms of information economics and licensing regimes and it is important that the primary focus of the Information Commissioner remains on access to information. The Information Commissioner and the National Archives are currently redrafting their MoU. Good levels of regulatory cooperation on areas where access and re-use overlap should be possible, to ensure that the end user receives an efficient service.

The Information Commissioner believes it would be possible to take on a role enforcing the regularity of publication of datasets, which could be linked to publication scheme provisions in the legislation. He would also be willing to take on a role related to data standards and quality in conjunction with the Cabinet Office or other public sector bodies who set standards.

Whilst the Information Commissioner's regulatory role is important it is clear that a combination of actors will need to work to together to deliver real benefits from open data.

It is also important to note that any additional regulatory work the Information Commissioner takes on concerning open data will have to be balanced against his wider responsibilities under FOIA and EIR. The Information Commissioner believes it is important that he plays a key role in pushing forward the transparency and open data agenda. However, the challenge is how much resource should be put into transparency and proactive disclosure balanced against the demand for FOI complaint handling. The last two years have seen a significant effort made to reduce a large backlog. No cases have been with the ICO for more than a year. The public's appetite for FOI is high - FOI complaints to the ICO were up 17% in 2010-2011.

The impact of improved FOI complaint handling performance is that public authorities are taking FOI more seriously as they know they can't buy so much time by resisting disclosure. This can clearly have a knock on effect to make public authorities think more about proactive disclosure.

3. Are existing safeguards to protect personal data and privacy measures adequate to regulate the Open Data agenda?

The Information Commissioner would not propose that further legislation and regulatory measures are required. The key to managing risks related to personal data will be a mix of proper decision-making functions, clearer guidance, further research and the availability of technical expertise and tools. The Information Commissioner would continue to stress the importance of using Privacy Impact Assessments[6].

The Information Commissioner is developing a Code of Practice on anonymisation, which will be issued under section 51 of the DPA. The Information Commissioner also welcomes sector-based initiatives, such as the current work taking place in the NHS on a de-identification standard.

The privacy risks of disclosing certain datasets should not be overlooked and the Information Commissioner broadly welcomes the report by Dr Kieron O'Hara into transparency and privacy. The Commissioner will be responding to this report separately. Usable tools and frameworks must be in place to aid decision making when disclosure of datasets poses a data protection risk. The Code of Practice on anonymisation should assist public bodies in their decision making. The Information Commissioner also acknowledges the importance of the knowledge and expertise of the Office for National Statistics in this area.

4. What might the resource implications of an enhanced right to data be for those bodies within its scope?

The Information Commissioner acknowledges there will be a range of resource impacts, for example:

- Costs of preparing data for release (e.g. anonymisation)

6 http://www.ico.gov.uk/for_organisations/data_protection/topic_guides/privacy_impact_assessment.aspx

- Costs of formatting data
- Costs of maintaining or checking data
- Costs of hosting data

Some public bodies may have the perception that publishing open data will require significant resources when in reality there may be tools and services that they can use, developed by other public sector bodies. The availability of guidance and other tools will be important to help public authorities assess what the costs may be and what the options are in terms of methods of publication.

How do we ensure that any additional burden is proportionate to this aim?

Research and piloting will be important. Careful consideration must be given to the balance between mandatory and discretionary requirements. The Information Commissioner believes that some mandatory requirements must be in place, but can also see the need for discretionary requirements. The balance between these requirements may need to change over time.

5. How will we ensure that Open Data standards are embedded in new ICT contracts?

Standard contractual clauses and templates should be used and made available by a range of bodies who issue guidance, this could be government and bodies who produce sector based guidance. This is something the Information Commissioner would welcome.

The Information Commissioner is keen to introduce the concept of "designing in access" or "access by design" alongside the well-established concept of privacy by design[7]. The concept would include developing a methodology and key access and open data principles that public authorities should integrate into their main ICT methodologies when developing new ICT systems He is currently considering whether to issue guidance which would compliment his existing privacy guidance. It is possible that this concept could be explained as good practice in the section 45 FOIA Code of Practice.

2. Setting transparency standards

[7] http://www.ico.gov.uk/for_organisations/data_protection/topic_guides/~/media/documents/pdb_report_html/PRIVACY_BY_DESIGN_REPORT_V2.ashx

1. **What is the best way to achieve compliance on high and common standards to allow usability and interoperability?**

   The Information Commissioner welcomes the range of options set out in paragraph 8.9 of the paper. It is important that a mix of these options is used.

2. **Is there a role for government to establish consistent standards for collecting user experience across public services?**

   The co-ordinating role government can play will be important.

3. **Should we consider a scheme for accreditation of information intermediaries, and if so how might that best work?**

   The Information Commissioner agrees this concept is worth exploring. The concept of accreditation is developing in the privacy regulation sphere, with some European Data Protection authorities offering accreditation for intermediaries offering data protection services. The concept of privacy seals is also developing.[8]

3. Corporate and personal responsibility

1. **How would we ensure that public service providers in their day to day decision-making honour a commitment to open data, while respecting privacy and security considerations?**

   They key to respecting privacy will be using tools like Privacy Impact Assessments when privacy risks are apparent. It will be important that privacy considerations are embedded in any process developed to consider the disclosure of datasets, rather than a bureaucratic add on at the end of the process.

2. **What could personal responsibility at Board-level do to ensure the right to data is being met include?**

   The Information Commissioner agrees that that board-level responsibility will be important to ensure that the right to data is being met. He has consistently stressed the importance of

[8] https://www.european-privacy-seal.eu/about-europrise

Board- level responsibility for Information Rights more broadly.

Should the same person be responsible for ensuring that personal data is properly protected and that privacy issues are met?

There is no problem in principle and many organisations will already have an individual with responsibility for information rights – covering both freedom of information and data protection. The key is making sure that all the freedom of information/open data/privacy responsibilities are properly recognised in any formal role.

3. **Would we need to have a sanctions framework to enforce a right to data?**

   As outlined above the Information Commissioner believes that a sanctions framework for the core components of the open data policy is important.

4. **What sectors would benefit from having a dedicated Sector Transparency Board?**

   The Information Commissioner recognises the value that Sector Transparency Boards can offer in terms of leadership, standard setting and providing sector specific help and guidance. Clarity of role is important and the relationship with the Information Commissioner and other regulators must be clearly explained. If the Boards have a decision-making role this must be carefully considered as part of the wider framework.

4. <u>Meaningful Open Data</u>

1. **How should public services make use of data inventories?**

   The concept of data inventories is welcome and could make a significant difference to discovery of datasets. The Information Commissioner would want to explore how data inventories could work with publication schemes to enable better discovery of the information published under publication schemes. Most FOIA publication schemes are now web-based and the Information Commissioner can see merit in mandating that the public authorities in most sectors should have a permanent URL or URN for their publication

scheme. There is also merit in exploring how metadata could be used to harvest data from publication schemes.

What is the optimal way to develop and operate this?

NA

2. **How should data be prioritised for inclusion in an inventory? How is value to be established?**

NA

3. **In what areas would you expect government to collect and publish data routinely?**

The areas would be:

- Data related to spending of public money
- Data about performance and outcomes of key public services
- Data used to support policy proposals or decisions
- Data about the "state of the nation" e.g. socio-economic data
- Data about Health and Safety
- Data on consumer-related areas e.g. MOT data, restaurant inspection data
- Environmental data (some of this will be covered by obligations under the EIR and INSPIRE)

4. **What data is collected 'unnecessarily'?**

The Information Commissioner would want to stress that personal data should only be held for specified purposes and should not be kept longer than is necessary. These are core principles in the Data Protection Act.

How should these datasets be identified? Should collection be stopped?

NA

5. **Should the data that government releases always be of high quality? How do we define quality? To what extent should public service providers 'polish' the data they**

publish if at all?

The Freedom of Information Act does not cover the quality of the information released. The EIR does to a certain extent - Regulation 5(4) states that information should be "up to date, accurate and comparable, so far as the public authority reasonably believes". Regulation 5(5) covers an obligation to make information such as measurement procedures available, when the environmental information is made available. These EIR provisions have rarely been tested.

The Information Commissioner and the Information Tribunal have generally been sceptical about general arguments run by public authorities that information is not of sufficient quality for disclosure or could be misunderstood, unless this can be clearly linked to specific harm in one of the exemptions in the legislation.

Although the Information Commissioner has limited experience of this area he agrees that the quality of data is an important issue if open data is to be a success. A graduated approach to quality should be possible – it will be important to "get the data out" and public involvement may help improve quality but he can understand concerns that some public authorities have about disclosing poor quality data and the risks in some circumstances. Public authorities should aim to improve the quality of the datasets they disclose over time.

5. Government sets the example

1. **How should government approach the release of existing data for policy and research purposes: should this be held in a central portal or held on departmental portals?**

   The disclosure of information supporting policy decision-making is recognised in sections 35(2) and 35(4) of FOIA. The Information Commissioner strongly supports the disclosure of data that has been used in the policy process. He is also aware that many users will also request data under FOIA and EIR for research purposes.

   The Information Commissioner does not have a strong view on the merits of a central portal or departmental portals– the key issue will be the impact on usability and findability.

2. **Which factors should inform prioritisation of datasets for publication, at national, local or sector level?**

   Refer to answer in 1.2 above.

3. **What is more important: for government to prioritise publishing a broader set of data, or existing data at a more detailed level?**

   NA

6. Innovation with Open Data

1. **Is there a role for government to stimulate innovation in the use of Open Data? If so, what is the best way to achieve this?**

   The Information Commissioner accepts that government has an important role to stimulate innovation, often working with other stakeholders. The approach of working closely with users, setting up challenges and competitions should continue. He also agrees that the international dimension set out in the consultation is important. The declaration made at the International Information Commissioner's conference (mentioned above) also supported the Open Government Declaration published in September 2011 in New York.