



Freedom of Information Act 2000 – first month reflections

The dawn of the Freedom of Information Act on 1 January 2005 (pet-named FOIA) has been hailed as a brave new world of public sector openness and transparency - or the end of municipal life as we know it. But what's it really like out there? Birmingham City Council's Chief Legal Officer, Mirza Ahmad, reports.

How Birmingham City Council deals with FOIA requests

During January 2005, Birmingham City Council received about 150 requests for Freedom of Information and within these there have been a number of multiple requests. As expected, the requests have come from the media, unions, companies, community/pressure groups, local residents and local politicians. Requests have also been targeted by certain individuals against the actions of certain officers/members - i.e. Chief Executive, Chief Legal Officer and Head of Corporate Procurement.

Examples of requests range from very specific ones; such as:

'A copy of the minutes of the February 10th disciplinary hearing organised by X Association of Neighbourhood Forums and held at the Council Chamber',

to broader ones; such as:

'Number of compassionate leave requests made by staff working for all BCC departments in the last financial year - and a breakdown of type of request (e.g. death of a near relative, breakdown in care arrangements, etc) and number of days requested'.

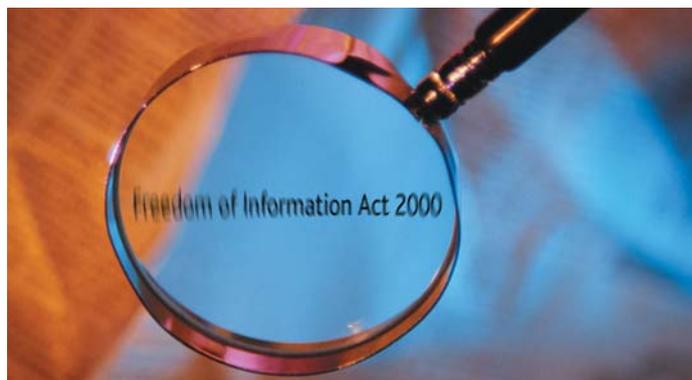
We have even had applications under the Act from known 'persistent complainers'. It should, however, be noted that it is the request, not the applicant, that the 'vexatious or repeated requests' provisions in section 14 of FOIA apply to and, as such, the fact that a person has been known to be a persistent complainer to the authority is not enough in itself to rule out of court a request for information under the Act.

Some other examples have included costs of Chief Executive recruitment and car parking/residential facilities made available to staff. Expenses claimed by members have also been a popular one. Some of the questions are also being targeted against many local authorities - i.e. what action/inaction the Council has taken re major national social services inquiries, to name but one example.

Early reflections

Seeking clarification on FOI Requests:

Clarification of requests for information should be sought only where it is **reasonable and necessary** and commonly understood terms should be treated as such. Local Authorities seeking clarification should not adopt a bureaucratic approach to common



words but should outline what they consider the request to mean and seek clarification on their understanding. This approach should avoid the clarifications on clarifications spiral!

Unreasonable or unnecessary 'clarifications' only serve to engender a closed cultural approach to FOIA and potentially opens up Councils - including identifiable Officer(s) - to ridicule from the Press, as some of the requests were targeted to other local authorities for 'comparative purposes'. A national league of bureaucratic responses comes to mind! Councils' reputation will be tarnished, therefore, with bureaucratic and unnecessary clarifications.

Assessing fees/charges: It is not sufficient to simply say that a request will exceed the £450 statutory limit. It must be

quantified and a reasonable charge properly estimated so that it can be relayed to the applicant and an explanation provided, if necessary, as to how the figures have been reached.

Frequently Asked Questions - Putting responses made under FOI into the public arena. It is important that FOIA is used to the fullest potential. Accordingly, where Councils make a response, a web page outlining the FOI requests and the disclosures ought to be set up. This should also engender a more open and transparent approach to 'FOIA for all' - not just those requesting the information.

Resource implications - So far, one BCC lawyer is doing an exceptional job dealing with all the requests and considering the exemptions - even on Saturdays! Back-up arrangements are being

put into place, as this level of legal support is not enough if all FOI requests are to be dealt with within the 20 working days deadline under the Act.

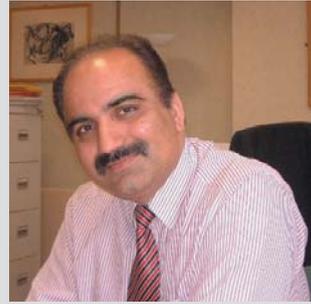
Section 36 exemption - the prejudice to effective conduct of public affairs - its use is designated only to the Monitoring Officer (or, in his absence, to the Chief Executive). BCC will only use the same if clear and justifiable reasons are presented.

Conclusions

Prior to 1 January 2005, Birmingham City Council had already done a great deal to prepare for FOIA and make more information available to citizens. It is clear from the first month's reflections under FOIA that the culture of openness demanded under the FOIA still has a long way to be developed in certain authorities. Turning round traditional

responses into more creative positive forces for FOI will remain, therefore, a major

challenge for FOIA Corporate Champions during the coming months...



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The Bitterest pill

Life is full of ups and downs with many a bitter pill to swallow on the long trek from cradle to grave. But after a hard working life most of us hope that our pension will provide at least some cushion for our old bones. Any problems here can be one of life's bitterest pills for prospective pensioners. Pinsent Masons Pensions Executive John Hanratty investigates where things stand when disputes break out.

We live in a litigious and contentious world; a brief scan of daytime TV brings a litany of 'where there's blame there's a claim' adverts encouraging individuals to make claims in all aspects of their life. As a standard part of credit card packages people may automatically be granted legal fees insurance to allow them to pursue claims through the courts.

The pensions world is not immune from this. However, there are a number of alternative methods of dispute resolution open to authorities involved in pension disputes.

Member Complaints

The first port of call for a complaint by a pension member will be the person appointed under Regulation 100 of the Local Government Pension Scheme Regulations 1997.

That appointed individual must write to the complaining member within two months of receipt of the complaint copying their response to the scheme employer and (where necessary) the appropriate administering authority.

Where a member disputes the decision of the appointed person, the disagreement can be referred to the Secretary of State and to the

appropriate administering authority (assuming that the scheme being complained about has an appropriate administering authority).



Whilst the dispute resolution procedure is on-going members may approach the Pensions Advisory Service (OPAS) - a group of volunteers employed in the pension industry, who make themselves available in their own time to assist members of occupational pension schemes to understand issues and resolve disputes.

OPAS employs technical specialists for the more complicated questions and its advisers come from all

walks of pensions life; including pensions lawyers, actuaries, consultants, pensions managers and other industry professionals.

If a dispute cannot be resolved through the dispute resolution procedure or with the Secretary of State, then a member may take the complaint to the Office of the Pensions Ombudsman. Generally, the Office of the Pensions Ombudsman will not hear a complaint until an OPAS adviser has been involved in order to try and resolve the issues.

The Pensions Ombudsman's Office was established in 1993 and the Ombudsman can hear cases involving errors or 'maladministration'. Over recent years the Ombudsman has tried to extend his jurisdiction by deeming certain events to be maladministration.

A determination of the Pensions Ombudsman is binding on both parties to the complaint and is enforceable through an Order of the County Court.

Non-member disputes

It is not only pension members who may have a dispute; we are seeing increasing cases of employing authorities and

administering authorities becoming involved in disputes with each other and with their professional advisers.

We are beginning to see more "true" litigation happening in the pensions world and the usual routes of alternative dispute resolution more commonly associated with commercial litigation such as arbitration and mediation are open to the parties to settle disputes before embarking on Court proceedings. The Association of Pension Lawyers can give guidance where a specialist pensions mediator may be required.

Finally, the increasing amount of litigation involving pension schemes should perhaps be no surprise considering the significant deficits that have grown or appeared in pension schemes in recent years. However, the costs of litigation can be significant and the advantages of seeking an alternative dispute resolution are all the more attractive when dealing with an under-funded pension scheme.

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Alternative Dispute Resolution for local authorities

Should you or shouldn't you make a move? You know you want to, but how will it be received? We are of course talking about mediation. Pinsent Masons Associate Julian Sladdin unlocks some of its mysteries and says that mediation can be a very useful tool for preventing and managing conflicts.

"Today sufficient should be known about ADR [Alternative Dispute Resolution] to make the failure to adopt it, in particular where public money is involved, indefensible", was Lord Woolf's criticism of a failure to use ADR to avoid costly public law litigation in *Cowl v Plymouth City Council* [2002].

Three years on, *Cowl* has a wider ramification for Local Authorities.



Romantic Rotherham fails to attract

Thomson Holidays unfortunately had to withdraw a special holiday offer for a romantic St. Valentine's Day in Rotherham after the promotion attracted no bookings at all – reported *The Times* on 4 February 2005 (Stacks of value, but no takers for lovers' break). What a pity – you'd have thought the fact that it had a 'fair' CPA rating and was 'the ideal venue for a romantic weekend', according to Clark Herron, Rotherham's economic development spokesman would have swung it over Venice or Paris! Some lovers have no taste...

Central Government has encouraged the use of mediation in Local Authority complaint systems and contracts and SOLACE and the Centre for Effective Dispute Resolution recently announced a joint initiative to promote the use of mediation by Local Authorities.

Mediation is already an integral part of the dispute resolution process and is clearly set to become a major tenet of Local Authorities' risk management policies. However, there is a need to understand fully the complexities of the mediation process and when and how it can be best employed before entering this brave new world.

Voluntary and confidential

Mediation involves a neutral third party attempting to facilitate a settlement by overcoming the deadlock of positional bargaining and trying to achieve a 'win:win' position. The mediator does not offer an opinion on the issues nor impose a decision in the event agreement cannot be reached leaving the parties to retain ownership of the dispute.

Benefits of the process

The strength of mediation is its minimum of formality, time and cost and that the parties gain satisfaction from having resolved their conflicts face to face.

A word of caution

However, a decision to use mediation should not be taken lightly. Inappropriate use of mediation or failure to use it when appropriate could lead to



cost sanction. It is probable that the majority of disputes faced by Local Authorities should be suitable for mediation however mediation should always be considered as one of a series of legal options and only used where it can provide a quicker more efficient resolution of dispute, where the cost of litigation is disproportionate to the claim, where the parties are deadlocked in settlement negotiations, where complexities of law, facts and relations between the parties are likely to protract proceedings or where the issues involved are sensitive or confidential.

Mediation will be unsuitable where an important point of law is to be tested by the Courts or legal precedent set, where Summary Judgment is more efficient or where the parties

require injunctive relief (although the underlying issues could be mediated later), where settlement discussions are already progressing or where it is clear that neither party want to settle.

Once these factors have been considered mediation could, as Lord Woolf suggests, be a significant and cost effective tool for Local Authorities in avoiding litigation. It could also have wider implications for preventing and managing conflict outside the litigation process as the fact that almost 90 per cent of cases have settled at mediation shows that it works.

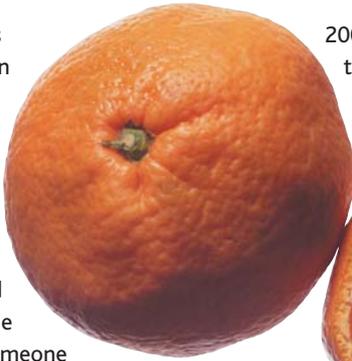
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Getting more juice from the orange

One person's efficiency can often seem like

another's deficiency, especially when you're working hard at having a lie down and someone

moans at you to 'get up and do something useful'. However, the Government takes local government efficiency seriously and published an eighty page paper to prove it on 28 January



2005. Appropriately titled 'Delivering Efficiency in Local

Services', it focuses on the measurement of efficiency gains, as well as the role of the Regional Centres of



Excellence and the activities of change agents. It also gives 'some examples of good practice'.

You will be delighted to note that your authority 'has full flexibility on how and where to achieve the required 2.5 per cent per annum efficiency gains'. The Regional Centres of Excellence (which are hosted, run by and act for local authorities, receiving core funding through the Challenge Fund and Capacity Building Fund) will provide support to

authorities to achieve efficiencies in procurement, corporate and transactional services.

But what is efficiency?

According to the paper it's about raising productivity and enhancing value for money. And efficiency gains can be achieved by one or more of:

- reducing inputs (i.e. money, people, assets etc) for the same outputs;
- reducing prices (i.e. procurement, labour costs etc) for the same outputs;
- getting greater outputs or improved quality (extra service, productivity, etc) for the same inputs or
- getting proportionally more outputs or improved quality in return for an increase in resources.

Power to the people?



Deputy Prime Minister John Prescott set out his vision for putting more power in the hands of local people in the five year plan he presented to Parliament in January 2005 - *Sustainable Communities: People, Places and Prosperity* Cm 6425. Nestling cosily amidst a sixty-five page document are some principles for neighbourhood arrangements.

The paper indicates that the powers agreed between local authorities and neighbourhoods might include: enabling communities to demand action to improve the performance of a particular service; model by-laws and new penalty notice powers to make it easier for communities to deal with problems such as anti-social behaviour; devolution of

budgets, local asset management and the power to manage particular services directly as well as additional revenue-raising powers.

However, any powers would 'have to balance neighbourhood interests of the wider local community, including the promotion of equality and community cohesion'. Whilst the proposals appear radical, they seem some way off from the legislation departure lounge. Indeed the flights probably haven't even yet been booked. Given the financial implications of the proposals the Government is asking the Lyons Inquiry on local finance to consider them and no doubt the Local Government Association will also have some views as the proposals develop.

But if efficiency is about getting more juice from the orange, it's not apparently about cuts (which the paper refers to as 'a significant reduction in the availability or quality of a particular service that the public receive and value'). As the paper points out, whilst councils may have to face hard choices and sometimes implement cuts, the resultant savings will not count as efficiencies.

Read all about it at http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/pdf/odpm_lgcgov_pdf_032969.pdf.



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This newsletter does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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