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Data Protection and FOI/EIR requests – coming out of lockdown – YOUR QUESTIONS ANSWERED

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Introduction



Delays & The ICO's Approach

Covid-related difficulties & the ICO



**Access to info
in physical
form (eg
archives)?**

**Restrictions
on numbers in
the office –
backlog?**

**How do we
handle
requests
working
from home?**

**Difficulties in
accessing
electronic
info?**

**Delays in
accessing the
info?**

Covid-related difficulties & the ICO



- Make requesters aware of the constraints
 - Ask if requesters will accept a partial response (eg if only have access to electronic material)
 - Flag immediately if there will be delays
- ICO's FOI Blog – development of her position
 - No formal power to extend deadlines under DP or EIRs
 - But pressure on resources and lack of access to information are relevant if complaints are made (regulatory context)
 - Need to evidence steps to deal with backlog and return to more normal working
 - FOI toolkit
- Keep an eye on the ICO's FOI blog for developments





Covid-related requests

Covid-related requests



What about requests asking about our working during Covid-19, eg the numbers of staff in the office and at home pre-Covid and now?

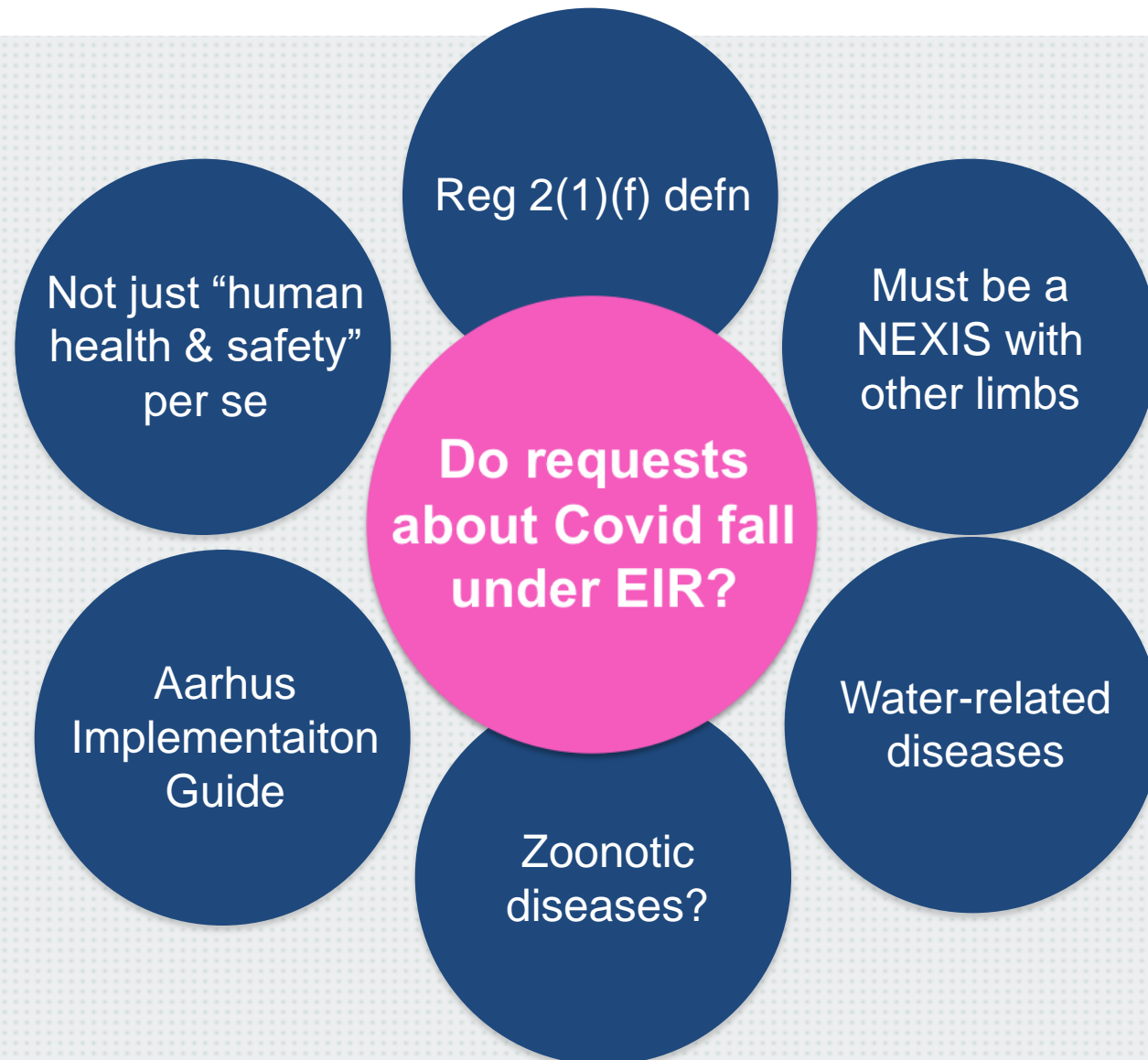
If comply with formalities, must answer

Do you actually hold that info?

No obvious exemption (unless can show harm?)



Covid-related requests





**“Nuisance” and unparticularised
requests**

How could we deal with “nuisance” requests?



FOIA: Can refuse requests where (1) the cost of compliance would be “excessive”, (2) the request is “vexatious”, or (3) the applicant repeats a request which they have already made and been complied with

EIR: Can refuse requests for environmental information which are “manifestly unreasonable”

GDPR/DPA: Can refuse requests for personal data where (1) the data subject already has the information or (2) the request is “manifestly unfounded or excessive”

When should we ask requesters to refine their requests?



FOIA

Can refuse to disclose if the request doesn't provide details necessary to identify and locate the requested information, but must comply with obligation to advise and assist

EIR

Can refuse to disclose if the request is too general, but must comply with obligation to advise and assist, e.g. by seeking clarification as to what the requester means



Form and format of disclosure

How should we present the requested information?



FOIA: requester's preference, so far as reasonably practicable

EIR: requester's preference, unless another form or format is reasonable

GDPR: If request was electronic then disclosure should be electronic, if possible, and unless otherwise requested



Compensation

Compensation for slow/non-response to SARs?



**Compensation
might be
recoverable
for....**



Material damage

Non-material damage (e.g.
distress)

The breach in and of itself?



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1. Record keeping during lockdown and beyond.
2. FOIA, EIR and ‘business as usual.’
3. Extension of deadlines for Subject Access Requests.

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Record keeping during lockdown and beyond (1)



- Obvious strain of the Coronavirus pandemic on local authority services.
- ICO guidance foresees proportionate regulatory action in the circumstances but is clear that no compromise on the need to **keep records**, as the ICO:

“[R]ecognise[s] that the reduction in organisations’ resources could impact their ability to comply with aspects of freedom of information law, such as how quickly FOI requests are handled [...] **we expect appropriate measures to still be taken to record decision making, so that information is available at the conclusion of the emergency**” (p.5)

Record keeping during lockdown and beyond (2)



- No new duty.
- Record keeping remains vital given the potential delays to compliance with freedom of information responsibilities.
- Practically: retain documents relevant to an outstanding issue until **after reply** provided, and a **reasonable period for complaint** elapsed (FOIA) or wait for a request for reconsideration within 40 days (EIR).

Record keeping during lockdown and beyond (3)



- **Toolkit** (under ‘compliance and assurance’) – maintain log or record of requests and reviews. Use Excel (small LA), or Casework Management System (larger LA).
- **Toolkit** (under ‘Handling requests’) – ensure that keep procedures in place to learn from previous requests as “lessons learned are a useful tool to improve future compliance.”

Record keeping during lockdown and beyond (4)



- Retention of information and record keeping more generally – see SoS guidance under s.46 of the **Freedom of Information Act 2000**.
- Note: importance of an effective **records management policy** and scope to review, update and amend the same.
- Consider use of a 'disclosure log'

Responding to requests: 'business as usual'? (1)



- Meaning of 'business as usual' – see the Code of Practice issued under s.45 FOIA 2000.
- “Information given out as part of routine business, for example, standard responses to general enquiries.”
- Examples: i.) request from member of the public regarding when their rubbish will be collected; ii.) where person asks LA whether there is a school space for their child; iii.) Trusted organisation or person seeking to share information for the purposes of joint working.

Responding to requests: 'business as usual'? (2)



- **NOT** appropriate where the information cannot be provided right away.
- **NOT** appropriate where the requester makes it clear that they expect a response under the FOIA/EIR (assuming response is in s.8 FOIA format).
- In any event, when appropriate will depend on capacity.
- Note overuse may inhibit collection of accurate data regarding the volume of requests.

Extension of deadlines for Subject Access Requests (1)



- Article 12(3) GDPR:

“The controller shall provide information on action taken on a request under Articles 15 to 22 to the data subject **without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests.** The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay. ⁴Where the data subject makes the request by electronic form means, the information shall be provided by electronic means where possible, unless otherwise requested by the data subject.”

Extension of deadlines for Subject Access Requests (2)



- Requests have not become more difficult to complete due to their 'complexity' or because of 'number' of requests from the same source.
- Where authority cannot comply in a timely fashion – **give reasons why** and keep **detailed record** of why deadline was not met and the steps taken to mitigate the delay (GDPR Recital 59).
- ICO cannot amend GDPR deadlines – but has stated that pandemic will be considered when considering enforcement on subject access (p.4).
- Further, ICO encourages use of a **recovery plan** with a view to reinstating information access functions.

Resources



The ICO's regulatory approach during the coronavirus public health emergency - <https://ico.org.uk/media/about-the-ico/policies-and-procedures/2617613/ico-regulatory-approach-during-coronavirus.pdf>

Lord Chancellor's Code of Practice on the management of records issues under section 46 of the Freedom of Information Act 2000 - <https://www.nationalarchives.gov.uk/documents/foi-section-46-code-of-practice.pdf>

Section 46 Code of Practice – Records Management: Freedom of Information Act & Environmental Information Regulations - <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

Freedom of Information Code of Practice (under s.45 FOIA 2000) – https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

ICO Guidance on 'Business as usual' (see the 'in brief' section) - <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>



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1. The duty to advise and assist

2. Requests for correspondence with third parties on commercial matters

3. Requests for information collected in a public consultation exercise

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Requests for information: your questions answered



How should we handle the duty to
advise and assist, coming out of
lockdown?

Requests for correspondence with third parties on commercial matters



Which exemptions might apply?

Example: an FOI request for copies of emails, exchanged between a Council and a company which rents commercial premises concerning:

- a) A planning application by the company; and
- b) A rent review affecting the company.

Would s. 43(2) of FOIA (commercial prejudice) apply?

Requests for information: your questions answered



Could any exemptions apply to a request for information (including personal data) collected in a public consultation exercise on a transport issue?



Conclusions

Requests for information: concluding thoughts



It seems to be assumed that lockdown will end, after which Information Rights services will return to pre-Covid standards.

But what if this proves not to be the case?



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