

Research data can be the subject of Freedom of Information requests, as recent high profile cases have shown. As a researcher, how should you respond if faced with such a request? This document sets out to answer that question and some others you may have. Details of particular circumstances can make a major difference, so conclusions reached in an individual case may well differ from those suggested here. This document does not constitute, and should not be construed as, legal advice.



Introduction

Freedom of Information (Fol) and Environmental Information (EIR) legislation provides the public with a right to access information held by a UK public authority, which includes most universities, colleges, or publicly-funded research institutions. The information requested could include your research data, and must be provided unless an exemption or exception allows your institution not to disclose it. The request could be addressed to anyone in the organisation, and there are only 20 working days to respond.

We assume that you are a researcher who works for, or with, or in a university or research institution, and you are concerned about requests for your research data under either Freedom of Information legislation, or Environmental Information Regulations, all of which came into force in 2005. These both differ slightly in Scotland versus the rest of the UK (the EIR differences are not significant for this document). Where significant, the differences are addressed in the relevant answers.

This document is primarily designed to be accessible, and so may over-simplify complex issues. We assume there are one or more Fol practitioners in your institution who can deal with this complexity. We use this generic term as a wide range of different titles is used in practice. Most institutions will have a Freedom of Information link on their home page that should lead you to

the right person. Fol practitioners will be crucial in responding to most requests.

Q1 How do I recognise a Fol or EIR request?

A Fol request simply has to be in writing, give the name of the requester and an address for correspondence, and specify the information requested. However, writing is interpreted liberally, and definitely includes email. A Fol request does NOT have to mention Freedom of Information. EIR requests can be made verbally, and also don't have to mention the regulations.

Q2 What's the short answer on what I should do if asked for data?

Most requests for information you will receive are part of routine business as usual, and need not be treated as Fol or EIR requests (even if, formally speaking, some of them are). Researchers share or trade data all the time, so if you normally agree to share data, you should continue to do so, paying due care and attention to normal research considerations eg ethics, privacy and confidentiality. However, in circumstances where you don't want to supply the data, or you think there are legal or ethical reasons why you shouldn't supply it, or the request is specifically identified as a Fol or EIR request, then you should consult your Fol practitioner as soon as possible. Explain the request, and the reasons why you don't want to supply the information, and they should take it from there. However, they will still need your help.

Q3 Why should I make my data available?

The Freedom of Information Acts and Environmental Information Regulations are designed to ensure accountability and good governance in public authorities. Most UK universities are defined as public authorities, and thus have a legal obligation to disclose information unless the law specifically provides a reason why they need not. In other words, unless there is an overriding reason for not providing information to the public, you must provide it. The reasons the law will consider as acceptable are contained in the Fol Acts as "exemptions" and the EIRs as "exceptions". If in doubt whether your data might be exempted/excepted, consult your Fol Practitioner who should be familiar with all the details.

Q4 How long have I got to respond to a request?

The legislation requires your institution to supply the information, or a refusal notice, within 20 working days from receipt of the request. It's good practice to acknowledge a request on receipt. If you are in any doubt about how to respond, consult your Fol practitioner immediately. If possible, get them to take over correspondence.

Where the request is not clear enough to identify what is being requested, you may have to ask the requester for clarification, and the 20-day clock will then stop until the requester provides this. An extension may also be possible in order to consider the public interest test.

Q5 I don't want to provide my data. What must I do first?

Ideally, you will have considered the Fol/EIR implications for your research data as part of your initial research data management plan (see Q21), and identified whether you wish to, or are required to, withhold some or all of your research data from public access.

On receiving a request, you should contact your Fol practitioner without delay and discuss the particular circumstances with them. In most cases, your institution has to confirm or deny whether it holds the information, and supply it or a refusal notice, within the 20-day time limit. There may need to be negotiation on the form of provision of the information.

There are three main grounds for not providing information to requesters:

1. it would cost too much (see Q18);
2. the request is repeated or "vexatious"; or
3. the request may be subject to a defined Fol exemption or EIR exception.

Some exemptions, such as those relating to personal information, are absolute, and in these cases there is no right to information under Fol; others are qualified and subject to a public interest test (Q13). Whatever the grounds for not providing data, we strongly recommend that your Fol practitioner take over correspondence with the requester. Where the exemptions/exceptions, and if appropriate the public interest test, support withholding a refusal notice must be issued.

The requester can challenge this via an internal review at your institution. If that also supports non-disclosure, the requester can apply to the relevant Information Commissioner to review the decision, and even appeal to an information tribunal.

Q6 What are the most likely Fol exemptions for research data?

While there are exemptions to the requirement to disclose information, there is generally a presumption in favour of release. Except for absolute exemptions, this means that institutions must justify decisions not to disclose by applying a public interest test (Q13). Exemptions to disclosure include information accessible by other means, information containing personal data (Q8), information subject to a duty of confidentiality (Q9) and information the release of which would prejudice legitimate commercial interests (Q10). In addition, and of interest to research, exemptions can cover information that is to be published in the future (Q12). In Scotland there is an important additional exemption for information being gathered in a programme of research that will itself lead to publication. Of these, the otherwise accessible, personal data and confidentiality exemptions are absolute.

However, the exemptions are complex and subject to interpretation as a result of decisions by the Information Commissioners. Always discuss a request with your Fol practitioner.

Q7 If there's an exemption/exception can I ignore the request?

You should NEVER ignore a Fol or EIR request. Unless you are going to supply the information requested as business as usual, and within 20 working days, you should always consult your Fol practitioner.

Q8 Some of the information may identify living individuals. Must I disclose it?

The relationship between the Data Protection Act and Fol/EIR is complex. Both Fol Acts make personal data, where the requester is the subject, exempt information (there is a similar exception under EIR). The requester should apply under the UK-wide Data Protection Act (for which different rules, timescales and fees apply).

If the requester is not the subject of the personal data, the exemptions become more complicated. Always discuss such cases with your Fol practitioner and/or data protection officer. In most cases where an exemption applies, it will be an absolute exemption, so no public interest test is needed.

Please remember that some kinds of anonymised, summary, tabular or statistical information that does not directly identify individuals may, when combined with other information, disclose the identity of those individuals. Specialist guidance is available, eg from UK Data Archive¹.

Q9 The data are covered by confidentiality agreements, must I provide them?

If the information comes from elsewhere and is covered by a confidentiality agreement, an exemption may apply. However, simply stating that information is confidential is not enough – there must be a real likelihood that disclosure would open the public authority to legal action for breach of confidence. Equally, marking documents "Confidential" or "Commercial in Confidence" is not sufficient evidence that their contents are in fact confidential. Consult your Fol practitioner.

Q10 Research is our business! Can I use the commercial exemption?

Universities have made use of the commercial exemption, but we don't know of anyone who has successfully used it as an exemption for research data. However, if you can show a real possibility that disclosure would seriously harm your research and follow-on research projects, or the possibility of commercial exploitation by the university or spin-out companies, then use of this exemption is possible.

Q11 But the requester is a competitor. Do I still have to comply?

In principle, the Fol Acts and EIR are "applicant blind and motive blind". The location, nature and/or motives of the requester are irrelevant.

Q12 But my research isn't finished. Do I still have to supply the information?

The fact that your research is not complete is not enough on its own to prevent disclosure, although under EIR there is an exception for information that is incomplete.

There is a Fol exemption from the duty to provide information that is intended for future publication. The intention must have existed before the request was received. However, under Scottish Fol the planned publication must be within 12 weeks of the request date; this period is not defined in the rest of the UK. This exemption may be of limited use as there must be a plan to publish the information requested, not simply an article based on the information.

However, if you have a policy to publish all research data once research is completed, then this exemption might be available. So a plan to publish later will protect your data from premature disclosure.

There is an extremely important research exemption under Scottish FoI (but not in the rest of the UK) for information obtained in the course of an ongoing programme of research (where a report of that research will be published, whether or not it includes the information requested). However for the exemption to apply, early disclosure must substantially prejudice the research programme, participants or the institution.

Q13 What's this Public Interest Test?

A few exemptions are absolute, and so always apply (see Q6). But many exemptions and all EIR exceptions are subject to a public interest test. In short, this says that the particular exemption or exception only applies where the public interest in withholding the information is greater than the public interest in disclosing. This will be a matter of judgement; in the first instance the judgement of your institution will apply, but there may well be a call for review or appeal. The Information Commissioners tend to view exemptions narrowly and the public interest broadly, so care must be taken in applying the public interest test.

Q14 Are my data environmental information?

Environmental information is broadly defined. Pretty much everything relating to the environment counts as environmental information, including information relating to environmental research, or plans, policies, advice etc, as well as the environment directly. Ask your FoI practitioner if you are in any doubt.

Q15 What are the most likely exceptions to the EIRs for research data?

The exceptions to EIR are fewer than for FoI, and none are absolute (so all are subject to the public interest test) as environmental information is seen as extremely important to citizens. Once again there are exceptions for personal data and for confidential information. There are also exceptions for information that is incomplete, and an exception concerning disclosure of internal communications. It is not clear how these might apply, and it is very important to consult your FoI practitioner, and for them to proceed carefully.

Q16 What can the person who gets my data do with them?

Intellectual property rights (IPRs) cannot prevent the disclosure of information under FoI, but the rights still apply. So if, for example, you or your university own copyright in the information, the person to whom it is disclosed will require your permission to perform acts controlled by copyright, such as publication. Any restrictions on re-use should be made clear when data are released. IPRs may be raised as an exception under EIR Regulation 12 if you can prove they would be adversely affected by disclosure, and the public interest in maintaining the exception outweighs the public interest in disclosure. However, there can be difficulties in establishing:

1. The extent of copyright if the information is data (copyright may not be applicable to all factual data, although other IPRs such as the Database Right may apply).
2. The ownership of any IPRs, particularly where research collaborations are involved (and doubly so if the collaborations are international, as data can have different copyright status in different jurisdictions).

It is important to make ownership rights to any information including research data explicit as part of a data management plan (see Q 21) or collaboration agreement prior to the



research starting. This is particularly important for collaborations, whether national or international.

Q17 How common are FoI/EIR requests for research data?

To date (2010) FoI or EIR requests for research data have been rare, although the high profile case at Queen's University, Belfast received a lot of publicity. So, at present, you are extremely unlikely to receive a request for research data. However, special interest groups and journalists are getting more familiar with using FoI requests, so this likelihood may increase, particularly in controversial areas or research affecting public policy.

Q18 Is the cost of providing the information an issue?

Both FoI Acts have an exemption where the cost of supplying information is above an "appropriate limit". There is guidance relating to the calculation of such costs, although it differs in Scotlandⁱⁱ from the rest of the UKⁱⁱⁱ. The threshold may change, but was originally set at £450 for public authorities other than central government bodies (£600 in Scotland). Direct disbursements like copying and postage can be charged.

Q19 Can't I just delete data I don't want to disclose?

You can delete your research data unless a request has been made for it under FoI/EIR. Once a request has been made it becomes a criminal offence to delete or destroy the information. Most of the sanctions under this legislation apply to your institution, but if you delete requested information or order deletion, you could be personally liable. Don't do it, and make sure it is not deleted accidentally after the request.

Q20 What form should I provide my data in?

If the requester asks for the information in a particular form, and you can reasonably easily supply it in that form, then your duty to be helpful to the requester suggests you should supply it as requested.

Q21 How would a data management plan be helpful?

Research funders increasingly require data management plans^{iv} to be created at the grant application stage. Maintained throughout the research lifecycle, a data management plan should help you think carefully about issues such as ethics, confidentiality, anonymisation, security, openness and sharing, data structures, records management and retention periods. The decisions you take in planning your data management may have a significant effect on how easy it would be to answer a FoI or EIR request, and could have an impact on whether a request can legitimately be refused. For larger, or long term, research projects it may be advisable to have protocols in place specifying how requests will be handled, to ensure all personnel involved with the project have a clear reference point with regard to FoI/EIR requests. For advice, consult your local research support office, records management office and/or FoI practitioner.

Further Information

Your first call should be to local information sources, including your FoI practitioner. JISC has funded JISC Legal and JISC InfoNET to provide information on FoI, so their web pages may prove helpful.

JISC Legal provides a section on Freedom of Information, including an “Essentials” document^v, and other publications. JISC InfoNet also provides some information on FoI, mainly from a records management perspective. They also have a useful guide to managing research records^{vi}.

JISC is also running a programme on managing research data that may point to further useful information^{vii}.

You may also find useful information through the Information Commissioner’s Office, which has a useful FAQ for organisations^{viii}. Guidance on exemptions is provided by the Ministry of Justice^{ix}. The Scottish Information Commissioner has a good set of Briefings and Guidance^x. These include a briefing on the future publication and research exemptions under the Scottish Act, and the incomplete information exception under EIR^{xi}.

- i See UKDA, (undated) Anonymisation, University of Essex.
www.data-archive.ac.uk/create-manage/consent-ethics/anonymisation
- ii See SIC. (undated) Public Authorities FAQ: Fees. St Andrews.
www.itspubliknowledge.info/FAQ/PublicAuthorityFAQ/FeesFAQ.asp
- iii See ICO. (2009). Freedom of Information Act: Using the Fees Regulations (June 2009) Wilmslow. Retrieved from:
www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fees_regulations_guidance_v2.pdf
- iv See UKDA guidance, e.g. Eynden, V. V., Corti, L., Woollard, M., & Bishop, L. (2009). Managing and Sharing Data. Colchester. Retrieved from:
www.data-archive.ac.uk/media/2894/managingsharing.pdf
See also DCC. (undated) Edinburgh Guidance and Tools: Data Management Plans.
www.dcc.ac.uk/resources/data-management-plans
- v JISC Legal. (2008). The Freedom of Information Act 2000 – Essentials. Glasgow. <http://www.jisclegal.ac.uk/ManageContent/ViewDetail/tabid/243/ID/930/Freedom-of-Information-Act-2000-Essentials-26022008.aspx>
- vi JISC InfoNet. (2007). Guidance on Managing Research Records. Newcastle.
www.jiscinfonet.ac.uk/partnerships/records-retention-he/managing-research-records
- vii See the JISC, Programmes: Managing Research Data www.jisc.ac.uk/whatwedo/programmes/mrd.aspx
- viii See ICO, (undated) Freedom of Information FAQs – For organisations. Wilmslow.
www.ico.gov.uk/Global/faqs/freedom_of_information_for_organisations.aspx
- ix See Ministry of Justice. (various dates) Freedom of Information: Exemptions guidance. London
www.justice.gov.uk/guidance/foi-exemptions-guidance.htm
- x See SIC (various dates) Briefings and guidance. St Andrews.
www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/Briefings.asp
- xi See SIC (undated) Information intended for future publication. St Andrews.
www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/section27/Section27.asp

Written and compiled by Chris Rusbridge, Consultant, and Andrew Charlesworth, Reader in Law, University of Bristol. This is an abridged version

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