

CAP 2008 Training Days Reports Training Day Two: Access to Archives

[NB – these notes are my impression of what we discussed and the conclusions that we reached. Please don't mistake them for any kind of definitive statement relating to the law – for that you need to buy Kelvin's book: *Freedom of Information: a practical; guide to implementing the Act* (London, Facet, 2004)]



Kelvin Smith, late of The National Archives (TNA) talked us through the requirements of the legislation related to which archive holdings we have to give out, which we have to keep secret, and which we have a choice about.

The big issue that most of us face is family history requests, and the relationship between the Data Protection Act (DPA) and the Freedom on Information Act (FoI). DPA establishes a right to look at your own records but keep them from others. FoI set out a broader 'right to know' unless it causes substantial harm. It's worth taking a look at the relevant legislation, but rather than get bogged down in the detail, the key things to bear in mind are the 8 Data Protection Principles, and the 28 different classes of exemption under the FoI. The million dollar question is whether to apply DPA or FOI? A good rule of thumb is that information about living people should be considered under DPA: dead people, under FoI. Without positive proof that someone is dead, a notional period of 100 years after their date of birth is normally used.

Private institutions can hold different categories of records: some that are FoIable (these may or may not be open); statutory public records, such as the archive of the Prison Service (these must be open); and records that fall into neither category, to which the FoI does not apply. All records of public bodies are FoIable, but if they were copyrighted, they remain under copyright even if released under FoI.

An 'FoI request' is in fact any request for information to any member or employee of an organisation, although in practice some public bodies will only treat something as

an FoI request if it is labelled as such. It must be in writing, and have a name and contact details for the requestee (email will do), and describe the information that they want. There is a 20 day limit for a reply, but this only needs to be an acknowledgment.

If you hold information which is regularly subject to FoI requests, it might be a good idea to make sure that it's on your organisation's publication scheme. There's a statutory duty for every public organisation to have one of these. It's good to have a publication scheme which contains information that people are going to ask for a lot: this can save a lot of time. And the publication scheme can also contain a description of the information that you have and a schedule of charges for FoI requests relating to it. The Information Commissioner's website has model publication schemes on it, and new ones are due out on the website in June or so.

It's possible under the act for one public body (such as a museum with an archive) to consult another, such as TNA or the Home Office, if they are unsure whether or not to release a documents which each has a copy of. The limit of cost per FoI request (£450) is calculated on the basis of how long it would take to dig the information up, rather than the time it might take to arrive at the answer of whether it's appropriate to give it out in the first place, even if this includes appeals to the Information Commissioner. One might expect the FoI to have rendered archive charges illegal, but this is not the case: TNA still do them, and have a legal opinion justifying this.

There are a number of FoI exemptions for historical documents. For example, number 29 refers to the 'administration of justice' and it is unlimited; number 31, concerning law enforcement can apply for up to 100 years; number 22, which deals with documents need to form an audit, lasts up to 30 years.

Some things can be released early if the information is already 'In the public domain' but this is not always as all-encompassing a defence as it might seem, so not always something that can be relied upon. The old test for releasing material was whether or not it would cause 'substantial distress'. Causing embarrassment is not a problem – causing harm generally is. The new test is based far more on what the Information Commissioner's Office (ICO) will let you get away with. The records of decisions by the ICO (available through http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx) are a useful resource which can offer you guidance on what the limits of disclosure under the FOIA are. This can be searched by exemptions – in other words, there's a list of all the relevant exemptions under the Act, and under it are listed all the decisions that have a bearing on that particular exemption. This is not always the final word: there's another appeal destination after the IC's office called the Information Tribunal.

Redaction (covering up personal or otherwise restricted information before release) is a very useful technique for us, although it's labour intensive. You can cover things up 'electronically' in Word, but then you MUST convert it to a PDF before releasing it to make sure that everything that is hidden stays hidden. Word files often have a lot of information buried in them about what they used to look like: merely deleting something can't guarantee that it's definitely gone. Remember also that it's not just names that must be covered, but all 'identifying markers', such as numbers, position, police and prison service numbers. To some extent the demands of the DPA can be side-stepped by *bona fide* researchers who have agreed to a guarantee of

confidentiality. Different organisations apply different rules to this process, but most require a letter of introduction from a sponsoring academic institution, check a draft of material before publication, and require a copy of the published material for their own records.

We left at the end of the day feeling that we'd got a good idea of the big picture, but also aware that the only way that this area can be negotiated is by close attention to the detailed requirements of the legislation. I have since checked out the ICO's website, and can recommend it: the guides produced by TNA and available on their website (<http://www.nationalarchives.gov.uk/recordsmanagement/code/default.htm>) are also a good starting point.