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Local Authority Handling of Freedom of Information Requests: Lessons from a Research Project

Introduction

Freedom of information requests can provide a fruitful resource for citizens, public interest groups, journalists and academic researchers alike. Since the Freedom of Information Act 2000 ("FOIA") and the Freedom of Information (Scotland) Act 2002 have come into force, the respective legislation has weaved into a fabric of existing mechanisms used to facilitate democratic accountability. Freedom of information is seen by some an 'essential component' in the quest for truth (Birkinshaw, 2001). The information obtained by such requests make a valuable contribution to the marketplace of ideas. An informed populous ensures the continued evolution of healthy, mature democracies, with the informed population more able to hold government accountable (Fenster 2010).

The purpose of this article is to report on early findings from a wide scale research project which relies on the effectiveness freedom of information provisions in order to obtain data. If freedom of information legislation does not function to ensure disclosures by public authorities, the research data necessary for the research would either not be available or would be much more difficult to obtain. In making FOIA requests, the authors hope to map the use of whistleblowing disclosures within a complex regulatory landscape, involving both local authorities and national regulators. In this piece a whistleblowing disclosure is seen as communication "by organisation members… of illegal, immoral or illegitimate practices under the control of their employers to persons or organisations who effect action" (Near and Miceli 1985) A particular emphasis is placed on the regulation of food premises. Following the development of an effective methodology to capture the required information, the authors sent FOIA requests to 48 local authorities as a pilot study.

The first part of this article will provide an introduction to the legislative provisions, outlining some of the hurdles faced by individuals motivated to make requests. The second part will

provide a detailed explanation of the methodology utilised by the authors. The third part will report on the initial results of the project. The article will then conclude by making recommendations for both requesters and local authorities with the aim of making the freedom of information regime more effective for all parties concerned.

1. The Legal Context – The Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002

This section will primarily focus upon the Freedom of Information Act 2000 ("FOIA"). Whilst it is acknowledged that there are variations in the provisions contained in FOIA (England and Wales) and the Freedom of Information (Scotland) Act 2000 the majority of local authorities contacted for the purposes of this pilot study were based in England and Wales.[1]

The Freedom of Information Act 2000 provides the general public with a right of access to information held by public authorities. Section 1 of the Act provides that 'any person' making a request to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case to have that information communicated to them. If the public authority does not hold the information requested, the person is entitled to a notice of denial. Where the information is determined to be exempt from disclosure, the person is entitled to be informed of this. The definition of 'any person' is not restricted to natural persons, as a consequence companies and persons located both domestically and abroad are entitled to request for information. Section 8(1)(a) – 8(2) FOIA provides that the request must be made in writing, including by electronic means, such as e-mail, provided that it is received in a legible form and is capable for being used for subsequent reference.

According to s.84 of the Act, information is defined as 'information recorded in any form.' Section 8 (1) (c) requires the applicant to describe the information he or she requests. This 'places the applicant at a significant disadvantage as he or she will be likely unfamiliar with the way in which the information has been stored by the public authority in question'

(Wadham, Harris and Griffiths, 2007). Public authorities are, however, under a duty to provide assistance to individuals making requests as per s.16 of the Act allowing the opportunity for applicants to be steered in the direction of particular types of information stored.

i. Cost limit

Public authorities are entitled to charge a fee of £25 per hour to cover the cost of the time spent by staff in searching for and providing the information requested (Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 regulation 4(4). Section 9 of the Act requires that they must provide a fees notice to the applicant to notify them of the intended charge. Moreover, there is an exemption from providing information where to do so would exceed the cost of £650 for government departments or £450 for all other public authorities.[2] Where this is likely to be the case, the authority should provide an indication of what information could be provided within the cost limit.[3] Section 10 (1) of the Act requires that a public authority must respond to a request for information by providing an acknowledgment as per the terms of s.1(1) promptly, and in any event not later than the 20th working day following the date of receipt. Under section 14 of FOIA a public authority is also not obliged to provide information where the request is deemed 'vexatious.' In Carpenter v Information Commissioner the Information Tribunal held that whether a request is vexatious is a question of fact to be decided in all the circumstances. The authority should consider factors such as whether the request forms part of an extended campaign which appears unfounded, whether the applicant has previously been provided with the information, whether the request entails disproportionate burdens on officers, whether the correspondence is tendentious, haranguing or obsessive and whether the request would have negative health and/or well-being effects on officers.

It is submitted that the cost limit may provide a substantial barrier to obtaining information. If the information requested is not stored or recorded in an easily accessible format there is an increased likelihood that the cost to retrieve the information would render the request of over the cost limit. A response received from a national regulatory body (reported in Savage and Hyde 2013) suggested that the response was not supplied because data was stored in each local office and aggregating that data would cost more than the limit. Whilst it is arguably

helpful for public authorities to work with applicants to provide a solution to reduce the potential cost to below the prescribed limit this may have an impact on wide scale research projects. In a research exercise in which a number of public authorities are contacted at once and the same questions are asked, the benefit of local authorities providing *some* but not *all* of the information requested is diminished. A comparable sample cannot be obtained where there are only partial results, as each local authority will not have reported the same data, and therefore information cannot be examine and compared to that provided by other authorities. Further, missing data reduce the robustness of research results, particularly when data is obtained from an entire population.

ii. Exemptions

There are a number of exemptions to the types of information that may be disclosed. Exemptions pertain to information regarding such matters as, national security, international relations, the conduct of criminal investigations and the conduct of public affairs.[4] For reasons of focus, this article will outline the form in which an exemption may take. It will then identify specific exemptions relevant to the authors' research study.

iii. Harm based and class based exemptions

The exemptions may be either 'harm-based' or 'class-based'. A 'harm-based' exemption places a requirement on the public authority to identify that the release of the information requested by the applicant would, or would be likely to, cause 'prejudice' to the interest specified the provision pertaining to the particular exemption. The Information Commissioner's guidance (Information Commissioner' Office 2013) on the meaning of the prejudice test suggests that the prejudice shown 'need not be substantial' but should be 'more than trivial.'[5] Whilst the appropriate level of prejudice is not specified, the Commissioner has advised public authorities that 'the less significant the prejudice is shown to be the higher the chance of the public interest falling in favour of disclosure' (Information Commissioner' Office 2009). Some of the provisions apply an additional hurdle whereby the public authority must first consider the prejudice test before considering a public interest test contained in s.2 of the Act.[6] Some provisions require the public authority to engage the prejudice test but do not require the public authority to consider s.2 public interest test.[7]

Where the public authority is required to engage a public interest test, section 2(1)(b) FOIA provides that the duty to confirm or deny the existence of information contained in section 1 does not apply where:

"In all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing the information"

With regards to the disclosure of the information FOIA s.2(2)(b) provides that the duty to disclosure does not apply where:

"in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

The Information Commissioners Office has issued guidance on the public interest test (Information Commissioner' Office 2009). This identifies broad categories which place a presumption in favour of disclosure. Firstly the release of information may 'further the understanding of and participation in the public debate of issues of the day.' Secondly, it may 'promote accountability and transparency by public authorities for decisions taken by them.' Thirdly, it may 'promote accountability and transparency in the spending of public money.' Fourthly, it may 'allow individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.' Fifthly, disclosure of the information may 'bring to light information affecting public health and safety' the prompt disclosure of which may prevent accidents or 'increase public confidence' in official scientific advice. The aforementioned guidance provides a number of different justifications for the disclosure of information. Once it is apparent that an exemption is likely to be engaged, it is for the public authority to conduct the public interest test, thus the burden is placed upon the recipient of the request rather than the requester to make a detailed determination as to whether the information should be disclosed.

In contrast to harm-based exemptions, class-based exemptions require the public authority to identify that the information requested falls within a certain category of exempted information contained within a provision. Certain provisions are subject to a class-based exemption where the public interest test does not apply, these 'absolute' exemptions do not require a public authority to prove that harm or prejudice would result if the information is

disclosed, this is easily achieved. There are provisions contained in the Act which are subject to a class-based exemption and where a public interest test will apply. Applicants are placed at a disadvantage if their request for information is likely to concern information falling within a class-based exemption. It should be noted that a class-based exemption subject to a public interest test will be more easily satisfied than a harm-based exemption which is subject to a public interest test, as the public authority does not have to show prejudicial effect, merely that the information fell within the prescribed category of information. This discussion will now proceed to identify exemptions relevant to the research study.

iv. Confidential Sources

FOIA section 30 (2) provides that a public authority is exempt from the duty to communicate information where it relates to investigations, criminal proceedings or civil proceedings to which the authority has the power to conduct and the information in question relates to the obtaining of information from a confidential source. It is a qualified exemption subject to a public interest test. The provision could relate to circumstances whereby a member of the public or an employee makes a complaint which may prompt an investigation and subsequent enforcement action. The public authority is exempt from their duty to confirm or deny such information. It is submitted that this section poses challenges for both applicants and public authorities.

First, a public authority must proceed with considerable caution before releasing the information to an applicant; the disclosure of relatively innocuous information may contain particular information of which only a certain person or a small class of persons could have been aware. Disclosure of such information poses the risk of that individuals will be discouraged from informing enforcement and/or regulatory bodies for fear of reprisals, particularly where responses to FOIA requests are then published on the public authority's website, accessible to all.[8]

Second, researchers in receipt of such information must likewise be careful not to publish information which could result in reprisals to others, adopting a protocol for dealing with such a situation (Hyde & Savage 2012). Thirdly, a public authority may recognise the potential for danger but over compensate by removing/ redacting any information considered potentially harmful. This creates difficulties for research attempting to interpret the data,

particularly where the un-redacted data appears unclear or is undecipherable without access to the redacted parts.

v. Duty of Confidence

Section 41 (1) FOIA provides an absolute exemption of the release of information if, it was obtained by the public authority from any other person, including another public authority, and the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person. It is noted that the provision has the potential to prevent release of documents which may, if ordinarily subject to a qualified exemption, be in the public interest. Requests may be frustrated when an exchange of information by two public authorities has resulted in the creation of a duty of confidence. The result is that applicants will be unable to obtain information on a particular topic from either authority. The exemption may impact on information that results from the sharing of intelligence between authorities, the process and disclosure of which may be of great interest to researchers (see, in an international context, Black 2008 and Meidinger 2009).

vi. Delay

Whilst delay is not an exemption, delay caused by a public authority's failure to respond to FOIA requests may act as a considerable barrier to the access of information. Public authorities have obligations under FOIA to provide a formal response within a specified time frame. FOIA section 10 (1) requires a public authority to respond promptly and no later than the twentieth date of receiving the request. The Information Commissioner has produced guidance suggesting that it is good practice for public authorities to formally acknowledge receipt of the request.[9] Under s.1 (3) FIOA public authorities may seek to clarify the request with the applicant. In this case the time would begin when a response to the clarification has been received. The Information Commissioner's guidance indicates that where a public authority has failed to comply with the time period set out in s.10 (1) the Commissioner may issue an enforcement notice. In conducting large scale research involving FOIA, applicants must keep a close eye on requests to ensure that responses are received within a specified time. Whilst steps may be taken to complain both within the public authority and to the Information Commissioner the fact remains that delays can frustrate the FOIA regime. This

has a particular impact when the information requested or indeed the project in which the information was intended is of a time sensitive nature.

Having considered the framework in which local authorities operate, this article will turn to examine the handling of requests in practice, considering the example of the authors large scale research project into whistleblowing. Using the response to these requests, it is possible to gain an appreciation of the practice of public authorities when responding to requests for information. Before, examining the responses received it is necessary first to authors' methodology, both in the study of FOIA response, and in the overarching study for the purpose of which the requests were made.

2. Methodology

Whilst this paper examines the handling of Freedom of Information Requests by local authorities, it draws upon research conducted during a large-scale study into the whistleblowing and regulation. Our overarching study questions how national regulators and local authorities in England, Scotland and Wales are handling whistleblowing disclosures, and in particular those disclosures relating to non-compliance with food law (see, in part, Hyde and Savage 2012; Savage and Hyde 2013). The first phase of the study was designed to map the current engagement of local authorities with whistleblowing disclosures. This project required examination of whether disclosures were being received, what types of non-compliance they disclosed and the response to such disclosures. We were also interested in examining local authority documentation governing the handling of whistleblowing disclosures, so such documentation was also requested. We had previously conducted similar research utilising FOIA which examined the handling of whistleblowing disclosures by national regulators (Hyde and Savage 2012; Savage and Hyde 2013). This article does not discuss the results of our investigation, but instead considers what our investigations demonstrate about the handling of disclosures by local authorities. The decision to consider the handling of freedom of information requests as a corollary to our main project was driven by a desire to improve the requests sent to authorities not within the pilot sample, and to refine our approach to obtaining data through the freedom of information requests. As this approach has proved successful in providing large amounts of data to analyse, we intend to use it in future, and by analysing the responses to our request we can tailor future requests to

produce high quality data. However, in order to put the findings in proper context it is necessary to briefly outline the methodology of our pilot study.

Publically held data is an important source for the examination of the behaviour of public authorities (Turner 2004; Weick 1990). This is particularly the case in food regulation where authorities make decisions based on their assessment of the risks posed by products. These assessments are based on information collated and analysed by public bodies (Rabinow 2008; Ericsson and Haggarty 1997).

Data held by local authorities about the handling of whistleblowing diclosures, and particularly the reception and use of information contained in such whistleblowing disclosures was not publically available. Details of how such disclosures are handled and translated into enforcement action had not been previously explored (so secondary data could not be accessed), nor had local authorities published their experiences in handling such disclosures. Therefore it was necessary to obtain this information from the authorities in order to conduct the research. We identified freedom of information requests as an appropriate research tool for obtaining such information. Whilst we could have approached the authorities and attempted to negotiate voluntary access to such data, such negotiations would be lengthy and unlikely to produce uniform answers to the research questions posed in the study. Freedom of information requests can be dispatched to multiple local authorities at the same time, allowing information held by public authorities to be obtained cheaply and in a uniform fashion. This data can then be usefully compared, allowing trends to be discerned. Furthermore, we had successfully used Freedom of Information requests to obtain this type of data while conducting similar research (Savage and Hyde 2013).

As we were interested in disclosures regarding food law it was necessary to identify the public authorities which would receive such disclosures. County, district and unitary authorities all have responsibility for food law enforcement;[10] parish councils do not. Therefore, we decided to send requests to all county, district and unitary authorities. In total 411 authorities were within the population. However, before sending requests to all authorities within the population, we decided to perform a pilot study. The pilot study enabled the testing of the form of questions asked in the request in order that the instrument would produce the best possible data from the responses. Our pilot study involved the making of Freedom of Information requests to 48 local authorities who had responsibility for the enforcement of food law. The authorities to be sampled during the pilot phase were selected

using a simple alphabetical method; those that began with the letters A and B were to be included within the pilot. The remaining authorities will be sampled in our main study.

A pilot request was formulated, containing six questions. The text of the request is set out in the appendix. The request was submitted to the 48 authorities by e-mail to the dedicated e-mail address for the receipt of freedom of information requests.' These were identified by examining the websites of the authorities concerned.

The methodology adopted does not present any ethical issues, as the analysis is of publically available data (although such data was made public in response to the request made by the researchers). Public authorities comply with the requirements of the Data Protection Act when responding to Freedom of Information requests, meaning that identifying data is not disclosed in responses. Therefore, individuals are not exposed to the risk of harm. As well as supplying the data directly to us, a number of local authorities also published the response on their own websites. In terms of the larger project, the responses received do not reveal personally identifying data, as the requested authorities are under a duty, under section 4(4) and Schedule 1 of the Data Protection Act 1998 read with section 40 of the Freedom of Information Act 2002, to ensure that data is scrubbed so that it does not identify individuals or businesses. In this study we are not examining this data, but the more prosaic, procedural, matter of the responses to our requests. As the responses are publically available data it would be legitimate to identify the source of the data where necessary, but we decided not to reveal the identities of local authority information officers, as this data is not essential to the evaluation of the responses received.

As a result of the pilot study we were able to draw conclusions about the ways in which freedom of information requests were being handled by local authorities, and to make recommendations about the handling of such requests. In order to comment on the handling of freedom of information requests we analysed the responses received from the local authorities in two ways. We compiled simple descriptive statistics in order to describe the sample and the results of our freedom of information requests. This provided an answer the question of what was happening to our freedom of information requests. In order to examine why local authorities gave particular responses we performed qualitative analysis of the responses received using the NVivo8 computer assisted analysis of qualitative data program (Bazeley 2007), drawing upon a grounded theory approach (Glaser and Strauss 1967 ; Strauss and Corbin 1998) to identify the key concepts show in the responses from the authorities. The

concepts reported in this article were repeated by a number of authorities, and therefore reached theoretical saturation, identified by Glaser and Strauss (1967) as the marker of a reportable concept about which a researcher can be confident. Confidence does not come from numeric accumulation of concept, and there is not threshold at which the concept becomes theoretically saturated. Instead, once data begins to be repeated a significant number of times it is treated as saturated. Therefore, it is argued that the concepts reported reflect a trend rather than simply being artefacts of the sample chosen. This article reports those findings, and draws conclusions about the handling of Freedom of Information requests by local authorities. Furthermore, it provides guidance to authorities and to researchers using FOIA requests in research.

3. Results – how were requests handled?

Responses were received to the pilot requests sent to the 48 local authorities. Requests were dealt with in by local authorities acted in four ways.[11] They responded to the request, requested clarification or refused. In a three cases the requests were ignored (or at least not acknowledged and responded to within the statutory time limits).

Whether this was deliberate or inadvertent is unclear, although it is submitted that such non-response is likely to be inadvertent. Such inadvertent failures to respond were tackled by communication with the local authority to ensure they had received the FOI request, and if necessary resubmission of the request. In one case the non-response was due to a failure to receive the request because the e-mail address displayed on the website had been superseded. It is submitted that e-mail addresses to which e-mails should be addressed should be more prominently displayed on the websites of some authorities, as it was often difficult to ensure that a request was directed to the correct place. By identifying more clearly the proper recipient of an information request the request will be directed to the proper officers, potentially leading to greater efficiency in responding to the request. Therefore, this section will focus on the three main responses; answer; clarification; and refusal.

i. Answer

The majority of local authorities in our pilot sample responded to the request by providing all or some of the information requested. Only two failed to respond at all. Most authorities responded to questions one and two, although four directed us to the location of the documents requested on their website. All 46 authorities that replied responded to question

three. With questions four, five and six some of these responses were partial, with a refusal to answer one or more of requests four, five and six or a request for clarification of the terms of the request. Where the answer was given, in some cases the data was insufficient to answer the questions posed by the research with insufficient detail provided on the use of the whistleblowing disclosures received. In one case, question 4 was answered with a simple number, without engagement with sub-requests a-d. In this case it was not possible to analyse the treatment of disclosures received beyond confirming that whistleblowing disclosures had been received.

ii. Clarification

Requests for clarification were received in two main areas. First, authorities asked about the meaning of 'whistleblowing disclosure.' A number of authorities were unsure about the meaning of this term, and in particular desired clarification of how these disclosures were to be distinguished from communications from consumers. A standard response was given to these requests for clarification, linking whistleblowing disclosures to the employment relationship, and distinguishing them from ordinary consumer complaints on the basis that the communication came from an employee. Whilst this clarification may not encapsulate the complex theoretical and doctrinal debates surrounding the boundaries of whistleblowing, it provided a defensible basis for local authorities to classify and report the communications received. As clarification was requested, the terminology used (which, given the importance of information in general (Baldwin and Black 2010), and whistleblowing in particular, to regulatory practice, should have been familiar to local authority officers (Savage and Hyde 2013; Public Concern at Work 1998)) was simplified. In some cases, more specific terminological questions were asked, and these questions were often dealt with by an e-mail, and followed up by a phone call to check whether further clarification was required.

A second species of requests for clarification encountered related mainly to the sixth request. Local authorities asked for clarification relating to the changes to the employment tribunal system that allowed information forming the basis of a claim made under the Public Interest Disclosure Act 1998 to be passed to a relevant regulator in order to allow investigations to be undertaken and appropriate regulatory action taken. Some authorities were unfamiliar with the procedure, which is relatively new, and asked for clarification about the information that we wanted, trying to find out exactly what they were looking for. Other authorities did not ask for clarification and provided irrelevant information, which had not been provided by HM

Courts and Tribunals Service on the basis of these reforms, and instead related to employment tribunal claims made against the authority, without these being related to whistleblowing to a regulated body.

iii. Refusal

A number of authorities refused to respond to the request (or part of the request). Other than the two authorities that did not reply, all authorities provided some information. As noted above, all authorities responded to question 3. However, a number of authorities refused to answer part of the request. The reason for refusal was said to be that the cost of complying would exceed the cost limit prescribed under FOIA. No local authorities refused to comply with the request on the basis that the information requested constituted exempt information under Part II of FOIA. When answering questions one and two, where information may have been available by other means,[12] and therefore exempt under Freedom of Information Act 2000 section 21, local authorities were prepared to provide these policies, as it is simple to place them as attachments to an e-mail. Authorities did not attempt to use exceptions, but in some cases did ask us to justify the utility of our request in public interest terms, reversing the usual burden, where the requested body must consider whether the test is satisfied. Clearly, such justification is unnecessary in these circumstances, but we found that it was unnecessary to adopt an aggressive stance by refusing to respond to such request, instead providing an explanation of our research project, with a summary of the anticipated benefits for both regulators and whistleblowers. Once the usefulness of our project was appreciated any objections based on public interest tended to drop away. We made the decision to engage with requests to justify the request in public interest terms in order to achieve a comprehensive dataset through our requests. By engaging with public authorities and responding to their questions regarding public interest we were able to ensure a response was forthcoming, whereas such a response may not have been given in a case where we did not provide a public interest explanation.

Some local authorities stated the reason that providing answers to questions four and five would be more expensive than the cost limit was that the information was not classified to enable separation between public complaints and whistleblowing disclosures. To compound this, in some cases the information was not stored on a centrally accessible database or, with respect to request five, authorities often did not have information about the result of information passed to another regulator so were unable to answer this part of the request.

Because of these problems, in order to answer the questions in the request it would require a member of staff to review files and decide whether any information provided was disclosed by a whistleblower, or to follow up with another regulator what had happened. This would take compliance over the costs limit. In most cases there was some communication from the authority prior to the refusal, but this was generally an attempt to clarify the concepts used.

In two cases, information was provided regarding all complaints so that the researchers could perform the classificatory task. However, this task was rendered difficult by the removal by local authorities of any data which could potentially identify individuals or businesses (as required by Freedom of Information Act 2000 section 40). Such scrubbed data made it challenging to determine whether the disclosure was made by a whistleblower.

In one case, a local authority Environmental Health Officer offered to take part in a semi-structured interview about the reception and use of whistleblowing disclosures but was unable to provide information in response to the request due to both the classification of information disclosed and the geographically dispersed nature of the information recording in his local authority.

In no cases was there an attempt to provide assistance in reformulating a request in order to bring compliance with the request under the cost limit as required by FOIA section 16. Most refusals noted that, due to the methods of classification and storage of the data, there was no way to reformulate the request to bring it within the costs limit. Therefore there was no attempt to communicate with us and negotiation ways to redraft the request to enable it to be answered.

Whilst authorities responded to question six, often after clarification, some failed to respond to the question asked, providing information about employment tribunal claims brought against the authority rather than information provided by the HM Courts and Tribunals Service about regulatory non-compliance.

iv. Conclusion

Local authorities responded to our request in a number of different ways. Whilst most responded positively to requests one, two and three, there was more variation in the response to questions four, five and six. In some cases local authorities responded, although occasionally without providing the information necessary to answer the research questions.

Alternatively, the recording of the data meant that the authority was unable to answer the request within the cost limit, as giving an answer would have required a member of staff to spend time looking at past cases in order to answer the request. Finally, there a request for clarification was made to the researchers, either in relation to the terms (most often 'whistleblowing') used in request or in relation to the legislative provisions referenced. It is necessary to consider these results, and to draw lessons from them, whilst fitting them with the current literature on the compliance of local authorities with their duties under the Freedom of Information Act 2000.

4. Analysis

This article does not attempt to draw more than simplistic conclusions about the effect of the implementation of FOI on transparency and accountability of local government. Instead it seeks to examine the challenges that local authorities may face when responding to information requests in the hope that this can prove valuable to both those making requests and those responding to them. By reporting the issues, authorities can become better prepared for requests and those drafting the requests can identify pitfalls that they should avoid.[13] At a subsidiary level, by demonstrating the responses of local authorities to such requests, it is possible to comment on the positive contribution made to accountability and transparency in this particular situation. Wider conclusions on the contribution of FOI to these policy goals require analysis of a greater range of information requests than examined in this piece, as the single request examined in this thesis may expose artifacts of data handling in this particular area, and not be represented of the treatment of requests in the public sector generally.[14] In order to draw full conclusions, analysis of the handling of a variety of requests across the range of bodies subject to the duty under FOIA, including central government (including NDPBs), local government (including parish councils), schools, NHS Foundation Trusts, prisons and emergency services would be required.

The study did not find that the variation in the response to the request was due to the type or nationality of the authority. The pilot study included one county council, twenty-eight district councils and nineteen unitary authorities. No variance of practice was noted between different types of authority, although this conclusion, particularly as regards county-level authorities should be revisited as the sample examined was extremely small.

Forty-two of the authorities were English, four Scottish and two Welsh. This distribution was a result of the pilot sample, which examined all local authorities in England, Wales and Scotland beginning with A and B. This sample is roughly stratified, with Welsh authorities making up 5.3% of the population and 4.5% of the sample and Scottish authorities making up 7.7% of the population and 9.9% of the sample. Despite national variations in the legislation (Dunion 2010), no variation of national practice was noted, however the pilot included a small sample of non-English authorities, and this conclusion should be revisited following the completion of the study. This contrast with the findings of Dunion (2010), who argued that the initial higher relative number of appeals to the Scottish Information Commissioner and the subsequent more rapid drop in such appeals could suggest a variation in practice between authorities in different parts of the UK.

In broad terms the use of Freedom of Information requests was successful in allowing us to access publically held data. By using FOI we were able to access data that was not previously in the public domain quickly and cheaply. This information contributes to our understanding of the role played by whistleblowing disclosures in regulation, providing an account that we could not otherwise have put forward. Therefore FOI contributed to the achievement of our research aims, allowing us to play a role in the debate about the worth of whistleblowing disclosures to regulatory bodies, suggesting some of the goals of FOIA , such as transparency and good governance (see Birkinshaw 2001), are being achieved.

Holsen and Worthy (2010) argue that "overall, FOI… is working well at the local level." On the basis of our study, we agree, subject to qualification. We were unable to access certain information required for our study. Analysis of the data identified three categories of reason for the failure of authorities to respond to Freedom of Information Requests. Challenges of terminology and concept; of technology; and of resource were the reasons most frequently cited for a lack of response to a request. Terminological and conceptual challenges often led to a request for clarification whereas technological or resource limitations on the authority led to requests being refused.

i. Conceptual Challenges

Where local authorities were unable to discern the focus of the request they asked for clarification. This need for clarification was inextricably linked to the concepts used in a request, and in particular to the concept of a whistleblowing disclosure, which seemed to be

unfamiliar to many local authority officers. The concept, linked to the Public Interest Disclosure Act 1998 section 43A, was not as clear as we anticipated, perhaps as the terms 'whistleblowing' is not used within PIDA. Where such terms are used in information requests, the requesting parties should consider offering a definition which allows freedom of information officers to identify the meaning of those terms, even where such meanings appear obvious. This would be likely to reduce the amount of clarification requested, although some confusion cannot be anticipated.

In this study, in order to resolve confusion, officers requested clarification through either informal means, such as by a telephone call, or more formally, requesting clarification in writing. These requests were responded to quickly, following, if necessary, an investigation of the root of confusion in order that the confusion could be removed. The risk of conceptual confusion was one reason that we chose to undertake a pilot study, and future researchers using this method are well advised to undertake a similar pilot.

A more damaging conceptual confusion was the misunderstanding of legal obligations shown by local authorities. This was a particular problem with the sixth question. The conceptualisation by the local authority of the question as one about the employment tribunal claims in general, rather than those tribunal claims referred under the regulatory referral procedure, prevented the provision of required information. The lesson to draw from this is that it is important for both local authorities and those requesting information to clarify the concepts used as far as possible. Whilst we sought to do this through reference to the statutory provisions, the lack of awareness of these provisions on the part of some officers rendered this method less useful than hoped. The lack of awareness of the provisions relating to regulatory referral may suggest that reliance on statutory provisions outside the core expertise of local authority officers will be insufficient to clarify concepts used in requests. It is possible that by providing copies of the statutes referred to, annexed to the original request, this difficulty could be avoided.

ii. Technological Challenges

The technological methods of recording data meant that certain authorities could not fulfil the request. In some cases the data about whistleblowing disclosures was not recorded separately from data about consumer complaints; in some cases the data was not aggregated; and in some cases the data was not recorded at all. The technological systems (in the widest sense)

designed by local authorities to allow them to use the data in their day-to-day operations and to respond to FOI requests proved inadequate to respond to our request.

The recording challenges presented substantive problems for the treatment of whistleblowers (not considered here) and for the provision of information to those requesting it. Unlike data protection, freedom of information is not restricted to information held in organised filing systems. However, the problems in obtaining information here demonstrate the necessity of record keeping in searchable systems. It is surely perverse that the lax record keeping of a public body can legitimately deprive a member of the public of their right to information because sorting through such poorly filed documents would be expensive. A central filing system should be created within every local authority in order to allow potentially relevant records to be identified and accessed. This will have the benefit of enabling requesters to access data, and reducing the staff time spent complying with requests. Such filing systems need not be electronic, but may be better constructed in this manner in order to increase searchability.

This does not mean, however, that classification must anticipate all possible requests. This would be impossible. In some cases, usually for operational reasons, data may be classified and stored in a manner that is not conducive to answering the question asked. However, in such cases the authority should give consideration to additional data recording where public interest can be anticipated. This may include the aggregation or disaggregation of data, or the recording of additional characteristics. Of course, the resource implications of this should be analysed by local authorities, and where they are severe the authority will be able to legitimately record in the manner proposed.

However, this means that it is important for the authority to explore the data request with the requesting party. By explaining the data held and the ways in which it is recorded, the authority and the requesting party may be able to creatively solve the technological challenges relating to the fulfilment of requests. Through engagement, the two parties are better able to understand each other's needs and concerns, and are therefore able to reach a mutually acceptable position allowing access to the information on terms that can be complied with using the currently available data recording framework.

iii. Resource Challenges

Challenges of resource are strongly connected to the refusals that we received. As noted above, the refusals we received were based on the inability to fulfil the request within the statutory cost limit, rather than any of the specific statutory exceptions. The cost of complying with our request was linked to the ways in which data was classified and stored. Some authorities were able to supply details quickly, at a minimal cost to them. Other authorities, particularly large authorities, where the data was not collated and classified in a manner which allowed identification of whistleblowing disclosures, would have needed to commit considerable staff resource to the answer our request. Therefore the request was refused. Even where the resources committed were below the statutory limit, there may still have been cases where the time expended was large. In order to preserve resources, authorities should consider their recording practices in order to reduce the resources expended. Where data is not classified in an effective and easily searchable manner, there is potential that the aims of PIDA, to allow the public access to information in order to hold public bodies to account, could be frustrated, as requests may be denied on the basis that the information is too expensive to access. This would penalise the public who have no control over public authority data handling practices, effectively making the FOIA scheme dependant on the filing and data classification adopted by the authority.

5. Conclusions

In conducting this research we have found that the Freedom of Information Act is invaluable in allowing access to information which would not otherwise be publically accessible, and would not be accessible at all without lengthy and costly negotiations. In this sense it is working well. We were able to gain a large amount of data that contributed to our understanding of the role played by whistleblowing disclosures in regulatory practice.

However, in some cases clarification was required before local authorities responded to our request, which was often due to the concepts used in the request. In order to minimise such cases it is necessary to pilot a large scale freedom of information request research project, and to, where possible, use concepts that would be familiar to local authority officers.

In other cases we were unable to obtain information, and this was principally due to the way that the information was recorded. The technologies of storage were inadequate to allow data to be interrogated in a way that allowed answers to our questions (at least within the resource limits set out in FOIA). This necessitates creative solutions to such challenges. Prior to a

request being made, authorities should give some thought to the classification of data; what are requesting parties likely to desire? In the event of the request arising, communication and co-operation is important. Rather than dismissing the possibilities of fulfilling the request, a dialogue may allow some useful information to be given, providing a win-win (albeit second best) solution for the requester and the local authority. By working in concert, rather than opposition, local authorities and requesting parties should be able to iron out difficulties in the provision of information under the Freedom of Information Act.

Appendix

Please provide the following information:

1. Your policies/ internal guidelines/ procedures for the handling of 'whistleblowing' complaints for the purposes of the Public Interest Disclosure Act 1998.
2. Your policies/ internal guidelines/ procedures for the handling of complaints relating to breaches of 'food law' (as defined by Regulation 178/2002).
3. The number of food business premises registered with your local authority; and the number of approved food business premises within your authority.
4. The total number of disclosures received between 1/1/2006 and 31/12/2010 relating to breaches of 'food law' (as defined in Regulation 178/2002), and a breakdown, by year, of when these disclosures were received.
    a. Please provide details of whether each individual contacted you on an anonymous, confidential, or self-identified basis
    b. Please provide a brief summary of the types of concerns raised and the outcomes, and if possible a breakdown, by statutory provision.
    c. Whether any action was taken following these disclosures, and in particular whether such disclosures led to formal enforcement action. In the event that formal enforcement action was taken, please provide details of the type of formal action taken.
    d. Whether information was passed on to another food authority and specify whether the concern was monitored by you following referral.
5. Whether any information derived from disclosures was received from other regulators (including, but not limited to, the Food Standards Agency and other food authorities (as defined in the Food Safety Act 1990 section 5)).
    a. Please provide a brief summary of the types of concerns raised and the outcomes, and if possible a breakdown, by statutory provision.
    b. Whether any action was taken following these disclosures, and in particular whether such disclosures led to formal enforcement action. In the event that formal enforcement action was taken, please provide details of the type of formal action taken.
6. Please provide information as to the number of Employment Tribunal claim forms referred to you (for all functions in relation to which you are prescribed) following commencement of the Employment Tribunals (Constitution and Rules of Procedure) (Amendment Regulations) 2010 on 06/04/2010
    a. Please provide an overview of the type of organisation the individual works in, the concern raised and the action taken by you (if appropriate). If the information was passed on to another food authority please indicate this and specify whether the concern was monitored by you following referral.

Please provide this information by e-mail.

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[1]For a table identifying the variations between FOIA and the Freedom of Information (Scotland Act) 2000 see: http://www.itspublicknowledge.info/Law/FOISA-EIRsLinks/FOISA_FOIAComparative.asp

[2] Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

[3] Secretary of State for Constitutional Affairs' Code of Practice on the Discharge of Public Authorities' Functions under Part I of the Freedom of Information Act, Para 14.

[4] Freedom of Information Act sections 24, 27, 30 and 36 respectively.

[5] *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006) suggests that there must be "a real and significant risk" before the exception applies.

[6] E.g. FOIA section 35.

[7] E.g. FOIA section 28.

[8] This risk is acknowledged by the Information Commissioner's Office, see ICO, 'The exemption for criminal investigations, criminal proceeding and confidential sources' (2009) available at <http://www.ico.org.uk/~/media/documents/library/freedom_of_information/detailed_specialist_guides/s30_exemption_for_investigations_and_proceedings_v3.ashx>

[9] See < http://ico.org.uk/for_organisations/freedom_of_information/guide/receiving_a_request>.

[10] See e.g. Food Safety Act 1990 section 6; Food Hygiene (England) Regulations 2006 regulation 5.

[11] In some cases an acknowledgement of the request, setting out the time by which the local authority would respond, was received. This should be seen as best practice. It manages the expectations of those requesting data, and allows those making the request to be satisfied that their request is being dealt with. If it is necessary to correspond with the local authority it also provides a gateway through which communications can be directed to the appropriate person.

[12] In some cases whistleblowing policies and policies about consumer complaints were available on the local authority website.

[13] In order to contribute to the virtuous circle of "learning, use and improvement" contemplated by Holsen and Worthy (2010) as necessary for FOIA to function well.

[14] In common with Chapman and Hunt (2010) "the variety of experiences is too vast to be adequately considered in a modest volume such as this."