

Official information held in private email accounts

Freedom of Information Act

The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.

An overview of the main provisions of FOIA can be found in The Guide to Freedom of Information (due for publication early 2012).

This is part of a series of guidance, which goes into more detail than the Guide to FOIA, to help you as a public authority to fully understand your obligations, as well as promoting good practice.

This guidance is intended to clarify the legal status under FOIA of information relating to the business of a public authority held in private email accounts in particular, but also other media formats. This is an emerging area of FOIA compliance and so the guidance may be updated in due course.

This guidance does not deal with exemptions which might be applicable to information held in private email accounts, only whether it may be held for the purposes of FOIA.

Overview

- FOIA applies to official information held in private email accounts (and other media formats) when held on behalf of the public authority. Such information may be exempt and will not necessarily have to be disclosed.
- It may be necessary to request relevant individuals to search private email accounts in particular cases. The occasions when this will be necessary are expected to be rare.
- Adherence to good records management practice should assist in managing risks associated with the use of private email accounts for public authority business purposes.

What FOIA says

Section 3 sets out the two legal principles by which it is established whether information is held for the purposes of FOIA.

3.

(2) For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.

Under section 3(2)(a) information will be held by the public authority for the purposes of FOIA if it is held to any extent for its own purposes. Only if information is held solely on behalf of another person will the public authority not hold it for the purposes of FOIA.

Section 3(2)(b) provides that in circumstances where information is held by another person on behalf of the public authority, the information is considered to be held by the authority for the purposes of FOIA. It is this sub-section that is of relevance to information held in personal email accounts.

The Commissioner's approach

Information held in non-work personal email accounts (e.g. Hotmail, Yahoo and Gmail) may be subject to FOIA if it relates to the official business of the public authority. All such information which is held by someone who has a direct, formal connection with the public authority is potentially subject to FOIA regardless of whether it is held in an official or private email account. If the information held in a private account amounts to public authority business it is very likely to be held on behalf of the public authority in accordance with section 3(2)(b).

This can apply to any public authority. For example, a Councillor may hold information relating to local authority business in his/her private email account on behalf of the local authority. The Commissioner is aware that the issue has also arisen in a central government context in relation to the use of non-work systems. There is a need to have a clear demarcation between political and departmental work. In the local government context, there is a

need to have a clear demarcation between Council business and work for individuals as their local representative.

Information in private email accounts that does not relate to the business of the public authority will not be subject to FOIA.

Situations where information legitimately requested under FOIA includes relevant information held on private email accounts will be rare. However, when a request for information is received, public authorities should consider all locations where relevant information may be held. This may include private email accounts.

The ICO recommends that, as a matter of good practice, public authorities establish procedures for dealing with such situations. These should outline the relevant factors to be taken into account in deciding whether it is necessary to ask someone to search their private email account for information which might fall within the scope of an FOI request the public authority has received. Relevant factors are likely to include:

- the focus of the request, indicated by the words used by the requester;
- the subject matter of the information which falls within the scope of the request;
- how the issues to which the request relates have been handled within the public authority;
- by whom and to whom was the information sent and in what capacity (e.g. public servant or political party member); and
- whether a private communication channel was used because no official channel was available at the time.

Where a public authority has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search their account for any relevant information.

The enquiries made should be directed towards deciding whether any information which is so held was generated in the course of conducting the business of the public authority. If it was, it is likely to be within the scope of the request. It will therefore be held by the individual on behalf of the public authority for the purposes of FOIA.

Where members of staff or other relevant individuals have been asked to search private email accounts for requested information,

there should be a record of the action taken. The public authority will then be able to demonstrate, if required, that appropriate searches have been made in relation to a particular request. The Commissioner may need to see this in the event of a section 50 complaint arising from the handling of the request.

Relevant information in other forms

Although the main emphasis of this guidance is on information held in private email accounts, public authorities should be aware that it applies to information in other forms. The definition of information under FOIA is provided at section 84 and states that “information” ... means information recorded in any form”. Therefore, official information recorded on mobile devices, including text messages on mobile phones, or in any other media, may also be considered to be held on behalf of the public authority in the circumstances outlined in this guidance. Again, this does not necessarily mean that such information will be disclosable, but, on receipt of a valid FOIA request, public authorities should consider all locations where the requested information may be found.

Concealment and deletion

Public authorities should also remind staff that deleting or concealing information with the intention of preventing its disclosure following receipt of a request is a criminal offence under section 77 of FOIA. For example, where information that is covered by a request is knowingly treated as not held because it is held in a private email account, this may count as concealment intended to prevent the disclosure of information, with the person concealing the information being liable to prosecution.

Records Management

The Lord Chancellor’s Code of Practice under section 46 of FOIA stresses the importance, and benefits, of having good records management. As such, public authorities are strongly advised to use their records management policies to clarify the types of information that could be considered as records relating to the public authority’s business. These policies should include clear advice to staff that recorded information held by individuals, regardless of the form in which it is held, and which relates to the business of the authority, is likely to be held on behalf of the authority and so subject to FOIA.

In order to avoid the complications of requesting searches of private email accounts, and other private media, records management policies should make clear that information on authority-related business should be recorded on the authority's record keeping systems in so far as reasonably practicable.

It is accepted, that in certain circumstances, it may be necessary to use private email for public authority business. There should be a policy which clearly states that in such cases an authority email address must be copied in to ensure the completeness of the authority's records. In this way, records management policies will make it easier for public authorities to determine whether information is held and to locate and retrieve it in response to requests. If the information is contained within the public authority's systems it can also be subject to consistently applied retention and destruction policies.

Other considerations

Additional guidance is also available if you need further information on:

- Records Management

- ⇒ see [the Code of Practice under section 46](#)
- ⇒ see [Using the procedural codes of practice](#)
- ⇒ see [Records Management FAQs](#)

- Holding information

- ⇒ see [Information held on behalf of another](#)
- ⇒ see [When is information caught by the FOI Act?](#)
- ⇒ see [Information produced or received by councillors](#)

More information

This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

If you need any more information about this or any other aspect of freedom of information or data protection, please [Contact us: see our website www.ico.gov.uk](http://www.ico.gov.uk).