

Freedom of Information Act 2000 (Section 48) Practice Recommendation

The National Archives

14 March 2023

Summary

Since 2020 The National Archives (TNA) has shown a declining trend in performance in terms of the time limit for complying with information requests, despite the occasional quarterly improvement. This has been highlighted by recent figures showing a further fall that is not simply attributable to the pandemic. In many instances TNA has been unable to meet the statutory timeframe for responding to requests that relate wholly or partly to archived information. In 2022, according to the [FOI statistics](#) published on the GOV.UK website, there was a significant drop (below 60%) in compliance from previous highs of over 70% during the worst of the pandemic and well in excess of 90% in 2017 and 2018.

Following engagement by his staff with TNA about the underlying reasons for these failings, the Commissioner has reached the view that TNA's request handling practices do not conform to Part 4 of the section 45 Freedom of Information Code of Practice, issued by the Cabinet Office in July 2018 (the Code).

Whilst the Commissioner has decided to make this practice recommendation, he wants to acknowledge the very real constraints that TNA has been operating under in the last few years. TNA is obliged to consult with whichever is the 'responsible authority' for a record that has been transferred. This can result in delays in such matters as carrying out the public interest test when the exemption is qualified. TNA (and not the authority consulted) has the duty to comply, but their performance is affected by the timeliness (or lack thereof) of the bodies it is required to consult with.

The Commissioner recognises that TNA is also facing a very specific challenge following its agreement to take a significant number of military personnel files that are in the process of being transferred from the Ministry of Defence (MoD). It is planned for these records to be transferred over six years, with around four million (of almost 10 million) records having been transferred so far. TNA describes this process as "the biggest and most complex transfer of public records in our history"¹. These records require preserving and storing safely to archival standards. The records are closed until 115 years after the individual service personnel's date of birth. This material includes personal data (and special category data) which needs to be assessed as to whether it can be open or closed fully/in part. At the same time the records are subject to information requests which TNA projects will increase to 6000 in 2023, solely for this collection, effectively tripling the usual

¹ [MOD Records Project - The National Archives](#)

rate of requests TNA receives. The Commissioner is aware that the transfer of these records has seriously impacted on TNA's ability to meet its statutory obligations under the FOIA and has taken this into account as part of his considerations.

Recommendations

The Commissioner has recently had discussions with TNA concerning the issues set out above and is aware that it is in the process of implementing a number of improvements to its information request handling processes. TNA has drawn up a detailed action plan designed to remedy the current position and bring its request handling back to acceptable levels of compliance.

The Commissioner has therefore designed the following recommendations to support and enhance TNA's plans to improve its information rights practices. In considering these recommendations, he expects TNA to ensure that it meets the requirements of all information rights legislation to which it is subject.

The Commissioner notes that because this public authority is an archive, it has an additional 10 working days to comply with an information request if it is a request that partly or wholly relates to a transferred public record that has not been designated as 'open'. In these instances, it has 30 as opposed to 20 working days. Therefore, all references to the time for compliance being 20 working days under the section 45 Code of Practice need to be substituted by 30 working days. This is set out in section 4(2) of [The Freedom of Information \(Time for Compliance with Request\) Regulations 2004](#) (legislation.gov.uk).

Area of Code	Non-conformity	Recommendation of steps to be taken
<ul style="list-style-type: none">Part 4 – time limits for responding to requests <p>Section 4.1 of the Code highlights the "clear" requirement that public authorities respond to</p>	<p>For the period 1 July 2022 to 30 September 2022 TNA had only met the deadline 'in time' in 57% of its information requests.</p>	<p>TNA should ensure that requests for information are responded to in a timely manner in accordance with section 10(1) of FOIA. When chased to issue responses by the Commissioner's Case Officers on complaints he has received about failures to comply, TNA should respond in a timely and appropriate manner. This will avoid unnecessary decision notices and further delays</p>

<p>requests for information promptly, and within 20 working days of receipt in accordance with section 10(1) of FOIA.</p> <p>Section 4.3 of the Code explains that some public authorities are subject to different deadlines as a result of regulations made under section 10(4) of FOIA. This provision applies to maintained schools, academies, archives, the armed forces (frontline units) and information held outside the United Kingdom where the initial 20 working day deadline has been extended in certain circumstances, as they may sometimes find it difficult to deal with requests under the standard deadlines. These initial deadlines cannot go beyond 60 working days following receipt of a request, except where payment of a fee is awaited.</p> <p>Section 4.4 of the Code states that public authorities may exceed the 20 working day</p>		<p>for the requesters.</p> <p>TNA should review its processes and any service standards that are in place with those public bodies that it is required to consult with most often following the receipt of information requests. Where needed, new service standards for the timeliness of consultation should be agreed with each body. Any breach of these standards, as well as any reasons provided for this, should be reported to the Commissioner when he makes enquiries following the receipt of a complaint about the handling of a relevant request so that he can take account of this in his considerations.</p> <p>The Commissioner recommends that requests for information from the records being transferred as part of the MoD project and the other FOI requests TNA receives are able to be distinguished in its statistics. This is so that they can be further contextualised separately on its website once the Government's national monitoring statistics are published, should it not be possible to make this distinction in that publication. In doing so, TNA can provide greater transparency about its performance in relation to the archival transfer project from MoD compared to its more routine casework. This could also help it to more effectively assess demand, prioritise and allocate (or request) the necessary resources it needs to manage this work accordingly.</p>
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<p>deadline if additional time is required to consider the public interest.</p> <p>Section 4.6 of the Code advises that it is best practice for an extension to be no more than a further 20 working days although a longer extension may be appropriate depending on the circumstances of the case, including the complexity and volume of the material.</p>		<p>TNA must ensure that its information rights training is sufficient to enable it to quickly recognise and be responsive to resource constraints when they arise (such as the departure of key staff members) in order that request handling times do not fall below a compliant level.</p>
		<p>The Commissioner also recommends that when the response to an information request is late, or likely to be late, it has clear internal processes in place that can be triggered to allow for escalation. This includes having a chain of responsibility in place setting out who needs to take action, the action they need to take, and within what timescale.</p>
		<p>TNA should publish on its website the action plan that it is implementing to address the issues outlined in this practice recommendation so that there is full transparency about the improvements it is making. Any subsequent updates or changes to that plan should also be published, with progress reported on a quarterly basis and an update also provided to the Commissioner in advance of the publication of each update.</p>
		<p>TNA should assess over the next 12 months whether the measures it is implementing are having the effect</p>

		<p>it anticipates to bring its performance back into line with its statutory obligations. If further resources are not available, it should explore with relevant parts of the UK Government in this period whether the provisions of section 10(4) of FOIA might be appropriate, specifically in relation to the Service Records material for the duration of the transfer process. This could give TNA the space it needs to construct a long term plan to manage this work during the remainder of the transfer and beyond.</p>
		<p>TNA should consider using the Commissioner's FOI self-assessment toolkit to improve its timeliness compliance.</p>

Reasons for issuing this Practice Recommendation

The Commissioner is issuing a Practice Recommendation at this time rather than an Enforcement Notice because, despite the significance of the performance issues currently affecting requesters, TNA has engaged openly with his Office about the significant problems it has faced, including the clear impact that the transfer of the MoD records has made on a previously well-performing public authority.

This practice recommendation formalises the Commissioner's concerns and holds the TNA accountable for improving its freedom of information request handling practices and, in turn, increase public confidence and trust in its information rights practices.

Failure to comply

A practice recommendation cannot be directly enforced by the Commissioner. However, failure to comply with a practice recommendation may lead to a failure to comply with FOIA, which in turn may result in the issuing of an enforcement notice. Further, a failure to take account of a practice recommendation may lead in some circumstances to an adverse comment in a report to Parliament by the Commissioner.

TNA should write to the Commissioner each quarter to inform him of its progress against its action plan and the additional recommended measures before publishing the update set out in this recommendation on its website. A full year review of TNA's performance against its action plan and this practice recommendation should then be provided one year after the date that TNA publishes its action plan.

The Commissioner will have regard to this practice recommendation in his handling of subsequent cases involving TNA.