

Reference: FPR0987667

# Freedom of Information Act 2000 (Section 48) Practice Recommendation

NHS England

4 July 2023

## Summary

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Section 48 of the Freedom of Information Act (FOIA) empowers the information Commissioner (the Commissioner) to issue a practice recommendation where it appears to him that a public authority has failed to conform, specifically, to the FOIA Codes of Practice. These failures are addressed in the recommendations section below.

NHS England has a poor level of performance in terms of the time limit for complying with information requests. Recent figures showing that NHS England has only been able to meet the statutory timeframe for responding to requests in 2022/2023 in 81% of cases. The Commissioner is also aware of issues with late internal review responses, with 200 overdue at the end of 2022/2023 and NHS England has a backlog of older requests dating back to 2019 which remain unanswered.

Following engagement by the Commissioner's staff with NHS England about the underlying reasons for these failings, the Commissioner has reached the view that NHS England'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. Whilst the Commissioner has decided to make this practice recommendation, he wants to acknowledge the constraints that NHS England has been operating under. Since the Covid-19 pandemic NHS England has received increased numbers of requests each year. This upward trend has continued with NHS England receiving 30% more requests to date in 2023 than in the same period in 2022. NHS England merged with Health Education England in April 2023 and NHS Digital in February 2023, this followed on from a merger with NHS Improvement in July 2022. It is therefore undergoing a significant change programme to create the new NHS England. This also requires the new combined organisation to be 30-40% smaller.

NHS England had anticipated the mergers would impact on the number of requests received but demand has so far outstripped expectation. Whilst the Commissioner is aware that these mergers will have had an impact on NHS England's ability to meet its statutory obligations, and he has taken this into account as part of his considerations, he cannot overlook the backlog of unanswered requests and his concerns over its ability going forward to comply with the statutory timeframe if the volume of incoming requests continues at the same level.

The Commissioner has had regular engagement with NHS England since 2018 so has had an overarching view of NHS England's FOI compliance over a period pre-dating the pandemic. In September 2022 NHS England put in place an action plan to tackle the backlog of requests that had built up during the pandemic. The action plan indicated NHS England's

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intention was to clear this backlog of requests by the end of March 2023 with NHS England focusing its resources on responding to incoming new requests within statutory timeframes and tackling its oldest requests with any remaining resources. The Commissioner noted an increased number of complaints to his office being received about the timeliness of NHS England's responses. Figures showed that in 2023 to date 18 decision notices had been issued where the sole issue was about late or non-responses to information requests and required NHS England to respond. In comparison, the Commissioner issued eight decision notices in the whole of 2022 on the same issue. This prompted the Commissioner to engage again with NHS England and ask for up to date figures on its current requests and backlog. The figures provided as of May 2023 showed 470 overdue requests, of which 193 date from before September 2021.

## Recommendations

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The Commissioner had discussions with NHS England concerning the issues set out above and is aware that NHS England has a plan in place to implement a number of improvements to its request handling processes. NHS England has drawn up an 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 NHS England's plans to improve its information rights practices.

In considering these recommendations, we expect NHS England to ensure that it meets the requirements of all information rights legislation to which it is subject.

Area of Code	Non-conformity	Recommendation of steps to be taken
<ul style="list-style-type: none"> <li> <b>Part 4 – time limits for responding to requests</b> <p>Section 4.1 of the Code highlights the “clear” requirement that public authorities respond to requests for information promptly, and within 20 working days of receipt in accordance with section 10(1) of FOIA.</p> <p>Section 4.4 of the Code states that public authorities may exceed the 20 working day 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> </li> </ul>	<p>In 2023, the Commissioner has received 79 complaints about NHS England. 66 of these were solely about timeliness of responses. 18 of the cases resulted in a section 10 decision notice either requiring NHS England to respond to the request or recording that the response or information was provided late.</p> <p>For the year 2022/2023 NHS England responded to 81% of FOIA requests within the statutory time limits.</p>	<p>NHS England should ensure that requests for information are responded to in a timely manner. When chased to issue responses by the Commissioner’s Case Officers, NHS England should respond in a timely and appropriate manner. This will avoid unnecessary decision notices and the subsequent further delays for the requesters.</p> <p>NHS England should use the Commissioner's FOI self-assessment toolkit to improve its timeliness compliance.</p> <p>In accordance with part 8.5 of the Code, NHS England should publish its information access request statistics and make these easily accessible on its website. The statistics should include the number of information access requests that have not been processed and the number of completed requests where the processing took longer than 20 working days.</p> <p>NHS England’s request handling procedures should include provision for when a response is late, or is likely to be late at any stage of the internal processes, it is clear when and to who to escalate, who is responsible for taking action, the action they will need to take, and by when.</p> <p>NHS England must ensure that its information rights training is sufficient to ensure that it has adequate coverage in place in order that request handling</p>

<p>Section 4.7 of the Code makes clear that when a public interest test extension is required, the public authority must inform requestors which exemption or exemptions it is relying on.</p>		<p>times do not fall below a compliant level in the event of the departure of key staff members.</p> <p>NHS England 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>NHS England should assess over the next 6 months whether the measures it is implementing are having the effect it anticipates to bring its performance back into line with its statutory obligations. Improvement should be seen in not only responding to new request in line with statutory timeframes but also in reducing the backlog of outstanding requests dating back to 2019.</p>
<p><b>• Part 5 – Internal reviews</b></p> <p>Sections 5.4 and 5.5 of the Code set out that a reasonable time for the completion of an internal review is 20 working days following the receipt of the request for review, and that, usually, no more than 40 working days will be required.</p>	<p>At the end of 2022/2023 NHS England had 211 outstanding internal reviews. Of these 200 were overdue. During this period NHS England completed 62 internal reviews within 40 working days, 22 of these within 20 working days.</p>	<p>NHS England should ensure that requests for internal reviews are completed within the reasonable times specified in section 5.4 and 5.5 of the Code are responded to in a timely manner. When chased to issue internal review responses by the Commissioner’s Case Officers, NHS England should respond in a timely and appropriate manner. This will avoid unnecessary subsequent further delays for the requesters.</p>

Section 5.8 of the Code sets out that internal reviews should provide “a fair and thorough review” of relevant matters.		
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## Reasons for issuing this Practice Recommendation

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The Commissioner is issuing a Practice Recommendation at this time rather than an Enforcement Notice because, despite the significance of the issues currently affecting requesters, NHS England has engaged openly with his Office about the problems it has faced and continues to face, including the impact of the mergers it has and is going through. The Commissioner also recognises that NHSE requires time to work through the design of a new permanent FOI team which reflects the broader FOI remit and caseload of the new organization.

This practice recommendation formalises the Commissioner’s concerns and holds NHS England 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

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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.

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NHS England should write to the Commissioner by 31 December 2023 to confirm that it has complied with its recommendations and how it has achieved this. It should also provide a quarterly update by 29 September 2023 on its progress.

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