

Freedom of Information Act 2000 (Section 48) Practice Recommendation

Ministry of Defence

16 October 2024

Summary

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. Section 47 of FOIA also makes clear that the Commissioner has a duty to promote the following of good practice beyond just the requirements of the Codes of Practice. The wider concerns the Commissioner has in this case are addressed in the "Other matters" section below to keep them distinct from the Section 48 related recommendations he has made.

The MOD has had a consistently poor level of performance in terms of the age profile of overdue requests and delayed internal reviews. This has been highlighted by complaints to the Commissioner and in statistical returns provided by the MOD to him. Following engagement by his staff with the MOD about the underlying reasons for these failings, the Commissioner has reached the view that the MOD's request handling practices do not conform to parts 4 and 5 of the section 45 Freedom of Information Code of Practice, issued by the Cabinet Office in July 2018 (the Code).

Recommendations

The Commissioner has been liaising regularly with the Information Rights Team (IRT) at the MOD regarding its performance, both prior and subsequent to, the Enforcement Notice (EN) issued in June 2023.¹ Through this engagement the Commissioner appreciates that the MOD's IRT understand what is necessary to deliver FOI responses in line with the requirements of the legislation. He also notes that the MOD's IRT have considered and implemented various mitigation measures in order to seek to address such performance challenges, as well as liaising and engaging positively with the Commissioner's staff.

However, there remains a number of issues in respect of the MOD's FOI performance that continue to concern the Commissioner. He accepts that the MOD's IRT are aware of these issues and the purpose of the Practice Recommendation is

¹ <https://ico.org.uk/media/action-weve-taken/foi-enforcement-notice/4026119/mod-enforcement-notice.pdf>

to ensure there is transparency about the action being taken by drawing wider attention to this issue. The Commissioner has also designed the following recommendations to support and enhance the MOD’s existing plans to improve its information rights practices.

In considering these recommendations, the Commissioner expects the MOD to ensure that it continues to meet its wider information rights obligations, including to comply with subject access requests under the UK GDPR.

Area of Code	Non-conformity	Recommendation of steps to be taken
<p>Part 4 – time limits for responding to requests</p> <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>As noted above, the Commissioner has been liaising regularly with the MOD regarding the number of overdue requests that it has open, particularly requests which are over 6 and 12 months old.</p> <p>The previous EN required the MOD (by 30 November 2023) to answer all open requests received by it prior to 31 December 2021.² The EN also noted that the Commissioner would continue to engage with the MOD in respect of any outstanding requests it had received since 1 January 2022.</p> <p>In February 2024 the</p>	<p>The Commissioner is satisfied that measures the MOD has in place to prevent cases from reaching six months old – as outlined in the action plan of March 2024 – are reasonable and considered. These include weekly monitoring by IRT of overdue requests and engagement with the FOI focal point responsible for the request; engagement with subject matter experts alongside FOI focal points to ensure quality and timely input is provided to cases; and increased communications across the organisation to raise awareness of FOI.</p> <p>Furthermore, the Commissioner does not have concerns about a lack understanding or engagement from the MOD’s central IRT. Rather in his view what appears to be preventing the MOD from improving and <i>maintaining</i> its performance in respect of the age profile of overdue requests is a lack of resource.</p> <p>Therefore, the MOD should ensure that it has adequate levels of resource for those within its</p>

² The EN required the MOD to close 73 cases, the oldest of which dated back to 2018.

<p>Section 4.5 of the Code states that an extension is permitted “until such time as is reasonable in the circumstances”, taking account, for example, of where the information is especially complex or voluminous, or where a public authority needs to consult third parties.</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>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>Commissioner asked the MOD to produce an action plan designed to:</p> <ul style="list-style-type: none"> • Close all current 12 month requests by the end of April 2024.³ • Close all current 6 month requests by the end of June 2024.⁴ • Set out how it would aim to prevent requests getting to the 6 month stage. <p>The MOD provided the Commissioner with the plan on 7 March 2024, committing to the first two bullet points. In respect of the third bullet point, the plan also set out the steps the MOD would take to prevent requests becoming 6 months old, but noted the challenges in doing so given rising request volumes and limited resources.</p> <p>In line with the targets in the action plan, by 31 April 2024 the MOD had closed all 22</p>	<p>business areas responsible for answering FOI requests – and its central IRT - to ensure that FOI requests are processed in a timely manner. This is to ensure that it is able to improve and maintain its performance in respect of the age profile of overdue requests, but not at the expense of ensuring that 90% of new requests are answered ‘in time’.</p> <p>The MOD should also consider how it can further ensure, beyond the steps already taken, that staff within its various business areas responsible for request handling are also aware of the importance of processing requests in a timely manner.</p>
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³ Of which there were 22.

⁴ Of which there were 32.

requests over 1 year old (as at 22 February 2024) and by the end of June 2024 had closed all 32 requests over 6 months old (again as of 22 February 2024).

On 12 July 2024 the MOD reported that it had 10 requests open over 6 months old, but no requests over 12 months old.

In a statistical to return to the Commissioner dated 30 July 2024, the MOD reported overdue request data as follows for the month of June:

- Total number of overdue requests: 103
- Total of overdue requests over one month old: 88
- Total of overdue requests over three months old: 30
- Total of overdue requests over six months old: 7
- Total of overdue requests over nine months old: 1
- Total of overdue requests over one year old: 0

	<p>It also confirmed that the % of requests completed 'in time'⁵ in June was 88%.</p> <p>As discussed elsewhere in this Practice Recommendation, the Commissioner recognises the steps the MOD has taken to reduce the number and age profile of overdue requests. However, given the period of time the Commissioner has been engaging with the MOD on this particular issue, he is concerned that such steps, without adequate resources needed to support them, may not be sufficient to prevent an ongoing situation where the MOD consistently has a number of requests which are allowed to get up to six months old, and an ongoing situation where the MOD consistently has requests which are over six months old.</p> <p>The Commissioner cannot condone a position where carrying such requests – even in low numbers – is a</p>	
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⁵ I.e. percentage meeting deadline of 20 working days or with permitted extension.

	<p>permanent feature of the MOD's FOI performance.</p>	
<p>Part 5 – Internal reviews</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>Section 5.8 of the Code sets out that internal reviews should provide “a fair and thorough review” of relevant matters.</p>	<p>The Commissioner recognises that the MOD's internal reviews involve a detailed and considered review of an initial FOI response. However, the Commissioner is aware, based on section 50 complaints brought to him, of a number of requests in which internal reviews have been significantly delayed or not completed by the MOD.</p> <p>More specifically, since March 2023 the Commissioner has logged 27 cases where the internal review was either delayed beyond the timeliness allowed for in the Code or not completed at all.</p> <p>In the 19 cases where the internal review was completed (but delayed) the average</p>	<p>The MOD should ensure that internal reviews are carried out and the outcome communicated to the requester in a timely manner. This improved timeliness should not come at the expense of the quality and detailed nature of internal reviews.</p> <p>The MOD should make sure that, in cases where it has gone beyond the Code's recommendations for internal review timeliness, it contacts requestors to explain why this has happened and inform them of their right to complain to the Commissioner at this point. This will help mitigate any perception of 'stonewalling'.</p> <p>As noted above, it is the responsibility of the MOD as an organisation to ensure that sufficient resources are in place to ensure that this is achievable. As the internal reviews are carried out by the IRT this means that this team should be adequately resourced to undertake this work.</p> <p>Albeit that the Commissioner accepts that the IRT is dependent upon the input of officials from across the department as the information holders to ensure</p>

	<p>amount of time taken to complete the review was 124 working days.</p> <p>In the remaining 8 cases where the internal review was not completed by the point the Commissioner completed his investigation, or where the review remains outstanding in more recent cases which are still the subject of an open investigation, a similar pattern of delays are usually evident.</p>	<p>reviews can be completed. The MOD should therefore consider how it can further ensure, beyond the steps already taken, that staff within its various business areas responsible are also aware of the importance of internal reviews being completed in a timely manner, and adequately resourced to allow them to do so.</p>
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Reasons for issuing this Practice Recommendation

The Commissioner's rationale for issuing this Practice Recommendation is outlined above under the 'Recommendations' heading. However, he would emphasise here that whilst the option is open to him at any point in time to issue an EN requiring the MOD to complete all existing overdue requests over a certain date, he does not wish to start a cycle where, following the previous EN, such formal action becomes a necessary – and repeated – step.

Rather, the Commissioner's intention by issuing this Practice Recommendation to the MOD is that it draws attention to the fundamental issues – primarily resourcing – which he considers are significantly contributing to the poor performance in terms of the age profile of old requests and internal review delays. Furthermore, the Commissioner expects the MOD to build upon the work already taken by its IRT in addressing these points.

Reference: FPR0987683

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

Other matters

When the Commissioner begins investigation of a section 50 complaint he will often contact a public authority and ask it to provide submissions to allow him to consider the complaint, eg a copy of the withheld information and submissions to support the application of exemptions. The Commissioner's standard response time for such letters is 10 working days. Whilst the Commissioner accepts that there may be some instances where a public authority needs an additional amount of time to respond (eg due to the absence of key staff or the complexities of a case) such instances should be justified and that such extensions should usually be limited to a further 5 or 10 working days. It should be noted that these timeframes follow on from the time already available to the department to respond both to the original request and the subsequent internal review, during which time appropriate consideration should have already been given to the request.

The Commissioner is concerned about a pattern of delays in meeting his deadlines in many (all be it by no means all) investigation letters sent to the MOD. Moreover, even where an extension has been agreed, this often not met. In particular, the Commissioner notes he has issued four Information Notices to the MOD since March 2024, including three which needed to be issued in September 2024.

Delays in the MOD responding to the Commissioner's investigation letters inevitably lead to delays in him completing his investigation of complaints. The Commissioner would emphasise that he has published service standards of closing 90% of FOI complaints within 6 months of receipt and is dependent on the timely responses of public authorities to achieve this. The Commissioner therefore recommends that the MOD is sufficiently resourced so that it can provide the Commissioner with timely responses to his section 50 investigation letters.

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.

The MOD should write to the Commissioner by 16 January 2025 to confirm that it has complied with its recommendations in respect of conformity with the Code and how it will embed the changes necessary to deliver what is needed consistently in the future.

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