

# Section 46 Code of Practice – records management

## Freedom of Information Act Environmental Information Regulations

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) give rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA and the EIR can be found in [The Guide to freedom of information](#) and [The Guide to the Environmental Information Regulations](#) accordingly.
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains the good practice public authorities should follow in records management.
5. FOIA creates a right of access to official information and places a duty on public authorities to publish information in line with publication schemes.
6. FOIA amends the Public Records Act 1958 and places obligations on public authorities to maintain their records in line with the provisions of a code of practice on records management issued by the Secretary of State under section 46 of FOIA.

## Overview

- Guidance for public authorities on good records management is provided by the section 46 Code of Practice.
- The code provides guidance to public authorities (and any other organisations whose administrative and departmental records are subject to the Public Records Act) on keeping, managing and destroying records.
- Although the code applies only to public authorities covered by FOIA, we recommend that bodies that constitute a public authority only for the purposes of EIR observe its requirements, particularly for documents that may become public records.
- Failure to comply with the code is not in itself a breach of FOIA or the EIR. However, following the code will help an authority to comply with the legislation.

- The Information Commissioner promotes observance of the code, in conjunction with The National Archives (TNA) and the Public Record Office of Northern Ireland (PRONI).

## What FOIA says

### 7. Section 46 states:

**46.**—(1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to relevant authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the keeping, management and destruction of their records.

(2) For the purpose of facilitating the performance by the Public Record office, the Public Record Office of Northern Ireland and other public authorities of their functions under this Act in relation to records which are public records for the purposes of the Public Records Act 1958 or the Public Records Act (Northern Ireland) 1923, the code may also include guidance as to —

- (a) the practice to be adopted in relation to the transfer of records under section 3(4) of the Public Records Act 1958 or section 3 of the Public Records Act (Northern Ireland) 1923, and
- (b) the practice of reviewing records before they are transferred under those provisions.

(3) In exercising his functions under this section, the Secretary of State shall have regard to the public interest in allowing public access to information held by relevant authorities.

(4) The code may make different provision for different relevant authorities.

(5) Before issuing or revising any code under this section the Secretary of State shall consult —

- (a) the Chancellor of the Duchy,

(b) the Commissioner, and

(c) in relation to Northern Ireland, the appropriate Northern Ireland Minister.

(6) The Secretary of State shall lay before each House of Parliament any code or revised code made under this section.

(7) In this section "relevant authority" means —

(a) any public authority, and

(b) any office or body which is not a public authority but whose administrative and departmental records are public records for the purposes of the Public Records Act 1958 or the Public Records Act (Northern Ireland) 1923.

8. Prior to the coming into force of the [Transfer of Functions \(Information and Public Records\) Order 2015](#) the section 46 Code of Practice was issued by the Lord Chancellor.

### The aims of the section 46 code

9. The [code](#) provides guidance to public authorities 'in connection with the keeping, management and destruction of their records' as well as the review and transfer of records to public archives.
10. The code sets out recommended, rather than mandatory, good practice. It is complemented by the [code of practice issued under section 45 of FOIA](#).
11. TNA is actively involved in monitoring how public authorities conform to the section 46 code.

### The role of the Information Commissioner

12. Section 47 of FOIA places a duty on the Commissioner to promote the following of good practice by public authorities and the observance by them, of FOIA and codes of practice.
13. The Commissioner works with TNA and PRONI to promote conformity with the code.

## What the code covers

14. The code fulfils the duty of the Secretary of State set out in section 46 of FOIA.
15. Part 1 of the code sets out good records management practice for public authorities subject to FOIA and the EIR, as well as other bodies subject to the Public Records Act 1958 or the Public Records (Northern Ireland) Act 1923.
16. Part 2 of the code only applies to authorities subject to the latter two Acts and describes the procedure for the review and transfer of public records to TNA or PRONI, or to other defined places of deposit.
17. Records are defined in the code as:

'Information created, received and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business.'

18. The code applies to all records irrespective of how they have been stored:

'It includes therefore not only paper files series and digital records management systems but also business and information systems (for example case management, finance, and geographical information systems) and the contents of websites.'

19. It does not matter whether the information is personal, financial or falls within any other category. A record can be anything that has been created, received or maintained in connection with the authority's work and is kept as evidence and information by that authority.

## The benefits of following the code

20. If an authority follows the code, its standard of record keeping and records management should conform to an acceptable standard.

21. This enables it to act quickly in identifying and retrieving information requested, and will help it comply with its duties under FOIA and the EIR.
22. Each public authority needs to determine how it will meet the requirements of the code, taking into account factors such as its own particular size and circumstances.
23. Following the code will also support an authority in the operation of its [publication scheme](#) and information it is required to publish under the EIR.
24. A public authority that maintains an effective publication scheme should already have good practice in records management for information in the scheme. The general right of access under FOIA and EIR should extend these procedures to all other recorded information held.
25. Good records management should be seen as a benefit, not a burden. All organisations, public and private, are advised to have good records management in place as part of achieving business efficiency, by making sure that information is easily retrieved and properly documented.

#### **Example**

The Information Tribunal case [Dr N Dudley v the Information Commissioner \(EA/2008/0089 20 April 2009\)](#) is an example of the effect poor records management can have on freedom of information complaints. In this case there was doubt as to what information was held and by whom, and the Tribunal alluded to the inadequacy of record keeping. All of this had contributed towards the appellant's complaint.

26. Failure to follow the code may mean that an authority also fails to comply with other legislation concerning the creation, management, disposal, use and re-use of records and information, for example:
  - Public Records Act 1958;
  - Data Protection Act 1998 (DPA);
  - Re-use of Public Sector Information Regulations 2015;and it may therefore be in breach of its statutory obligations.

27. More detailed guidance to support the operation of the code is available and is listed in Annex B of the [code](#).

## The section 46 code in detail

28. The code is split into two parts – Part 1: Records Management and Part 2: Review and Transfer of Public Records.

### Part 1: Records Management

29. Part 1 sets out the 'key elements' of good practice in records management. To meet these good practice recommendations an authority should:
- have in place organisational arrangements that support records management – this includes the recognition of records management as a core corporate function, the allocation of clearly defined roles and responsibilities, and the provision of appropriate training;
  - have in place a records management policy covering information security, records retention, destruction and archive policies, and data protection (including data sharing) policies;
  - retain the records needed for business, regulatory, legal and accountability purposes;
  - have in place systems that enable records to be stored and retrieved as necessary;
  - know what records are held, where they are and ensure that they remain useable;
  - ensure that records are stored securely and that access to them is controlled;
  - define how long records should be kept for, and dispose of them when no longer needed;
  - ensure that records shared with other bodies or held on their behalf are managed in accordance with the code; and
  - monitor compliance with the code.

## Records management policy

30. The code advises an authority to have its records management policy endorsed at senior management level. The policy could form part of a wider information or knowledge management policy, but the essential point is that it is supported at all levels in the organisation.
31. The senior management of the authority should recognise that information and records are corporate assets and that good records management practice is a core corporate function.
32. They should ensure that sufficient financial and other resources are provided to achieve the records management programme.
33. A good records management policy should include proper risk management and business continuity plans.

### Example

In [Bromley v the Information Commissioner and the Environment Agency \(EA/2006/0072 31 August 2007\)](#) the Information Tribunal (IT) acknowledged the number of reorganisations prior to the creation of the Environment Agency and said that its role was “not to assess the quality of the EA’s administration but to determine the straightforward issue...” of whether the information was held (para 18).

The Commissioner’s approach is that a poor records management system does not necessarily mean that the information must inevitably be held. Instead the Commissioner is looking for a rigorous and well-focused search which takes into account the limitations imposed by a historically inadequate filing system.

At paragraph 28 the IT said “we do not feel qualified, in any event, to tell a complex national organisation discharging statutory responsibilities how it should operate record keeping systems in support of its functions”.

Whilst it may not be the IT’s role to comment on a public authority’s system of record keeping, it does fall within the Commissioner’s remit via the section 46 records management code.



## Records management training

34. An authority will only achieve good records management if its staff understand the importance of proper record keeping. An authority should arrange training for all staff involved in the creation or management of records.
35. This should be supported by clearly defined instructions to all staff, including temporary staff, contractors and consultants, on procedures and responsibilities. The authority should clearly set out roles and lines of responsibility in relation to records management.
36. This is covered in section 6 of the code and in the [Implementation Guide 2 – Organisational arrangements to support records management](#) devised by TNA to help public authorities comply with the code.

## Storage of records

37. The code says that an authority should know what records it holds and where they are. It should ensure that records remain usable for as long as they are required.
38. An authority should decide the format for the storage of its records. It is likely to hold records and information in a number of different electronic and manual systems. The authority should ensure that appropriate storage and preservation arrangements are in place, especially if there are any specific legal requirements for particular records.
39. Special care and monitoring is recommended in the case of vulnerable or sensitive material and paper files. An authority should consider keeping back-up copies of records in digital systems in a secure separate location.
40. All information held by an authority is treated the same for the purposes of FOIA and the EIR, regardless of whether it is stored in a different location. It is important for an authority to apply its records management policies consistently, even though it may store its records across more than one site. This minimises any issues when dealing with an information request.

### Example

In the case of [Bromley v the Information Commissioner and](#)

[the Environment Agency \(EA/2006/0072 31 August 2007\)](#) the Environment Agency discovered additional documents during the appeal process that they did not disclose when dealing with the original request. This led the appellants to believe there was yet further information to which they were entitled.

The IT said that "there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records", particularly .... "with a large organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations".

The IT decided that on the balance of probabilities no further relevant information was held, and in reaching this conclusion said they were "satisfied that the instances of information being wrongly withheld resulted from the sort of mistake that can understandably occur in a search across numerous sources".

### **Security and access**

41. An authority should ensure that its arrangements for storage, handling and transmission of records 'reflect accepted standards and good practice in information security'. An authority should already have an information security policy in place in order to comply with the requirements of the DPA.
42. An authority should restrict internal access where necessary, especially with personal data or confidential information. There should be an audit trail of access to and transfer of records. The authority should put in place a requirement for prior authorisation for the transmission of records, especially outside its own premises.

### **Disposal schedules**

43. An authority should review and manage its records efficiently. The Code recommends that an authority should define how long it needs to keep particular records and that it should dispose of them when no longer needed.
44. The Code states:-

'Disposal of records should be undertaken only in accordance with clearly defined policies....'

45. Disposal schedules form a key part of this process. They are timetables that set out when individual records or groups of records are due for review, transfer to an archives service or destruction. The Code provides advice on the disposal or retention of records in particular circumstances.
46. The authority should document what has happened to each record or piece of information falling within different categories.
47. An authority should ensure that any records scheduled for destruction are destroyed securely and that the proper process is followed.
48. It is important for an authority to keep records showing the location of the information it holds or has transferred to archives; or whether the information has been destroyed and if so, why and when.
49. If an authority receives a request for information that was destroyed, for example, as part of the routine disposal process these records will enable the authority to respond with confidence that it no longer holds the information.

#### **Example**

In [Fowler v the Information Commissioner and Brighton & Hove City Council \(EA/2006/0087 6 November 2007\)](#) the IT suggested that it may be persuaded that the information is not held where there is evidence of destruction. If a public authority raises such an argument, the Commissioner would look for evidence of destruction such as a retention policy or a disposal schedule.

50. The code may be used either to support a challenge to the public authority's assertion that the information is not held or may be referenced in the other matters section to promote better record keeping.

## Part 2 Transferring records to archives

### The review and transfer of public records

51. Part 2 of the code **only** applies to public authorities that are subject to the Public Records Act 1958 (PRA) or the Public Records Act (Northern Ireland) 1923 (PRANI).
52. This guidance is confined to those authorities that are also subject to FOIA or the EIR.
53. Part 2 of the code sets out the arrangements for authorities to follow in order to 'ensure the timely and effective review and transfer of public records', to TNA, a place of deposit for public records or PRONI.
54. The PRA also provides for the deposit of records in places other than TNA.
55. TNA supervises these places of deposit to ensure that appropriate arrangements are in place for preservation and access, and that suitable standards are maintained. More information on [approved places of deposit](#) can be found on TNA's website, [www.nationalarchives.gov.uk](http://www.nationalarchives.gov.uk).
56. The TNA [website](#) provides more detailed information on the review and transfer of public records and how this operates in practice.

### What Part 2 of the code covers

57. An authority should have effective arrangements in place to determine which records should be selected for transfer to an official archives service for permanent preservation.
58. Under the PRA a public authority is obliged to select and transfer public records to TNA or a place of deposit by a specified deadline.
59. From 1 January 2013 this timeframe was reduced from 30 to 20 years, but there is a ten year transition in place covering records from the years 1984 – 2001 so that the timeframe is reduced progressively, until the new rule is fully in effect.
60. The first phase commenced in January 2013 and applies to government departments and other bodies that transfer records to TNA.

61. The second phase which started in January 2015 covers public records of certain bodies that transfer records to local places of deposit. Records within this category are primarily of local interest and include those created by Magistrates' courts and the NHS.
62. More information on the 20 year rule and the phasing arrangements can be found in the [Frequently Asked Questions](#) section of TNA's website.
63. Under PRANI, transfer normally takes place at 20 years, or later if the principal officer of the department (or a judge in the case of court records) certifies this to the Minister.
64. Certain records may be retained by a public authority for longer than the specified deadline subject to approval by the Secretary of State. These are:
  - records that need to be retained by departments for ongoing administrative purposes; and
  - records that need to be retained for a particular reason, for example records containing information so sensitive that a release date cannot be estimated.
65. The Secretary of State can approve the retention of large categories of records of a similar character, such as security and intelligence material, known as blanket approvals. More information on retention is available from TNA.

## **Relevance of Part 2 of the code to FOIA and the EIR**

66. An authority transferring records to archives as described above should review the access status of those records prior to transfer, consulting others as appropriate. The basic rule is that those records are considered 'open' unless exemptions or exceptions apply.
67. If the transferring authority considers that exemptions or exceptions may apply, it ought to consider what information should be made available in the public interest. Certain exemptions or exceptions no longer apply after 20 years.
68. If the authority wishes to continue to apply exemptions or exceptions, it should submit a schedule to TNA or PRONI for review and advice prior to transfer.

69. The transfer of records under the code will not affect the statutory rights of access established under FOIA or the EIR. Anyone has the right to make a request for information to the authority holding it, including TNA, a place of deposit or PRONI.
70. Those organisations must handle the request under the relevant legislation on a case by case basis. They should review the continued relevance of any exemptions and, where appropriate, consult with the relevant government department before reaching a decision about the request.
71. For further guidance on exemptions and exceptions under FOIA and the EIR, please refer to [www.ico.org.uk](http://www.ico.org.uk).

## Enforcement of the code

72. Bodies that transfer records to TNA provide data on the volume and transfer status of the records they hold. TNA monitors compliance with the statutory duty to transfer the selected records by the deadline. This information is contained within the [TNA Record Transfer Report](#).
73. Failure to conform to the section 46 code is not in itself a breach of FOIA or the EIR; however the Commissioner promotes the observance of the code.
74. The Memorandum of Understanding between the ICO and TNA says 'The principal means of monitoring conformance with the records management code of practice will be self-assessment by public authorities, using tools provided by TNA.
75. The self-assessment tool at [www.nationalarchives.gov.uk](http://www.nationalarchives.gov.uk) can help a public authority evaluate and assess the conformance of its records management systems.
76. TNA has also issued a number of implementation guides covering records management processes, and guidance on how to apply the good practice recommendations in the code.
77. This code forms part of the framework which provides rights of access to information.
78. The Commissioner can take account of whether the code has been observed when considering section 50 complaints.
79. If the Commissioner needs information to decide whether or not a public authority's practice conforms to the code, he may

serve an information notice requiring the authority to provide specified information.

80. The Commissioner has the power to issue a practice recommendation under section 48 of FOIA if he considers that a public authority is not conforming to the code.
81. The practice recommendation would indicate which provisions of the code had not been met and specify steps for the public authority to take.
82. Failure to follow a practice recommendation could lead to a failure to comply with FOIA or the EIR, or could lead to an adverse comment in the Commissioner's report to Parliament.

## More information

83. More detailed guidance to support the operation of the code is available and is listed in Annex B of the [code](#).
84. Further guides are available from [TNA](#) and [PRONI](#).
85. Public authorities may also wish to consider the ICO guidance on:-

[Section 16 FOIA – Advice and Assistance](#)

[Regulation 9 EIR – Advice and Assistance](#)

[Section 45 FOIA Code of Practice](#)

[Regulation 16 EIR Code of Practice](#)

86. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Commissioner, Tribunals and courts.
87. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
88. If you need any more information about this or any other aspect of freedom of information or the environmental

information regulations, please [contact us](#), or visit our website at [www.ico.org.uk](http://www.ico.org.uk).