

Consultation process between the Information Commissioner and the Keeper of Public Records:

S48(3) Freedom of Information Act (2000) practice recommendation

Introduction

1. The Freedom of Information Act (2000) (FOIA) and the Environmental Information Regulations (2004) (EIRs) confer statutory regulatory powers on the Information Commissioner (the Commissioner), which includes issuing practice recommendations under s48 FOIA.
2. Under s48 FOIA, the Commissioner shall consult the Keeper of Public Records, who is also Chief Executive of The National Archives (TNA), before issuing a practice recommendation which relates to;
 - Conformity with s46 Code of Practice, in respect of;
 - Records which are public records for the purposes of the Public Records Act 1958 (PRA). At this time, Welsh public records are managed as though they are public records under the PRA, as the category of Welsh public records under s148 of the Government of Wales Act 2006 is currently latent.
3. The [Memorandum of Understanding \(MoU\) between the Commissioner and TNA](#) sets out the principles of cooperation between the parties. When issuing practice recommendations under s48 FOIA, consultation activity takes place under paragraph 19 of the MoU, which permits the sharing of knowledge, expertise, best practice and intelligence in relation to matters of mutual interest (excluding personal data).
4. This document sets out the consultation process between the Commissioner and the TNA under s48 FOIA and the MoU. Activity under this MoU is delegated by the Information Commissioner to the Director of FOI, and by the Keeper of Public Records to TNA's Director for Government. This consultation process will be reviewed as part of any review of the MoU, and at any other time as deemed appropriate by either party.

When will the Commissioner consult?

5. The Commissioner's [FOI and Transparency Regulatory Manual \(pilot\) 2022](#) sets the pilot framework for how the FOI and Transparency Directorate will take regulatory action in line with the Commissioner's statutory powers, which include practice recommendations.
6. Where the Commissioner has identified the need to issue a practice recommendation that relates to conformity with the s46 Code of Practice, in respect of public records, the Commissioner will consult with TNA before issuing that practice recommendation.
7. The usual timeframe that TNA will respond to the Commissioner is within 10 working days. However, the Commissioner and TNA may agree to amend this timeframe depending on the circumstances.

What will the Commissioner consult on?

8. The Commissioner will provide TNA with the draft practice recommendation, and other additional information as appropriate and relevant. Discussions will be held in line with the MoU and recorded.
9. The Commissioner will ask TNA to consider and provide feedback on:
 - The findings and recommendations of the draft practice recommendation, taking into account any engagement with TNA's information management assessment programme and its overall compliance with PRA obligations.
 - The cause and impact of any failures in practice, by contributing evidence-based views.
 - Measures for improvement, including any support TNA can provide to the public authority.
 - Any TNA products or tools the Commissioner can include in the draft practice recommendation.
 - Any resource implications for TNA contained in the draft practice recommendation.
10. The Commissioner and TNA can raise any other matters in the consultation as appropriate and relevant to the circumstances.

Points of contact

11. The Commissioner and TNA will identify and inform each other of the relevant 'points of contact' for each consultation.
12. For the Commissioner, the Group Manager who is going to be the signatory for the practice recommendation will be the point of contact for the consultation.
13. For TNA, this will be The Head of Government Services, Strategy and Stakeholder Engagement.
14. Issues can be escalated within each organisation when necessary and appropriate.

This consultation process has been agreed by:

Warren Seddon, Director of FOI and Transparency

Information Commissioner's Office

Lucy Fletcher, Director for Public Records Access & Government Services

The National Archives

10 February 2023

Annex

S48 Freedom of Information Act 2000

FOIA

48 Recommendations as to good practice.

(1) If it appears to the Commissioner that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with that proposed in the codes of practice under sections 45 and 46, he may give to the authority a recommendation (in this section referred to as a "practice recommendation") specifying the steps which ought in his opinion to be taken for promoting such conformity.

(2) A practice recommendation must be given in writing and must refer to the particular provisions of the code of practice with which, in the Commissioner's opinion, the public authority's practice does not conform.

(3) Before giving to a public authority other than the Public Record Office a practice recommendation which relates to conformity with the code of practice under section 46 in respect of records which are public records for the purposes of the Public Records Act 1958, the Commissioner shall consult the Keeper of Public Records.

(4) Before giving to a public authority other than the Public Record Office of Northern Ireland a practice recommendation which relates to conformity with the code of practice under section 46 in respect of records which are public records for the purposes of the Public Records Act (Northern Ireland) 1923, the Commissioner shall consult the Deputy Keeper of the Records of Northern Ireland