

Memorandum of Understanding between the Keeper of Public Records and the Information Commissioner

Introduction

The purpose of this memorandum is to clarify the relationship between the Information Commissioner ('the Commissioner') and the Keeper of Public Records ('the Keeper') under the Freedom of Information Act 2000 ('the Act'). It also seeks to establish a working framework for the development of this relationship in practice.

Legal Framework

1. As required by the Act, the Lord Chancellor has issued two codes of practice. The section 45 code relates to the discharge of functions by public authorities under Part 1 of the Act, and the section 46 code relates to records management in relevant authorities (public authorities and other bodies whose administrative and departmental records are "public records" as defined by the Public Records Act 1958).
2. Section 47(1) requires the Commissioner to promote the observance of the two codes of practice, and may, with the consent of an authority, carry out assessments of whether good practice is being followed (section 47(3)).
3. Section 47(5) requires the Commissioner to consult the Keeper about the promotion of the records management code in relation to public records.
4. Under section 51(1)(b)(ii) the Commissioner can serve an Information Notice on a public authority requiring it to provide information relating to conformity with either code of practice.
5. Section 48 enables the Commissioner to give to a public authority a "practice recommendation" specifying the steps which he considers should be taken in order to conform with good practice as recommended by either code of practice. A practice recommendation must be in writing and must refer to specific provisions of the code. Where the practice recommendation relates to conformity with the records management code and the records in question are public records, section 48(3) requires the Commissioner to consult the Keeper.
6. Under section 3(2) of the Public Records Act 1958 all bodies subject to that Act are required to perform their duties in relation to the selection and safeguarding of records under the guidance, co-ordination and supervision of the Keeper of Public Records.

Arrangements agreed between the Keeper and the Commissioner for the above statutory provisions to be observed

1. Liaison Meetings

- The Commissioner and the Keeper shall meet in March and September each year.
- This meeting will be an opportunity to discuss items of mutual interest and concern in relation to records management practice within public authorities.
- In particular, the Keeper will be able to share her assessment of the current levels of conformity with the records management code. The Commissioner may refer to this assessment in his annual report to Parliament.
- The meeting will also be an opportunity for the Commissioner and the Keeper to agree a programme of audits that the Keeper will undertake on behalf of the Commissioner to assess conformity with the records management code. Reports on the progress of on-going audits may also be provided at the meeting.
- In due course the Commissioner and the Keeper may decide to hold the meeting on an annual basis or at some other appropriate interval.
- The Deputy Keeper of the Records of Northern Ireland may be invited to participate in the meetings between the Commissioner and the Keeper.
- Nothing in this Memorandum prevents more frequent meetings from taking place between the Commissioner and the Keeper or their respective members of staff.

2. Audit

- The principal method for monitoring conformity will be self-assessment by public authorities.
- The Commissioner may request the Keeper to carry out assessments of conformity with the Records Management Code on his behalf. The detailed arrangements for such assessments may be formalised in a service level agreement.
- Selected authorities may be actively audited by the Keeper, in accordance with guidelines set out by the Commissioner for such audits.

3. Practice Recommendations

- Where, either via her role under the Public Records Act 1958 or in acting on behalf of the Commissioner under the Act, the Keeper considers that a practice recommendation should be given to a public authority she will raise this with the Commissioner.
- There may be circumstances, for example as a result of a complaint or following the response to an Information Notice, where the Commissioner considers that a practice recommendation should be given to a public authority. In such cases the Commissioner will consult the Keeper who will be able to advise whether there is a sound basis for the Commissioner's view and whether she considers that a practice recommendation is appropriate.
- The final decision as to whether or not a Practice Recommendation is issued will be taken by the Commissioner.

4. Information Notices

- There may be cases where the Commissioner considers that an Information Notice is needed so that he can assess whether a public authority is conforming with the records management code. The Commissioner will contact the Keeper who will advise whether she considers that an Information Notice is appropriate. For example, she may have relevant background information on the public authority in question.
- If the Commissioner decides that an Information Notice is to be served the Keeper may assist in the framing of the Notice.
- If the Keeper advises the Commissioner of a possible failure by a public authority to conform with the records management code and the Commissioner considers that further information is needed, the Keeper will assist in the framing of an Information Notice.

5. Co-ordinated Promotion and Monitoring

- In pursuance of the requirements of section 3(2) of the Public Records Act 1958, the Keeper issues standards, guidance and other tools in support of records management in government. In recognition of this, the Commissioner and the Keeper agree to work together in promoting and monitoring good records management in the public record sector.
- This co-operation will extend to the promotion and monitoring of conformity with the records management code, and the Commissioner and the Keeper will endeavour to carry out such activities in a co-ordinated manner. For example, this may involve the Commissioner alerting the Keeper to the need for an audit, or the Keeper alerting the Commissioner to the need for an Information Notice.
- In general, where the Keeper becomes aware of poor records management by a public authority which may indicate a significant failure to conform with the records management code she shall inform the Commissioner of this, and vice-versa. The Commissioner and the Keeper will agree on the appropriate course of action as circumstances dictate.

Signed by the Information Commissioner and the Keeper of Public Records on 24 May 2004

SERVICE LEVEL AGREEMENT

THIS AGREEMENT is made the 21st day of March 2005

BETWEEN:

- (1) The Keeper of Public Records (the "Keeper"); and
- (2) The Information Commissioner (the "Information Commissioner").

WHEREAS

- (A) In accordance with the provisions of the Freedom of Information Act 2000 (the "Act") the Lord Chancellor has issued two codes of practice. The code made under section 45 relates to the discharge of functions by public authorities under Part I of the Act, the code made under section 46 relates to records management in relevant bodies (public authorities and other bodies whose administrative and departmental records are "public records" as defined by the Public Records Act 1958).
- (B) Section 47(1) of the Act imposes a duty on the Commissioner to promote observance of the two codes of practice. Section 47(3) provides that the Commissioner may, with the consent of any public authority, assess whether that authority is following good practice (including compliance with the codes).
- (C) Section 47(5) provides that the Commissioner shall consult the Keeper about the promotion by the Commissioner of the records management code made under section 46 of the Act (the "Records Management Code") in relation to public records.
- (D) The Keeper and the Commissioner entered into a Memorandum of Understanding 24 May 2004 which clarifies the relationship between the Commissioner and the Keeper of Public Records under the Act (the "Memorandum of Understanding").
- (E) In section 2 (Audit) of the Memorandum of Understanding the Keeper and the Commissioner have agreed that Commissioner may ask the

Keeper to carry out assessments of conformity with the Records Management Code on his behalf. Section 2 further provides that the detailed arrangements for such assessments may be formalised in a service level agreement.

IT IS AGREED

1. Services and consideration

- 1.1 In consideration of the Commissioner assisting the Keeper in the pursuance of her duties and obligations with regard to the management of public records the Keeper shall provide assistance and services (as set out in clauses 3 and 4 below) to the Commissioner.
- 1.2 In consideration of the Keeper assisting the Commissioner in the performance of his duties under section 47 of the Act the Commissioner shall carry out the obligations set out in clause 2 below.

2. Obligations of the Information Commissioner

- 2.1 Any request made by the Commissioner to the Keeper to carry out assessments of conformity with the Records Management Code on his behalf shall be accompanied by, or include, a formal written statement providing the following information:
 - (a) A formal request, referring to section 2 (Audit) of the Memorandum of Understanding, for the Keeper to carry out an assessment of conformity with the Records Management Code on behalf of the Commissioner.
 - (b) The name, address and contact details of the public authority to be assessed.
 - (c) Confirmation that the public authority is aware of, and has consented to, the Keeper conducting such an assessment on behalf of the Commissioner to determine whether good practice is being followed.
 - (d) A statement providing the background to the request, summarising the reasons for concern and, where known, the specific areas of focus for the Keeper to assess.
 - (e) A named contact within the Commissioner's office to provide liaison and advice for each individual assessment.
- 2.2 Any issues of sensitivity or confidentiality of which the Commissioner is aware, which may be pertinent to the assessment are to be notified to the Keeper before the assessment is undertaken or, where that is not possible, as soon as is practicable given the particular circumstances, to ensure the Keeper's assessment team is fully briefed to undertake the assessment.
- 2.3 If required by the Keeper, a representative of the Commissioner will make themselves available on reasonable notice, for meetings with the

Keeper's representatives to resolve any matters of concern relating to each request for an assessment to ensure the process is undertaken in a timely manner and in accordance with the Methodology (as defined in Clause 4 below)

3. Obligations of the Keeper of Public Records

- 3.1 The Keeper shall provide sufficient resource to undertake up to a maximum of eight assessments in any one business year (that is 1st April to 31st March) and a maximum of two assessments in any one quarter of a business year.
- 3.2 The Keeper will, subject to the agreement of the relevant public authority, commence an assessment within 3 months of the receipt of the request made in accordance with clause 2 above.
- 3.3 The Keeper will provide a timetable for the completion of the assessment to the Commissioner within one month of receipt of the request.
- 3.4 The Keeper will use her best endeavours to complete an assessment within four months of the receipt of the request unless there are exceptional circumstances, which prevent the Keeper from undertaking the assessment within that time. Where the assessment will take longer than four months, the Keeper will advise the Commissioner of the exceptional circumstances as soon as possible after becoming aware of such exceptional circumstances and agree a revised completion date for the assessment.
- 3.5 Receipt by the Keeper of the request made in accordance with clause 2 above will mark the start of the four month assessment period referred to in 3.4 above.
- 3.6 The Keeper will provide a written report of the assessment to the public authority concerned within two months of completing the assessment detailing the level of compliance with the Records Management Code with appropriate proposals for remedial action by the public authority which has been the subject of the assessment.
- 3.7 The Keeper will provide a draft of the assessment report to the Commissioner within one month of completing the assessment and any proposals for a Practice Recommendation to improve or achieve good practice will be discussed and agreed before the report is finalised.
- 3.8 The Keeper will provide a named point of contact for receipt of all requests for assessment and other inquiries concerning the process and progress of individual assessments.
- 3.9 The Keeper shall notify the Commissioner within one week if any of the information required in 2.1 is missing or not in sufficient detail to enable the Keeper to carry out an assessment.

4. Methodology for undertaking the assessments

4.1 The Keeper is developing a draft methodology ("the Methodology") to enable both self-assessment by public authorities and provide a tool to inform external auditors (including the Keeper's staff) who may be required to undertake assessment of compliance with the Records Management Code. The draft Methodology has been provided to the Commissioner for consideration and review.

4.2 The Keeper shall ensure that

4.2.1 the Methodology will be based on the areas highlighted for action in the Records Management Code together with the objectives described in the model action plans developed and published by The National Archives ("TNA").

4.2.2 the Methodology will identify both quantitative and qualitative indicators of compliance and provide the means to identify areas of concern or risk, which in turn will enable public authorities to assess the risk of non-compliance, undertake remedial action and develop appropriate contingency planning.

4.3 The Keeper will circulate the draft Methodology between April and June 2005 for external peer review within the record management and audit community covering the following sectors:

- Central government
- Local government
- Health
- Education
- Police and emergency services
- Professional organisations (e.g. Records Management Society)

Specifically TNA will send the draft methodology to and endeavour to seek feedback from the following organisations:

- PRONI and NAS
- Audit Commission
- National Audit Office
- Healthcare Commission
- Commission for Social Care
- Department of Health Information Governance Branch
- ACPO
- JISC

4.4 The draft Methodology will be revised in the light of the feedback and finalised subject to the agreement and approval of the Commissioner and the Keeper to the proposed changes.

- 4.5 The Keeper will publish the agreed Methodology on its web-site.
- 4.6 The Keeper will test the Methodology in 2005/2006 and provide a report of the experience of the assessment teams and, if appropriate, make recommendations for further changes. Such changes will be incorporated into the published methodology with the consideration and agreement of the Commissioner and the Keeper.

5. Limitations and restrictions

- 5.1 Each request for an assessment will be limited to an assessment of one public authority.
- 5.2 The Keeper will limit the assessments it undertakes to public authorities based in England and Wales.
- 5.3 The Keeper will undertake no more than one assessment at a time unless a specific arrangement is requested, negotiated and agreed by both parties.

6. Review mechanisms

- 6.1 Both parties, on an annual basis, will jointly review this Agreement until it lapses or is terminated.
- 6.2 Both parties will collaborate to provide an annual report of each organisation's operational experience of assessments of public authorities against the Record Management Code undertaken in accordance with this Agreement. This report will be reviewed at the meetings to be held by the Commissioner and the Keeper in accordance with clause 1 of the Memorandum of Understanding. The review of the report will also consider the desirability of publishing the report.

7. Term and Termination

- 7.1 This Agreement shall commence on the date it was signed by both the parties and shall continue indefinitely thereafter unless it is terminated by either party giving the other not less than three months written notice

8. Governing Law

- 8.1 This Agreement shall be governed by and construed in accordance with English Law and each party hereby submits to the non-exclusive jurisdiction of the English courts.

Signed by the Information Commissioner and the Keeper of Public Records on
21 March 2005