

Freedom of Information Act 2000 (Section 48)

Practice Recommendation

Date 31 March 2008

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Following a recent decision, the Information Commissioner has, in accordance with his enforcement strategy, conducted an audit of complaints concerning the Department of Health (the 'Department'). As a result, the Commissioner is of the view that the Department's procedures do not conform to the following Code of Practice issued by the Secretary of State for Constitutional Affairs in November 2004:

- Discharge of Public Authorities' Functions under Part 1 of the Freedom of Information Act 2000 issued under section 45 of the Act (the 'Code').

A full copy of the Code can be found at:

<http://www.dca.gov.uk/foi/reference/impref/codepafunc.htm>

Summary

On 21 January 2008 the Commissioner served a Decision Notice (case reference [FS50083381](#)) which identified a number of concerns. These included; a breach of sections 1 and 17 (1) (b) and (c) of the Freedom of Information Act 2000 (the 'Act'); the failure to thoroughly ascertain the views of a third party contractor on the release of information at the appropriate time; the application of an exemption on a general principle and the admission that the Department could not account for the whereabouts of numerous documents filed between August 2003 and September 2004.

In the Commissioner's opinion, some of the concerns recorded in Decision Notice FS50083381 are symptomatic of the Department's general approach to requests for information made under the provisions of the Act. The Commissioner's views on the authority's approach to requests are supported by his findings in an audit of section 50 complaints received by his office. This audit considered 40 complaints, 20 of which relate to requests made in 2006 / 2007.

As a result of the audit the Commissioner has gathered evidence which suggests that the Department has failed to offer appropriate advice and assistance to applicants; has failed to

transfer requests appropriately; and is delaying the internal review process beyond a reasonable timescale.

In addition to the above, the Commissioner wishes to record his concerns in respect of the Department's failure to respond appropriately to an Information Notice.

The Commissioner considers that these, and other failures detailed in this practice recommendation represent non-conformity with the following parts of the section 45 Code of Practice:

- II – The provision of advice and assistance to persons making requests for information
- III – Transferring requests for information
- IV – Consultation with Third Parties
- VI – Complaints procedure

The matter of the missing files will be considered separately in accordance with section 48 (3) of the Freedom of Information Act 2000 (the 'Act').

As the regulator of the Data Protection Act 1998 (DPA), the Commissioner has also had other dealings with the Department. In 2007 the Department was investigated in relation to a security breach of the Medical Training Application Service (MTAS) website. The investigation found that junior doctors' personal details, which included religious beliefs and sexual orientation, had been readily accessible to anyone using the MTAS website. The investigation culminated in a DPA Undertaking, which required the Department to adhere to certain standards of security in the handling of personal data.

The Commissioner's Role

1. The Commissioner's duty is to promote observance of the Code of Practice under section 45 as a means of encouraging good practice by public authorities in carrying out their obligations under the Act.
2. Section 48 of the Act empowers the Commissioner to issue a Practice Recommendation, where it appears to him that the practice of a public authority does not conform to the Code. Such a recommendation will identify the provisions of the Code with which, in the Commissioner's opinion, the authority's practice does not conform and will specify the steps which he considers are necessary to promote conformity.

Nature of non-conformity

3. The Commissioner considers that the practice of the Department in relation to the exercise of its functions under the Act does not conform to the following provisions of the section 45 Code of Practice:
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Practice Recommendations are issued pursuant to section 48(1) of the Freedom of Information Act 2000. Regulation 16(5) of the Environmental Information Regulations 2004 provides that section 48(1) applies to environmental information.

Part II – The provision of advice and assistance to persons making requests for information

4. The Commissioner wishes to highlight the following practices of the Department when responding to requests for information which in his opinion, fail to meet the general levels of advice and assistance defined and implied under the Code:
 - The Department repeatedly applies blanket exemptions to requested information with the effect of withholding entire documents from release. This suggests that rather than considering requests on their own merits, exemptions have been applied on a general principle. The Commissioner is concerned that the application of exemptions in this way may have the effect of suppressing non-exempt information from release.
 - The Department repeatedly fails to establish the full extent of information held before responding to a request, resulting in the application of exemptions to information which is not held in its entirety.
 - The Department has failed to offer advice and assistance to requesters in bringing their requests within the appropriate limit.
 - The Department has failed to respond to various requests within the statutory time for compliance.
 - The Department has failed to respond appropriately to an Information Notice by supplying the ICO with incorrect information. Furthermore, the Commissioner has felt compelled to warn the Department that an Information Notice would be issued in order to elicit a suitable response to his specific enquiries during the investigation of two other cases.

5. In addition to the matters outlined above, the Commissioner is also concerned that the Department is regularly extending the time to consider the balance of public interest beyond the timeframe set out in his guidance of the 22 February 2007. A copy of this guidance is available at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf

6. The following examples illustrate some of the practices of the Department in regard to the consideration of the balance of public interest:
 - In response to a request made on 5 October 2007, the Department extended the time for consideration of the public interest on three separate occasions, exceeding the limits set out in the Commissioner's guidance. At the time of drafting this practice recommendation, the delay resulting from these extensions amounted to more than 90 working days.

- In another case, the Department extended the timescale for consideration of the public interest by 10 working days. The refusal notice issued on conclusion of the 10 days provided limited information on the application of the exemption itself, and only four lines of text to demonstrate the authority's consideration of the balance of public interest. In the Commissioner's opinion such limited explanations suggest that the need for an extension to the time to consider the balance of public interest is unwarranted.
7. Although they are not detailed here, the Commissioner is also aware of numerous lengthy extensions to the time to consider the public interest which have taken place in 2005 and 2006.

Part III- Transferring requests for information

8. During the investigation of one case, the Department suggested to the ICO that some of the information requested could in fact be obtained from a third party and that the complainant could resubmit his request to this party. Whilst the Commissioner welcomes the Department's direction in this regard, he notes that this advice came more than twelve months after the original request was made.
9. A similar situation occurred in another case considered by the Commissioner. A complainant was advised in September 2006 that he should make a request for some of the information he required to a third party. This advice was provided as part of the Department's internal review of the handling of the request which took place almost one year after the initial request was made.
10. In the Commissioner's view the failure to promptly inform the complainant that the request should be redirected in both of these cases demonstrates non-conformity with Part III of the Code.

Part IV – Consultation with Third Parties

11. The circumstances of complaint FS50083381 are detailed in the published Decision Notice and as such the full text is not repeated here. In summary, the Department received a request for a copy of a contract. The Department advised the requester that it believed the contract to be exempt from disclosure under sections 41 (information provided in confidence) and 43 (2) (prejudice to commercial interests) of the Act.
12. In the Commissioner's opinion the Department did not consult fully with the third party contractor to whom the contract related at the time of the request, nor at the point at which an internal review was conducted. Rather, the substantive consultation with the third party took place after the Commissioner had commenced an investigation. Whilst the Commissioner accepts that circumstances had

progressed and that consultation at this stage may have been appropriate, he is disappointed to note the absence of a detailed consultation at the time of the request. In addition he considers that the length of time taken to ascertain the views of the third party prolonged his investigation.

13. In another case, the Department withheld the names of various third party organisations detailed in the requested information. In keeping with the Part IV of the section 45 Code of Practice, the Commissioner would expect the Department to have consulted with the relevant third parties prior to reaching its decision to withhold their names. It appears to the Commissioner that in this case, the Department made its decision and consulted with the third parties involved retrospectively. In the Commissioner's opinion the approaches outlined in paragraphs 12 and 13 of this Practice Recommendation do not conform to Part IV, paragraph 27 of the section 45 Code of Practice
14. Part IV, paragraph 28 of the Code recommends that in cases where the information has been created by, or in conjunction with, a third party, an authority should consult that party as to whether it would be appropriate to provide further explanatory material or advice to the requester. In the Commissioner's opinion, such consultation is not routinely taking place.

Part VI – Complaints procedure

15. Part VI, paragraph 38 of the section 45 Code of Practice states that any written reply from an applicant which expresses dissatisfaction with an authority's response to a request for information should be treated as a complaint (request for internal review).
16. The Commissioner notes that in some cases, the Department has prevaricated in commencing a review until a full response to the initial request is provided, despite the fact that the complaint is made on the basis of the delay. In one case, the Department advised a requester complaining about delay, that a review could only take place after a response to the original enquiry had been provided. Such an approach does not conform to the recommendations made in Part VI, paragraph 38 of the Code.
17. In other cases, the conduct of the internal review itself has been subject to delay. In the Commissioner's opinion, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In a small number of cases which involve exceptional circumstances it may be reasonable to take longer, however in no circumstances should the total time taken exceed 40 working days. The Commissioner's view is set out in his Freedom of Information Good Practice Guidance No. 5, published in February 2007. A copy of this guidance is available at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

- In one case, the Department received a request for review on 28 March 2007, the outcome of which was not communicated until the 14 August 2007, over 90 working days later.
 - In two other cases recently brought to the Commissioner's attention, the Department responded to requests for review from the same applicant, dated 17 July 2007 and 7 August 2007 respectively, on the 26 November 2007. This amounts to a delay of over 80 working days in each of the cases.
 - In another case, the Department received a request for an internal review on 14 January 2007. The outcome of this review was not communicated until the 26 March 2007.
 - In a further case, a request for review submitted on 29 August 2006 remained outstanding in April 2007. This delay is of particular concern as a response to the initial request had already been subject to an inordinate delay whilst the Department considered the balance of public interest test. The Commissioner makes reference to this and other occurrences as the delays ensued despite the publication of his guidance on the matter.
18. Although they are not listed here, the Commissioner is also aware of numerous delays in the conduct of internal reviews requested in 2005 and 2006.
19. The Commissioner considers that these delays demonstrate non-conformity with Part VI, paragraph 39 of the section 45 Code which states that complaint procedures should encourage a prompt determination.
20. In addition to the matters outlined above the Commissioner wishes to record two further incidences of non-conformity with Part VI of the Code:
- In one case a requester claimed that he had not received a response to a request made in June 2005. The Department contested this, but resent a copy of the response in March 2006. The requester then asked for an internal review, which the Department declined to conduct on the grounds that an unreasonable delay had ensued since the original response was issued. Given the uncertainty over receipt of the original refusal notice, and the fact that the Department itself delayed in responding to the request by several months, the Commissioner considers that as a matter of good practice the Department should have erred on the side of caution and conducted a review.
 - An internal review considered by the Department in February 2006 was undertaken by the same staff member who responded to the initial request. This does not conform to the recommendations of Part VI, paragraph 40 of the Code. However the Department has acknowledged this oversight and the Commissioner is confident that this matter has been properly addressed.

Action Recommended

21. As a result of this audit and the experiences of his case officers, the Commissioner is concerned that information management, particularly in relation to freedom of information requests to the Department, may not be adequately resourced or given appropriate priority.
22. The Commissioner wishes to draw the Department's attention to the guidance provided by the Secretary of State in the procedures and training section of the Foreword to the section 45 Code of Practice which states:

Larger authorities should ensure that they have a central core of staff with particular expertise in Freedom of Information who can provide expert advice to other members of staff as needed.

23. Whilst the Commissioner has no doubt that pockets of expertise in the area of freedom of information exist within the Department, he is concerned that current levels of resource may not support the volume of requests and reviews received. He therefore recommends that the Department review existing levels of resource for FOI and the deployment of that resource.
24. The Commissioner recognises that the Department has already taken steps to improve communication with his office and welcomes the progress made in this regard. However, some problems in respect of timeliness of responses remain. The Commissioner hopes that this practice recommendation will encourage further improvements and reduce the need for formal intervention, such as Information Notices, in future investigations.

Part II- The provision of advice and assistance to persons making requests for information

25. The Department should ensure that all information relevant to the request (and where applicable, the review) is assembled and considered fully before making a decision as to whether disclosure is appropriate. The Department should also ensure that each request is considered upon its own merits, taking into account any circumstances relevant to the request (or review) at that time. This should assist the Department in making decisions on the matters intrinsic to the request, as opposed to the application of exemptions on a general principle. Ultimately, the Commissioner considers that such an approach will ensure greater transparency and openness within the Department.
26. In cases where the Department wishes to invoke the appropriate limit (section 12), as a matter of good practice the authority should provide a breakdown of how the

estimate on the cost of compliance was reached. In order to demonstrate conformity with Part II, paragraph 10 of the section 45 Code of Practice, the Department should for example, provide one or more of the following:

- an outline of the different kinds of information which might meet the terms of the request;
 - access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
 - a general response to the request setting out options for further information which could be provided on request.
27. In cases where the requester indicates that they are not willing to meet the fee that the Department proposes to levy, the authority should consider whether any information that may be of interest to the applicant could be provided free of charge. In addition the Department should advise the requester that by reforming or re-focussing their request, information may be supplied for a lower, or no, fee. This would assist the authority in demonstrating conformity to Part II, paragraphs 13 -14 of the Code.
28. The Department should ensure that all requests and subsequent reviews are dealt with within the appropriate timescales.
29. If the Department has not already done so, consideration should be given as to whether a statement on the following should be published:
- the usual procedure for transferring requests for information
 - the procedure for consultation with third parties
30. These recommendations are not exhaustive, and the Department should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

Part III – Transferring requests for information

31. Where the Department has reason to believe that a third party holds the information requested and therefore proposes to confirm that the information is not held, it should do one of the following:
- If the Department believes that such information is held by another public authority it should:
- explain this to the requester;
 - suggest that the requester reapply to the relevant authority;

- provide contact details for that authority

If it is more appropriate to transfer the request to the other authority the Department should:

- seek confirmation from the authority that the requested information is actually held prior to transfer;
- if the information is held, consider whether a transfer is appropriate;
- consider whether the requester is likely to have grounds to object to the transfer

32. These actions should be carried out as soon as is practicable, and the applicant must be informed as soon as possible once this has been done.

Part IV – Consultation with Third Parties

33. When considering requests which relate to a third party, the Department should, where appropriate, ensure that thorough consultation with that party is carried out at the earliest opportunity, preferably immediately after receipt of the request. If circumstances have changed on receipt of a request for an internal review, the Department should consider whether it would be appropriate to contact the third party again.
34. In cases where the information has been created by or in conjunction with a third party, the Department should consult that party as to whether it would be appropriate to provide further explanatory material or advice to the requestor. This should be done at the earliest opportunity. In the event that further explanatory material or similar is suitable for release, this should be provided to the requestor as soon as it is practicably possible.
35. Such an approach will assist the Department in conforming to Part IV, paragraphs 26- 28 of the Code.

Part VI – Complaints procedure

36. Any written reply from an applicant expressing dissatisfaction with the handling of a request should automatically trigger the internal review process. The Commissioner recommends that the Department review its procedures in this regard to ensure that the current provision for complaint handling is adequate.
37. In order to avoid situations where internal reviews run concurrently with requests which are effectively unanswered, the Department should ensure that responses to requests are provided within the statutory timeframe and should only extend the time for consideration of the balance of public interest where absolutely necessary.
38. The Department should ensure that there are procedures in place to expedite internal reviews and conduct them within the recommended timeframe of 20 working days (40 days in exceptional circumstances).

39. Part VI of the Code makes a number of other suggestions in relation to internal review procedures and the Commissioner believes it would be beneficial to remind the Department of two of these:
- Public authorities should publish their target times for dealing with complaints and information as to how successful they are in meeting those targets. When dealing with reviews, they should inform the complainant of the target date, including if necessary estimates of when the complaint will take longer to resolve.
 - Records should be kept of all complaints and their outcomes. Public authorities should review these records for repeated reversals of initial decisions and if necessary amend their request handling procedures or publication scheme.
40. The Department should refer to the resources available on the Commissioner's website (www.ico.gov.uk) or contact the ICO directly should it require any further guidance or assistance when implementing these recommendations.

Failure to comply

41. A Practice Recommendation cannot be directly enforced by the Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the Act 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 under section 49 of the Act.

Other matters

42. Although they do not form part of this practice recommendation, the Commissioner wishes to highlight the following matters:

Section 1

43. By failing to fully establish the extent of information held before responding to requests, the Department is, on occasion, failing to meet the requirements of section 1 (a) of the Act. Section 1 (a) states '*Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request*'.

Section 17

Practice Recommendations are issued pursuant to section 48(1) of the Freedom of Information Act 2000. Regulation 16(5) of the Environmental Information Regulations 2004 provides that section 48(1) applies to environmental information.

44. When refusing a request or extending the time for consideration of the public interest, sections 17 (1) (b) and (c) require that an authority specify the exemption in question and state (if that would not otherwise be apparent) why it applies. In the Commissioner's opinion some of the notices issued by the Department fail to specify the exemption in question or provide an adequate explanation as to why it is engaged. As such, some of the notices issued breach the requirements of section 17 (1) (b) and (c).

Section 46 Code of Practice

45. The Department has informed the Commissioner that it cannot account for the whereabouts of numerous paper documents filed between August 2003 and September 2004. Furthermore, other complaints made to the Commissioner suggest that the authority may be failing to meet the expected standards of good practice in relation to records management. The Commissioner is exploring these issues further under the provisions of section 48 (3) of the Act but would like to take this opportunity to remind the Department, once again, of the provisions of the section 46 Code.

Dated the 31 day of March 2008

Signed.....

Richard Thomas
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF