

Freedom of Information Act 2000 (Section 48)

Practice Recommendation

Date 03 November 2008

Public Authority: Department of Communities and Local Government

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In accordance with his enforcement strategy, the Information Commissioner has conducted an audit of a number of section 50 complaints concerning the Department for Communities and Local Government (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

In December 2007, the Commissioner received a complaint concerning a request for information made in June of that year. The complaint centred upon the failure of the Department to respond to a request for an internal review submitted on the 25 July 2007.

Given the apparent seriousness of the delay, the Commissioner's Case Reception Unit contacted the Department for an explanation, and was verbally informed that this review was one of several outstanding.

In January 2008 the Commissioner's Good Practice and Enforcement Team, who have responsibility for overseeing the [enforcement strategy](#), wrote to the Department to informally advise that the authority:

1. prioritise the completion of all outstanding internal review requests that are older than 40 working days;
2. provide the Commissioner with copies of any policies and procedures relating to internal reviews;
3. advise of the steps, if any, being taken to improve the time taken to undertake internal reviews in line with the Commissioner's guidance and the requirements of the Environmental Information Regulations.

In March 2008 the Department responded, advising the Commissioner that it was aware of the practice guidance for dealing with complaints contained in the Lord Chancellor's Code of Practice, and of the Commissioner's own good practice guidance. The Department assured the Commissioner that its responsibilities in this regard were taken seriously and that it always aimed to comply with both its statutory obligations and the good practice guidance for carrying out reviews. The Department also explained the steps it was taking to alleviate the delays.

Later that month, the Commissioner's Good Practice and Enforcement Team contacted the Department for a second time to advise that they would continue to monitor the situation. In line with the Commissioner's general approach to investigating internal review delays, the Good Practice and Enforcement Team also asked to be provided with a summary of the reviews outstanding. At this stage, and in recognition of the reassurances offered by the Department, the Commissioner had in mind to resolve the matter informally.

The Commissioner carried out an analysis of the information the Department had supplied and was extremely concerned to note that a significant number of reviews appeared to be subject to lengthy delay. For example, at the time of receiving the information, at least two internal reviews appeared to be over two years old.

The Commissioner was also concerned to note that the information supplied by the Department appeared to show that a number of responses to initial information requests had also been subject to delay, calling into question the Department's compliance with section 10 (1) of the Act (time for compliance with request).

Furthermore, it appeared to the Commissioner that there were a number of significant delays between the receipt of a request for review and its actual allocation. Some of these delays appeared to be in excess of 100 working days. The Commissioner was concerned that aside from explaining the difficulties around the availability of review officers, the Department had not demonstrated specific reasons for these delays.

Given this lack of explanation and the magnitude and volume of the issues highlighted by the analysis of the information supplied, the Commissioner wrote to the Department, in July 2008, asking it to confirm whether his interpretation of the figures was correct and advising that on receipt of this information, he would consider whether formal action was appropriate. He also undertook to conduct a review of 24 section 50 complaints submitted to his office in 2007 / 08.

In August 2008 the Department provided a response to the Commissioner's letter. It explained that the Commissioner's interpretation of the figures provided was correct, but stressed that continuing quality assurance may yield additional improvements to the accuracy of the data.

The Department also provided an updated list of outstanding reviews, from which the Commissioner was pleased to note, a number of internal reviews appeared to have been completed.

In issuing this practice recommendation, the Commissioner recognises the assurances already made by the Department. However he considers that, to date, it has failed to demonstrate an appropriate level of commitment to improvement and failed to offer acceptable explanations for the performance issues. Furthermore, the extent of the internal delays are so significant that the Commissioner wishes to make them a matter of public record, in keeping with his general functions to disseminate information on the operation of the Act under section 47 (2). In the Commissioner's view, the public should be made aware that delays of this nature are not acceptable.

The Commissioner has also had dealings with the Department in his capacity as the regulator of the Data Protection Act 1998. On the 24 September 2008, the Commissioner issued the authority with an [Enforcement Notice](#) under section 40 (1) of the Data Protection Act. The notice related to the Department's failure to respond to a request made under section 7 (1) of that Act within the prescribed timeframe.

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.
3. Section 47 (2) of the Act allows for the Commissioner to disseminate, in such form and manner as he considers appropriate, information that appears expedient to him to provide to the public on:
 - the operation of the Act
 - good practice
 - other matters within the scope of his functions under this Act

Nature of non-conformity

4. 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:

Part VI – Complaints procedure

5. 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).
6. In a number of cases, the conduct of the internal reviews has been subject to significant 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_speci alist_guides/foi_good_practice_guidance_5.pdf

- In one case, the Department received a request for review on 11 August 2006. Information supplied to the Commissioner from the Department indicates that this review remained outstanding on the 22 August 2008, over 500 working days later, and over one year from the date of publication of the Commissioner's guidance on the timescales for internal review.
- Additionally, a request for review submitted on the 30 October 2006 remained outstanding on the 22 August 2008, over 450 working days later.
- In another case, a request for review submitted on 28 November 2006 remained outstanding on 22 August 2008, over 430 working days later.
- In another, the Department received a request for review on 3 October 2006. Information supplied to the Commissioner from the Department indicates that this review remained outstanding on the 19 June 2008, over 400 working days later. The Commissioner understands that this review has now been concluded.
- Additionally, a request for review submitted on the 15 May 2007 remained outstanding on the 22 August 2008, over 300 working days later.
- In a further case, a request for review was submitted on the 12 June 2007. A response to this review remained outstanding on the 22 August 2008, over 290 working days later. This delay is of particular concern to the

Commissioner as the Department's own figures suggest that a response to the initial request had already been subject to an inordinate delay.

7. The Commissioner makes reference to these and other occurrences as the delays ensued despite the publication of his guidance on the matter, and despite his officers drawing the Department's attention to this guidance on numerous occasions.
8. Although they are not listed here, the Commissioner is also aware of numerous other delays in the conduct of internal reviews requested in 2006, 2007 and 2008.
9. 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.

Action Recommended

10. As a result of the information supplied by the Department, the information held on section 50 complaint files, the experiences of his case officers, and the results of his audit the Commissioner is concerned that information management, particularly in relation to freedom of information requests made to the Department, may not be adequately resourced or given appropriate priority.
11. The Commissioner recognises that the Department has already taken steps to try to address the backlog of internal reviews which has accumulated. These steps include:
 - Extending the eligibility of staff capable of being internal review officers;
 - Issuing a renewed call for volunteers to perform the role of internal review officers, a step which has yielded an additional eight officers;
 - Delivering a programme of targeted training to new and existing internal review officers;
 - Allocating additional staff to assist with the administration of internal reviews;
 - Actively prioritising the allocation and completion of all outstanding reviews in excess of 40 working days;
 - Ensuring that the Department's Corporate Delivery Board is aware of the problems with conducting internal reviews. This has resulted in the recruitment of some additional review capacity.
12. The Department has also indicated that it will be taking a number of steps to ensure that its existing resource is utilised effectively. This includes the suggestion that the Department will contact requesters with longstanding complaints to ascertain whether or not they still wish the Department to conduct an internal review. The

Department has also indicated that it will consider whether information that was originally withheld may now be released, which may negate the need for a review.

13. Whilst the Commissioner welcomes these suggestions, he would like to remind the Department that the purpose of an internal review is not limited to considering whether information was withheld appropriately. Rather, an internal review should provide a fair and thorough opportunity to assess both decisions taken pursuant to the Act and the procedural handling of a request.
14. The Department has explained that, ultimately, it aims to eliminate the backlog of internal reviews entirely. The Commissioner welcomes the commitments the Department has made in this regard and recognises that aside from some initial delays, the authority has been both helpful and co-operative when assisting with his enquiries. Furthermore, he recognises that the Department has already adopted some of the informal recommendations made during the course of correspondence with the authority. However, by the Department's own admission, adherence to the recommended internal review timescales is more of an aspiration than a reality at present. Accordingly the Commissioner considers that to date, the Department has failed to demonstrate an appropriate level of improvement within a suitable period of time.
15. 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.
16. Whilst the Foreword does not form part of the Code itself, the Commissioner has replicated its content here to reinforce the message that large authorities are expected to have appropriate expertise in place.
17. The Commissioner hopes that this practice recommendation will encourage further improvements and facilitate tangible progress in reducing the backlog of internal reviews.

Part VI – Complaints procedure

18. 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.
19. 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). If it has not already done so, the Department

should consider assigning temporary resource to tackle any remaining backlog of internal reviews.

20. It appears to the Commissioner that the Department has been to some extent reliant on the goodwill of its staff in volunteering to conduct reviews, an approach which may not be sustainable in the long term. The Commissioner therefore recommends that the Department consider whether there is scope to include responsibility for the consideration and completion of internal reviews within specific job roles or to specifically designate internal reviewers.
21. 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 three 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.
 - Where the outcome of the complaint is that the procedures within an authority have not been properly followed by the authority's staff, the authority should apologise to the applicant. The authority should also take appropriate steps to prevent similar errors occurring in future. If the Department has not already done so, the Commissioner would urge the authority to contact those individuals whose internal reviews remain outstanding to apologise for the delay.
22. The Commissioner notes that the figures supplied to him by the Department suggest that in a number of cases, there is a significant delay between the receipt of a review and its actual allocation. He therefore recommends that the Department take urgent steps to reduce the potential for such delays in future by ensuring that reviews are allocated for action at the earliest possible opportunity.
23. The Commissioner believes that these steps are necessary to ensure the timeliness of responses to internal reviews.
24. 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

25. 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

26. Although they do not form part of this practice recommendation, the Commissioner wishes to highlight the following matters:
27. In addition to his responsibilities in respect of the Freedom of Information Act, the Commissioner also holds regulatory responsibility for the Environmental Information Regulations 2004 (EIR) and for the Code of Practice issued under Regulation 16 of the EIR. Regulation 16 (5) of the EIR explains that the Commissioner's power to give a practice recommendation under section 48 of the Freedom of Information Act shall also apply for the purposes of the EIR (subject to the modifications specified in paragraph (16 (6))).
28. The Commissioner is aware of at least two significant internal review delays emanating from requests made under the EIR, and considered issuing separate recommendations to this effect. However, as the advice provided would, for the most part, be a repetition of that contained in this recommendation he has decided not to do so on this occasion.
29. The Commissioner would however, like to take this opportunity to remind the Department that Part XII, paragraph 63 of the EIR Code explains that authorities must consider whether they have complied with their requirements under EIR and respond to the complainant within 40 working days from the time when the complaint was received.

A full copy of the EIR Code can be found at:

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specalist_guides/environmental_information_regulations_code_of_practice.pdf

30. For the avoidance of doubt the Department is considered to be a public authority for the purpose of both the Act and the EIR.
31. The Commissioner notes that a number of incidences in which internal review delays have occurred relate to requests made to Government Offices. For the purposes of the Act, the EIR and the Data Protection Act, the Government Offices for the regions are

considered to be part of the Department and are not public authorities in their own right.

Further detail is available from the Department's website, at

<http://www.communities.gov.uk/corporate/foi/>

32. Section 10 (1) of the Act requires that a public authority must respond to a request made under section 1 (1) (the general right of access to information) promptly and in any event not later than the twentieth working day following the date of receipt. Section 17 (3) of the Act provides a mechanism for an authority to extend the time for compliance with a request if a decision on the balance of public interest is yet to be reached.

33. The Commissioner has received complaints which suggest that the Department has extended the time for consideration of the balance of public interest beyond a reasonable timeframe. In addition the Department's own figures, voluntarily provided to the Commissioner, suggest that the authority has invoked 17 (3) to extend the timeframe for the consideration of the balance of public interest on numerous occasions. Whilst the Commissioner notes that many of these extensions took place in 2006 and early 2007, he would like to take this opportunity to remind the authority of his guidance, issued in February 2007 on this matter. In this guidance the Commissioner recommended that public authorities should aim to respond fully to all requests in 20 working days. Although it suggested that it may be reasonable to take longer where the public interest considerations are exceptionally complex, the guidance stated that in no case should the total time exceed 40 working days. The full text of this guidance can be viewed at:

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

Dated the 3 November 2008

Signed.....

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