

## Freedom of Information Act 2000 (Section 48)

### Practice Recommendation

Date 10 March 2008

**Public Authority:** National Offender Management Service (NOMS)  
(an Executive Agency of the Ministry of Justice)

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Following a number of recent appeals received regarding freedom of information requests made to NOMS, the Information Commissioner has, in accordance with his enforcement strategy, conducted an audit of the complaints. As a result, the Commissioner is of the view that the authority's policies and 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.

A full copy of the Code can be found at:

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

The Commissioner notes that under the Freedom of Information Act 2000 (FOIA), NOMS is not a public authority itself but is in fact an executive agency of the Ministry of Justice (MoJ) which is in turn responsible for NOMS. The public authority in this case is therefore the MoJ, although for the sake of clarity this practice recommendation refers to NOMS as if it were the public authority.

### Summary

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On 22 February 2007, the Commissioner issued guidance on the time limits for considering the public interest test (PIT). This 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.

In early October 2007 the Commissioner's case reception team began to notice that when responding to requests under FOIA NOMS appeared to be extending the time for considering the PIT as a matter of course. The Commissioner's published enforcement strategy indicates that repeated and/or systemic breaches of the Act or non-compliance with the Codes of Practice may lead to intervention. As a result, the ICO conducted an audit of complaints received regarding the handling of FOI requests by NOMS. The audit has revealed that since the guidance was issued NOMS has extended the time for considering the public interest test on 61 separate occasions involving 14 different requests.

On 8 September 2007, a complaints team leader wrote to NOMS reminding it of our guidance on the time for the PIT. Its acknowledgement four days later stated that our advice had been noted but subsequently NOMS twice extended the time to consider the public interest in relation to another request.

In a meeting with representatives of NOMS on 16 November 2007, ICO staff highlighted a number of concerns relating to the handling of information requests by NOMS and in particular stressed their concern regarding the overuse of extensions to the time for considering the PIT. The Commissioner is particularly disappointed that since this meeting NOMS have extended the public interest test in relation to a further four requests.

The Commissioner reviewed 26 cases in total, half of these involving requests made to NOMS in 2007. As a result of the audit, the Commissioner also has some concerns about the application of section 12 (and an accompanying lack of appropriate advice and assistance) as well as the time taken for internal reviews. In addition, he wishes to highlight breaches of section 17 of the Act, although these are dealt with in the 'Other Matters' section as they are not strictly issues that can be addressed in a practice recommendation.

## **The Commissioner's Role**

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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

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3. The Commissioner considers that the practice of NOMS 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 II - The provision of advice and assistance to persons making requests for information.

4. The Commissioner wishes to highlight the following general practices of NOMS when dealing with requests to which they have applied a qualified exemption:
  - NOMS sends out regular monthly letters to extend the PIT, in some cases for 12 months consecutively.
  - NOMS repeatedly fails to give a reliable target date by which the PIT considerations will be concluded.
  - NOMS does not attempt to explain the specific reasons for delay or the PIT considerations themselves in any of their extension letters. Although this is not a requirement of either the Act or the Code, the Commissioner considers that in cases involving exceptional PIT delay it would be both good practice and good customer service to provide such information to the applicant.
  - NOMS often applies the same exemption, section 31(1)(f), before extending the time for the PIT, even when it would appear to the Commissioner that there are other more appropriate exemptions which could be applied.
  - NOMS does not explain why the exemption applies. As this is a requirement of section 17 of the FOIA, this issue will also be considered in the 'Other Matters' section of this practice recommendation.
5. Based on the above, the Commissioner is concerned that NOMS may be regularly extending the time to consider the PIT in order to 'manage' the workload created by the requests for information it receives. Such practices may also appear to be designed to delay full responses to requests and as such the Commissioner is concerned that NOMS may encourage allegations of deliberate delay. For example, in some cases, having initially failed to explain why an exemption applies, NOMS has subsequently decided not to rely on it or failed to refer to it in its reply, thereby raising questions as to its application in the first place.
6. The following findings from the Commissioner's investigation also give considerable cause for concern:
  - Following ICO intervention in three PIT cases NOMS eventually released the information requested, deciding not to rely on the exemption but making no attempt to explain the PIT considerations and thereby the delays.

- Following intervention in a further four PIT cases, NOMS eventually released some information but then introduced section 12 (appropriate limit) for the first time to withhold the remainder. In these cases NOMS then failed to demonstrate how the appropriate limit was exceeded and failed to offer any advice on how to refine the request to bring it within the cost limit. Neither did it advise what information (if any) would be available within the limit.
  - On three occasions where the requested information has subsequently been released or partially released, NOMS, in its final response, has entirely failed to mention a qualified exemption on which it originally relied and for which the PIT was being considered.
  - In two cases, NOMS applied section 40 in their final response without explaining which data protection principle(s) would be breached or why. In one of these cases, the application of section 40 was obvious at the request stage but it was not introduced until the final refusal four months and four PIT extensions later. In the other, section 40 was applied initially (along with other exemptions) and the complainant received three standard PIT extension letters despite the fact that this exemption is not subject to a PIT.
  - In two further cases involving multipart requests, NOMS has applied exemptions (again without explaining why they apply) and then presented very brief generic PIT arguments which do not specify the information with which they are associated and moreover do not actually appear to relate to that information. In one such case, the refusal notice contained only five lines of argument. The requestor had asked for a review of the time taken to consider the PIT and in response NOMS first extended the time to reply to the complaint and then advised that it was satisfied that the delay of four months was not excessive and was necessary due to the complexity of the PIT arguments.
  - When applying section 12, NOMS typically advise that a complainant can refine their request to bring it under the cost limit but then add that a series of smaller requests may be declined under the aggregation of fees. The Commissioner considers this advice to be unhelpful and discouraging and not in the spirit of the Act.
7. Although the Commissioner does not believe that NOMS is seeking to intentionally delay responses to requests, he considers that when taken together these actions demonstrate that NOMS is repeatedly failing to meet its obligations under section 16 and the Code.

## Part VI – Complaints procedure

8. The Commissioner notes that prior to 9 May 2007, NOMS was an executive agency of the Home Office and that at this time internal reviews, complex cases and ICO complaints were handled by the Home Office. In addition, some of these cases would have also required input from the then DCA (now MoJ) clearing house. He recognises but does not condone that the involvement of such parties

may introduce delays that are not always or entirely the responsibility of NOMS. Nevertheless he wishes to highlight the following evidence of unacceptable delays and process in dealing with internal reviews:

- In one case referred to the Home Office, the internal review was requested on 2 February 2005 but not completed until 28 June 2007, nearly 29 months later.
  - In another case, the internal review was initially requested on 11 December 2006 and eventually resolved through informal meetings in the second half of 2007. However, in the intervening period the public authority first stated that they were unable to supply a likely completion date and then failed to meet their own subsequent target date.
  - For two separate requests for internal reviews made on 12 September 2006, the responses were not received until 20 June 2007 and 24 September 2007, over nine months later and one year later respectively.
  - The Commissioner is also aware of a number of other cases where the time for internal review has been between three and a half and four months.
9. Since becoming part of the MoJ, NOMS deal with all of their own requests and internal reviews (including some transferred back from the Home Office) and there are now significantly fewer referrals to the clearing house. Although more recent cases have been delayed by extensions to the time for the PIT and so have yet to progress to an internal review where necessary, the Commissioner hopes that this simplified process will result in a significant reduction in the number and nature of internal review delays.

## Action Recommended

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10. In order for NOMS to conform to the above mentioned Code, the Commissioner recommends the following action be taken:

## Advice and assistance

11. As mentioned earlier in this practice recommendation, the Commissioner is concerned that NOMS may be utilising aspects of the Act and the Code to manage its workload. This in turn raises the question that NOMS may not be adequately resourced to meet its FOI responsibilities or that these resources could be better deployed. NOMS has advised that it receives 25-30 requests per week and that its FOI team consists of 11 staff. In order to meet statutory obligations and conform to the related codes of practice, NOMS and/or the MoJ should therefore review the situation to ensure that FOI in the agency is adequately and appropriately resourced as well as given suitable priority. They should also ensure that all members of staff receive relevant training.

12. NOMS should review its existing FOI request handling policies, procedures and associated training with particular emphasis on the efficacy of these in relation to resources. Specifically, it should address the timeliness and quality of internal and external communications as well as its procedures for applying exemptions, refusing information and offering advice and assistance. It should take account of the 'Procedures and Training' advice in the foreword to the Code when assessing whether its training and procedures are adequate. Although the foreword does not form part of the Code the advice will undoubtedly assist NOMS in meeting the expected standards of conformity.
13. NOMS should ensure that its staff are aware of the advice and assistance guidance in the Code and that they are adequately trained in order to provide it. In addition to the guidance on the time for the PIT mentioned earlier in this practice recommendation, it should also refer to the following produced by the Commissioner:
  - Awareness Guidance No. 23 – Advice and Assistance  
[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_23\\_-\\_advice\\_and\\_assistance.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_23_-_advice_and_assistance.pdf)
  - Awareness Guidance No. 3 – The Public Interest Test  
[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_3\\_public\\_interest\\_test.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_public_interest_test.pdf)
14. Given the complex inter-relationships with the MoJ, prisons, probation and private service providers, NOMS should publish procedures for dealing with requests requiring consultation with other public authorities and/or third parties in accordance with Part IV of the section 45 Code. It should also consider publishing similar procedures for requests which need to be transferred to other public authorities in accordance with Part III of the Code.
15. Where NOMS apply section 12 because the cost of complying with the request would exceed the appropriate limit, it should consider providing details of how to refocus the request together with an indication of what information, if any, could be supplied within the cost limit. In the past, NOMS advice in this regard has been unspecific and over eager to stress that a number of smaller requests may be refused under aggregated costs.
16. The Commissioner believes that these steps are necessary to ensure the adequacy, consistency and timeliness of responses to both requests for information and internal reviews.

## Complaints Procedure

17. In February 2007, the Commissioner published guidance on the time limits for carrying out internal reviews and this is available online at:  
[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_good\\_practice\\_guidance\\_5.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf)

18. In summary, this guidance states that the Commissioner considers that 20 working days is a reasonable time for completing an internal review and that in no case should the total time taken exceed 40 working days.
19. 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 NOMS of these:
  - When refusing a request or part of a request, public authorities should ensure that they provide full details of their complaints procedure including how to make a complaint, and inform the applicant of the right to complain to the Commissioner if still dissatisfied following the review.
  - Any written reply expressing dissatisfaction with an authority's response to an FOI request should be treated as a complaint and should therefore invoke the internal review procedure.
  - The complaints procedure should provide a fair and thorough review of the handling issues and decisions taken throughout the life of the request. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue, and should be as clear and simple as possible encouraging a timely determination of the complaint.
  - Complaints should be acknowledged promptly and such acknowledgements should include the target date for completing the review. In accordance with the Commissioner's guidance, the target time should only be extended in exceptional circumstances and in such cases the complainant should be informed and provided with an explanation of why more time is required.
  - 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 **reliable** 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 a complaint is that the procedures within an authority have not been properly followed, the authority should apologise to the applicant. The authority should also take appropriate steps to prevent similar errors occurring in future.
20. NOMS should refer to the resources available on the Commissioner's website ([www.ico.gov.uk](http://www.ico.gov.uk)) or contact the ICO directly should it require any further guidance or assistance when implementing these recommendations.

## Failure to comply

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21. 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

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22. Although it does not form part of this Practice Recommendation, the Commissioner wishes to highlight the following matters:
23. It is possible that a PIT extension letter issued by a public authority could also act as a refusal notice. However, in the 14 requests mentioned earlier where the PIT was extended, NOMS issued large numbers of extension letters which failed to explain why the exemptions applied and did not include details of the complaints procedure or the appeal rights to the ICO. Consequently, the Commissioner considers that these are not refusal notices and that at the time of issuing its final response in each of these cases NOMS had either failed to comply with its duty under section 1(1) or section 17(1) within the time limit prescribed by section 10.
24. The Commissioner also considers that a number of the final refusal notices breach section 17(1)(c) by failing to explain sufficiently why an exemption is engaged. In addition, in cases involving multipart requests and more than one exemption, NOMS should ensure that it is clear both to what information an exemption applies and why it is engaged.
25. Finally, the Commissioner has serious concerns in relation to the manner in which NOMS engage with this office:
- In two cases the ICO was forced to issue an Information Notice as information required for an investigation of a complaint was unforthcoming. On one occasion NOMS lost the Commissioner's Information Notice and had to be supplied with a copy.
  - Since October 2007 the Commissioner's case reception team and case officers have been routinely writing to NOMS to repeat and emphasise the Commissioner's guidance on the time for the PIT. In almost all these cases NOMS have acknowledged this correspondence and advice but as is evident from this practice recommendation they have failed to act upon it.
  - In a number of cases, NOMS failed to meet deadlines set by the ICO and sought to extend them only to miss some of them again.

- In a case involving a request made on 22 August 2007 where NOMS had already extended the time for the PIT four times, an officer of the agency advised the ICO on 8 February 2008 that NOMS were not able to give an indication of when they would be able to provide a substantive response. Furthermore, they went on to add that some of the information requested was on the NOMS disclosure log but that the applicant had not been informed of this and section 21 had not been cited.

Dated the 10 day of March 2008

Signed.....

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