

Freedom of Information Act 2000 (Section 48)

Practice Recommendation

Date 15 December 2009

Public Authority: UK Border Agency

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In accordance with his Enforcement Strategy, the Information Commissioner has taken action in relation to the UK Border Agency (UKBA). The action took the form of a period of monitoring during which it was understood that UKBA would be expected to demonstrate improved practice. At the conclusion of this period of intervention, the Commissioner is of the view that UKBA's practice does 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.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf>

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

Summary

In July 2008, having viewed the evidence provided by section 50 complaints¹ relating to UKBA's handling of requests for information, it appeared to the Commissioner that the authority may not be conducting internal reviews in accordance with the recommendations of part VI of the Code.

The Commissioner was particularly concerned that the authority was failing to conduct reviews promptly and that in so doing was failing to adhere to the Code and to his published guidance in this respect.

¹ Section 50 'Application for decision by the [Information] Commissioner'.

Paragraph 39 of the Code states that internal reviews should be clear and simple and should “....encourage a prompt determination of the complaint.”²

The Commissioner’s guidance, published in February 2007, sets out his expectations regarding the time which public authorities should take to complete internal reviews. It echoes the Code’s focus on promptness and explains that:

- a reasonable time for completing an internal review is considered to be 20 working days from the date of receipt;
- there may be a small number of exceptional cases in which it may be reasonable to take longer;
- in no case should the time taken exceed 40 working days³.

In keeping with his [FOI Enforcement Strategy](#), the [FOI Practice Recommendations Policy Statement](#) and the [Better Regulation Task Force Principles](#), the Commissioner, via his FOI Good Practice and Enforcement Team, initially sought to resolve matters informally. This was in recognition of UKBA’s stated commitment to improvement and steps it had taken to address its performance. The informal intervention took the form of a 12 month period of monitoring, at the end of which, UKBA would be expected to demonstrate significant improvements in its handling of internal reviews.

At the end of the monitoring period, despite making some progress in relation to a backlog of overdue internal reviews, UKBA was still consistently failing to meet the Commissioner’s recommended completion targets.

This evidence of consistent delays and failure to take adequate steps to improve performance led the Commissioner to issue this practice recommendation which finds that UKBA has failed to conform to the following parts of the Code:

- Part VI – Complaints procedures

² The Code is available online here:

<http://www.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf>

³ Guidance available on the ICO website here:

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

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

Chronology

4. In July 2008, following receipt of two complaints⁴ which identified delays in conducting internal reviews the Commissioner wrote to UKBA. The purpose of writing was to establish whether the delays were evidence of repeated or consistent failure to conform to the recommendations of the Code and also to seek clarification of UKBA's internal review procedure.
5. On 14 August 2008 UKBA responded and explained that, in relation to the procedure, almost all of its internal reviews are undertaken by its Information Access Policy Team, except in rare cases where all team members have been involved in the handling of the original request. In such instances, reviews are handled by the Home Office's Information Rights Team. In relation to performance, UKBA confirmed that the evidence of delays provided by the Commissioner were not unusual and that, during the period 21 January 2007 to 21 July 2008, 17 of 46 internal review decisions had been completed within 40 working days. UKBA acknowledged that this rate fell short of the Commissioner's recommended best practice and outlined steps that had already been or would be taken to address performance.

⁴ ICO references: FS50177320 and FS50161811.

6. On 21 August 2008 the Commissioner contacted UKBA for a second time and expressed concern at the high volume of internal reviews taking an excessive time for completion. The Commissioner acknowledged the steps taken by UKBA to address this issue and, in order to be assured that these were sufficient to produce the necessary improvement, proposed to monitor this aspect of UKBA's performance. The monitoring would take place over a six month period during which UKBA would provide the Commissioner with two quarterly breakdowns of internal review performance.
7. On 5 December 2008 UKBA provided statistics regarding its internal reviews. These showed that the majority of reviews had taken between 41 and 72 working days to complete. Two outstanding reviews which, despite being requested prior to the commencement of the Enforcement monitoring period, were incomplete after in excess of 200 working days. UKBA acknowledged that the statistics were disappointing but emphasised that it took its responsibilities very seriously and that it was working hard to address its performance. UKBA also set out further steps it had taken in order to produce an upturn in performance, including the recruitment of additional staff.
8. On 10 December 2008 the Commissioner contacted UKBA and advised that, as a matter of urgency, it should consider escalating the oldest internal review cases in its backlog.
9. On 22 March 2009 UKBA provided the Commissioner with further statistics. UKBA acknowledged that the statistics reflected disappointing performance and, making reference to measures taken to correct this, explained that new members of staff were, understandably, not yet performing to their full potential.
10. On 31 March 2009 the Commissioner responded, noting that the statistics showed that of the reviews completed between 1 August 2008 and 31 January 2009, only 10% were completed within 20 working days. 57% of reviews took in excess of 40 working days to complete. Further cause for concern was provided by the figures regarding the volume of outstanding reviews and the timescales involved. The elapsed time in relation to 14 incomplete reviews ranged from 51 to 260 working days. Despite the evidence of unsatisfactory performance, the Commissioner noted UKBA's commitment to improvement and acknowledged that it would be reasonable to allow further time for the steps taken to have effect. A further six month period of monitoring was, therefore, set and it was made clear that if there was no evidence of improved performance by the end of this period, it was likely that a formal practice recommendation would be issued.
11. On 15 April 2009 UKBA agreed to provide statistics for a further 6 months. UKBA also stated that it accepted that a practice recommendation would be issued if significant improvements were not displayed by the end of the additional monitoring period.

12. On 1 June 2009 UKBA wrote to provide the first round of statistics for the extended period of monitoring. These showed that, whilst some inroads had been made into the backlog of internal reviews, there were still a significant number of reviews awaiting completion after over 100 working days. UKBA indicated that there were signs of improvement in relation to requests for review received since 1 April 2009 with the majority of these being completed within 40 working days. However, it was acknowledged that considerable further improvement was required before the end of the monitoring period in order to avert the possibility of a practice recommendation.
13. On 4 June 2009 the Commissioner wrote to UKBA to acknowledge that some progress had been made. However, it was emphasised that much stronger evidence of improvement was required. It was hoped that, by the end of the monitoring period all existing reviews incomplete after 100 working days would be cleared. It was also expected that statistics would provide some evidence of a steady state system which was performing to the Commissioner's recommended targets.
14. On 2 October 2009 UKBA wrote to provide the final statistics of the monitoring period. UKBA confirmed that all the outstanding, overdue reviews referred to in the Commissioner's previous letter had been completed. However, in relation to current performance, UKBA acknowledged that this was not as good as it should be; nor as good as UKBA would want it to be. Of ten reviews received between May and July 2009, two were completed after 79 and 67 working days. The remaining eight reviews were incomplete after between 45 and 88 working days.

Nature of non-conformity

15. The Commissioner considers that the practice of UKBA 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

16. Part VI, paragraph 38 of the section 45 Code 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).
17. In a number of cases, UKBA's internal reviews have been subject to severe 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.

- In one case, a request for review received on 13 March 2008 remained incomplete on 31 March 2009, after 260 working days.
 - A review requested on 22 May 2008 was still ongoing on 31 March 2009, after 214 working days.
 - A review requested on 30 September 2008 was still ongoing on 1 June 2009 after 165 working days.
 - A review requested on 4 August 2008 remained incomplete on 31 March 2009 after 164 working days.
 - A review requested on 11 August 2008 was still ongoing on 31 March 2009 after 160 working days.
18. The Commissioner makes reference to these and other occurrences as the delays ensued despite the publication of his guidance on the matter.
19. Although they are not listed here, the Commissioner is also aware of numerous other specific delays in the conduct of internal reviews. In terms of overall performance, according to figures provided by UKBA for reviews conducted between August 2008 and April 2009, only one review was completed within the 20 working days recommended by the Commissioner. UKBA's reviews met the upper limit of 40 working days, which the Commissioner has set as the timescale for reviews in exceptional cases, in only 29% of reviews requested during August – October 2008 and in 27% of reviews requested between November 2008 and January 2009. Of reviews either ongoing or completed beyond the 40 working day target during this period, over a quarter (28%) exceeded 100 working days.
20. 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

21. As a result of information provided regarding UKBA's practice in relation to the conducting of internal reviews the Commissioner is concerned that information management, particularly in relation to freedom of information requests made to UKBA, may not be adequately resourced or given appropriate priority.
22. The Commissioner notes that, during the 12 month period of monitoring, UKBA has experienced a rise in the volume of requests for internal review, many of which are complex in nature. This, combined with unavoidable staff absences has had an impact on the timeliness of UKBA's responses.

23. The Commissioner notes that UKBA has already taken steps to address its performance in relation to the conducting of internal reviews. Measures already taken or due to be implemented include:
- Reviewing the allocation procedure to speed up the process;
 - bringing in a temporary manager to cover a continued absence;
 - reviewing the resources within the team responsible for handling reviews to establish whether the right size and grade mix has been allocated;
 - providing more cross training and increasing flexibility to ensure that priority actions are always carried out regardless of individuals' work patterns;
 - considering whether some internal reviews could be carried out in the business by an independent third party or whether an additional officer could be loaned to the team for 2-3 months to help address the backlogs;
 - the preparation of a submission to UKBA's Chief Executive canvassing support in reminding Directors of their responsibility to respond to FOI requests in a timely manner. Alterations to the relevant database have been requested to allow more informed management information to be gathered to support this escalation process;
 - the roles of senior officers to be developed to allow for a better relationship to be developed between the FOI team and the business to allow a more targeted approach to monitoring the completion of FOI requests.
24. The Commissioner welcomes these measures and notes that steps already taken by UKBA have produced laudable results in addressing existing backlogs. However, by UKBA's own admission, whilst the improvements in performance are an achievement, the current rate of internal review completion is neither as good as it should be nor as good as UKBA would want it to be.
25. Accordingly, the Commissioner considers that, to date, UKBA has failed to demonstrate an appropriate level of improvement within a suitable period of time.
26. Whilst the Commissioner acknowledges that, within public authorities, FOI must compete with other demands on resources; he expects that authorities should make provision for the volume of and/or content of initial requests and requests for internal review within their handling procedures.

27. The Commissioner wishes to draw UKBA'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:
- “...it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and the Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on good practice issued by the Commissioner.”⁵
28. Whilst the Foreword does not form part of the Code itself, the Commissioner has reproduced its content here to reinforce the message that large authorities are expected to have appropriate expertise and resources in place.
29. The Commissioner hopes that this practice recommendation will encourage further improvements and facilitate tangible progress in relation to the timeliness of UKBA's internal reviews.

Part VI – Complaints procedure

30. 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 UKBA review its procedures in this regard to ensure that the current provision for complaint handling is adequate.
31. UKBA 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). It is noted that UKBA is already intending to assign temporary resource to address the existing backlog of reviews. If necessary, UKBA should consider extending this proportionately to address any overdue reviews.
32. 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 UKBA 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.

⁵ The Code is available online here:

<http://www.justice.gov.uk/guidance/docs/foi-section45-code-of-practice.pdf>



- 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 the future. If UKBA has not already done so, the Commissioner would urge it to contact those individuals whose internal reviews remain outstanding to apologise for the delay.
33. The Commissioner believes that these steps are necessary to ensure the timeliness of responses to internal reviews.
34. UKBA 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 conform

34. A practice recommendation cannot be directly enforced by the Commissioner. However, a failure to conform to 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.

Dated the 15th day of December 2009

Signed.....

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