

Information Commissioner's Office

ICO response to Consultation on revisions to the FOI s45 Code of Practice

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About the ICO

The ICO's mission is to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

The ICO is the UK's independent public authority set up to uphold information rights. We do this by promoting good practice, ruling on complaints providing information to individuals and organisations and taking appropriate action where the law is broken.

The ICO enforces and oversees the Freedom of Information Act, the Environmental Information Regulations, the Data Protection Act and the Privacy and Electronic Communication Regulations.

Introduction

The ICO has a duty under section 47 of the Freedom of Information Act 2000 (the Act) to promote good practice by public authorities. One of the means by which we do this is via the code of practice under section 45 of the Act (the Code).

We were given the opportunity to comment on an earlier draft of the revised Code and we welcome the chance to do so again now. We look forward to being consulted again on the final version before publication.

The ICO also welcomes the Government's expression of its continued commitment to proactive transparency by the public sector, as evidenced in the draft Code. This builds on the recommendations in the report of the Independent Commission on Freedom of Information.

The ICO's response to the consultation contained in this document should be read jointly with our detailed comments on the wording of the draft Code itself, which we have provided together with this response.

Overview

The draft Code is now much more comprehensive than its predecessor. We commented in 2016 that there is a risk, in making it more detailed, that the Code might become out of date as new court judgments are made and interpretations of the Act evolve.

Since we aim to keep our website guidance on the Act up to date with these changes, we suggest that public authorities might find it helpful for the Code to include a prominent link to the [guidance section of the ICO website](#) as a further source of guidance about the Act.

Specific questions and issues

For clarity and ease of reference, we have set out our comments below in response to each question and in relation to each chapter, together.

Right of Access – Chapter 1

Question 1:

Is the guidance in chapter 1 of the Code clear and helpful for public authorities to understand the right of access to information in the FOI Act and how to manage requests on this basis?

Partially.

Chapter 1 would benefit from a link to the [guidance section of the ICO website](#) as a source of more detailed guidance on the right of access to information.

We have recommended some changes to wording.

Amendments to wording

Chapter 1 is mostly clear but contains some inaccuracies that we have highlighted in our detailed comments on the draft Code itself. Please read those comments in conjunction with this response.

There is a risk that, left uncorrected, these would mislead public authorities about the requirements of the Act and of the Code.

For example:

- certain obligations under the Act still apply even when, for instance, information is not held. A public authority must therefore respond to the requester even when it does not hold information, stating that fact (or citing an exemption if the duty to confirm or deny does not apply) (eg para. 1.8);
- what constitutes a valid request (eg 1.7);
- what is recorded information (1.7); and
- whether information is held by a public authority:
 - an authority may still “hold” information that is political or personal, for instance (1.10)
 - an authority does not hold information for the purposes of the Act if it holds it **solely** on behalf of another (1.10);
 - deleted information held as a backup is still held (1.11).

GDPR and Data Protection Bill

Para. 1.5 refers to the Data Protection Act 1998; depending on the envisaged date for publishing the Code, we recommend that consideration be given to updating this to reflect the GDPR which will take effect from 25th May, as well as the requirements of the Data Protection Bill.

Use of social media when making a request

We recommend that the Code does not limit valid addresses to postal, email and twitter addresses, since requests via other forms of social media may also be valid. It is preferable to ensure the Code is future-proof from a technological advancement perspective for as long as possible.

Since the use of social media to make requests might increase, and other platforms might emerge, it would be helpful to provide public authorities with more guidance on it in the Code.

Are there any other areas where it would be helpful for this guidance to be more detailed or where it could be clearer?

Yes; as outlined above and in our comments on the draft Code document.

We note that the draft Code does not provide guidance on matters of form and format (s.11 of the Act). We suggest that you might like to consider doing so in this chapter and/or elsewhere (eg the chapter on advice and assistance; see below).

We have also commented on the other chapters of the Code.

Chapter 2 Advice and assistance

Section 16(2) of the Act states that any authority which provides advice and assistance that conforms with the s45 code of practice is taken to have complied with the section 16(1) duty to provide advice and assistance. The Code should therefore be as comprehensive as possible on this topic. We suggest that it might also be useful to public authorities for the Code to provide a link to our guidance on this subject.

Also, the Code does not cover form and format matters (s.11); you might like to consider including some guidance on that in this chapter (for instance, authorities might consider offering a particular requester the means to view information in a way that meets their needs) as well as including a reference in chapter 1 to make it clear that requesters have a right to express a preference about the means by which information they have requested is communicated.

In 2.10 the reference to "costs limit" on line one should instead be "appropriate limit" which are the words used in s.12 of the Act.

Chapter 4 Time limits for responding to requests: PIT extensions

In 4.7 the Code should make clear that the authority has to state to the requester which exemption(s) it is relying on, and explain why.

Chapter 5 Internal reviews

In 5.2 the Code should explain that the authority must state if it does not have an internal review procedure. It should also state that it is good practice to provide internal review details in all responses to requests, not just refusal notices, so a complainant knows they can challenge anything about a response, rather than just refusals.

In 5.3 we suggest you might like to reconsider use of the words “usual practice”, since there does not appear to be any objective evidence to support this statement.

Also in 5.3, it is incorrect to state that authorities are not obliged to accept a request for internal review made later than 40 days from the initial response.

In 5.4 the Code should state the expected timescale for completing an internal review, as set out in the ICO’s guidance: no longer than 20 working days in most cases, or 40 in exceptional circumstances.

In 5.9 the Code should explain that an internal review should sufficiently engage with the complainant’s arguments, particularly on prejudice and the public interest where relevant, to demonstrate that the internal review request has been properly considered.

Chapter 6 Cost limit

We note that this chapter goes beyond providing guidance on good practice under the Act, and focusses on the provisions of the costs regulations. If it is intended to retain this detail, we suggest that the Code make clear it is referring to the regulations. There is also a risk that, by including specific details from the regulations, the Code will become out of date if the regulations are amended.

In 6.2 it is incorrect to state that an authority isn’t obliged to respond to a request that would take it over the costs limit. The authority must respond, explaining its application of section 12.

Chapter 10 Communicating with a requester

In 10.2 the Code should clarify that an authority is not obliged to have an internal review / appeals process. However as we stated above in relation to 5.2, it should also state that it is good practice to provide internal review details in all responses to requests, not just refusal notices, so a complainant knows they can challenge anything about a response rather than just refusals.

In 10.3 the Code should make it clear that authorities have to explain their application of the public interest test where relevant.

As we stated above in relation to 5.9, the internal review response should sufficiently engage with the complainant’s arguments, particularly on

prejudice and the public interest where relevant, to demonstrate that the internal review request has been properly considered.

For the remaining chapters, please see comments below and on the draft Code document.

Chapter 8 Transparency publications

Question 2:

Does the guidance about publication of FOI compliance statistics provide enough detail for public authorities to start publishing their own compliance statistics?

No.

If further guidance on this would be helpful what should this cover?

The Code needs to be clearer on practical detail, to help authorities to understand how, when and where they are expected to publish the compliance statistics. Para. 8.6 is contradictory. It states that they should “publish their statistics in line with central government, on a quarterly basis” but then goes on to state “Publication schemes are likely to form the best vehicle for publishing this information”.

Central government statistics are published on gov.uk on a quarterly schedule; if other public authorities are expected to accord with that medium and/or timescale, this will need to be explained clearly to them. Otherwise, they will need to understand what they must do to publish that information.

Whilst we agree publication schemes might provide “the best vehicle for publishing this information”, publication schemes are not published on a quarterly basis; they are available on a continuous basis, and should be updated regularly. There is no expectation for them to conform to a quarterly schedule, and they are published not on gov.uk but on the public authority’s own website.

Will the new statistics fall under the definition of official statistics under the Statistics and Registration Service Act 2007 (and hence fall outside the FOIA s.11(5) definition of a dataset)? Regardless of whether or not they are a dataset, we would encourage the publication of the statistics in an open machine readable format so they can be used and explored by the public.

The ICO’s website guidance on publication schemes does not currently contain references to compliance statistics; for clarity we will need to update it to reflect this Code requirement.

Finally, it will be important to publicise the new requirements well to public authorities; how is it planned to do this? The ICO stands ready to assist.

Chapter 8 Transparency publications

Question 3:

Is the guidance about the publication of information about senior pay and benefits clear and helpful?

Partially.

Authorities are likely to perceive a conflict between their existing transparency obligations and those introduced by the revised Code; there is also likely to be confusion about what precisely they are expected to do.

Since publication of this information might give rise to concern, further consideration may be needed as to how it fits in with data protection requirements.

Are there any areas of this guidance where further detail would be useful?

Yes.

This amended section of the Code implies that the information on senior level pay and benefits should be published in an authority's publication scheme, but does not explicitly state that; we think that would be helpful and clearer for authorities.

Whilst this section acknowledges that the level of staff about whom information should be published may not always be "a direct read-across" (8.9), we have concerns that authorities may find the additional requirements of the code to be confusing, when compared with their publication scheme obligations.

The ICO guidance for each sector (the definition documents and guides to information) on publication of salaries and benefits (ie the thresholds and timescales) is likely to differ in some respects from the requirements of paragraphs 8.9 and 8.10. The details in that guidance were the result of discussions with the sectors. Do the Code requirements mean public authorities should publish two sets of information? Do you anticipate that the Code should prevail?

Para. 8.10 states that authorities "can refer to the ICO's guidance as a guide to the expected minimum level of detail, and that local authorities should follow the "publication requirements" of the Local Government Transparency Code. This needs some clarification; does this refer to the timing of updates to the publication scheme / transparency code publication, or again to the content of the information to be published?

Again, as with the compliance statistics, appropriate publicity will be essential.

Chapter 7 Guidance for vexatious requests

Question 4:

Does the proposed guidance on vexatious and repeated requests provide the right level of detail about the circumstances in which public authorities might want to consider using section 14?

Partially.

In 2016 we commented that this chapter refers to the court's interpretation of "vexatious", rather than providing guidance on good practice. We query the legal position on the extent to which this is permissible.

We suggest that this chapter of the Code should reflect the court's wording as closely as possible, as our guidance on this subject does. It would be helpful to provide a link to our website guidance here.

If further guidance on this would be useful what should this cover?

The report of the Independent Commission on Freedom of Information recommended that the Code should encourage public authorities to make use of s.14 in appropriate cases. In the light of that, we suggest that it could be given greater emphasis in the chapter.

Chapter 11 and Annex - Datasets

Question 5:

Is it helpful to merge the datasets Code of Practice with the main section 45 Code so that statutory guidance under section 45 can be found in one place?

Yes, definitely.

It will assist public authorities in applying the dataset provisions, and in understanding how they relate to the rest of the Act. We note that the text here reproduces key elements of the current datasets code, though more concisely.

Question 6:

If you agree the datasets code should be merged is it helpful to split the datasets guide into a section on release of datasets and a section on guidance on re-use of datasets?

It's helpful to split it into two sections to make the distinction between the provisions on disclosure, which apply in all cases involving datasets, and those on re-use, which apply only in specific contexts. The draft explains that distinction clearly. However, the re-use provisions are still part of the Act; that section could be still included in the main body of the text, rather than being relegated to an Annex, which perhaps implies they have a lesser status.

Other areas within Part I of FOIA

Question 7:

Are there any other areas in Part I of the Act where it would be helpful to have additional guidance in the Code? If so, what do you think the additional guidance should cover and why?

Yes; as outlined below and highlighted in our comments on the draft Code.

Transparency and confidentiality obligations in contracts and outsourced services – Chapter 9

We welcome the guidance provided by the Code on this important issue; the Code rightly points out that the volume of outsourcing in the public sector is continuing to increase. The Information Commissioner's 2015 report on outsourcing pointed out the risks of the transparency gap emerging from this.

Whilst we are making some suggestions to improve the wording of this section of the Code (see below and on the draft Code), we believe that further policy interventions are required to address the emerging transparency gap, and these may need to include formal FOIA designation of some outsourced providers and amendment to the definition of 'information held' in FOIA. The Commissioner will be publishing a report on this issue later in 2018.

We propose that the Code should make greater reference to the Crown Commercial Service's model services contract, which provides standard clauses related to FOIA.

We also recommend that greater reference is made to the importance of publishing contracts and related information about performance under FOIA publication schemes.

In relation to confidentiality clauses, we also suggest that the Code should use stronger wording to make clear that blanket clauses are rarely likely to be acceptable, and parts of a contract marked confidential should be narrowly drawn.

Consultation on revisions to the FOI s45 Code of Practice

For further information on this submission, please contact Vivienne Adams, Senior Policy Officer, Policy and Engagement Department, Information Commissioner's Office on 01625 545850 or email viv.adams@ico.org.uk

If you would like to contact us please call 0303 123 1113.

www.ico.org.uk

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