

Freedom of Information Act 2000 (Section 48) Practice Recommendation

Department for Work and Pensions

23 March 2023

Summary

Section 48 of the Freedom of Information Act (FOIA) empowers the information Commissioner (the Commissioner) to issue a practice recommendation where it appears to him that a public authority has failed to conform, specifically, to the FOIA Codes of Practice. These failures are addressed in the recommendations section below. Section 47 of FOIA also makes clear that the Commissioner has a duty to promote the following of good practice beyond just the requirements of the Codes of Practice. The wider concerns the Commissioner has in this case are addressed in the "Other matters" section below to keep them distinct from the Section 48 related recommendations he has made.

In respect of the FOIA cases submitted to him for a decision, the Department for Work and Pensions (DWP) has had a consistently poor level of performance in terms of its request handling, specifically in relation to determining whether information is held and the conduct of internal reviews. This has been highlighted in those cases where it has been necessary for the Commissioner to intervene in order to ensure DWP's compliance with FOIA.

Following engagement by his staff with DWP about the underlying reasons for these failings, the Commissioner has reached the view that DWP's request handling practices do not conform to parts 1, 5 and 10 of the section 45 Freedom of Information Code of Practice, issued by the Cabinet Office in July 2018 (the Code).

Recommendations

The Commissioner has been engaging with DWP regarding his concerns about its request handling. During this correspondence, DWP confirmed to the Commissioner the improvements already made to its request handling, namely that the Central FOI Team (CFOIT) now reviews all responses and internal reviews to ensure compliance with FOIA. The Commissioner has therefore designed the following recommendations to support and enhance DWP's improvements to its information rights practices.

In considering these recommendations, we expect DWP to ensure that it meets the requirements of all information rights legislation to which it is subject.

Area of Code	Non-conformity	Recommendation of steps to be taken
<p>Section 1 of the Section 45 Code of Practice</p> <p>Section 1.1 of the Code sets out requesters' right to be informed whether or not the public authority "holds information meeting the description set out in the request" [emphasis added].</p>	<p>A direct consequence of the requirement of section 1 of the Section 45 Code of Practice is the need for a public authority to adequately and precisely "scope" the request. Put another way, the public authority must read the request and ask itself "what, precisely, is being requested?".</p>	<p>DWP should ensure that staff are sufficiently trained and aware of its procedures and practices in order to provide responses that fully comply with FOIA and the section 45 Code of Practice. DWP should ensure that responses pay careful attention to the wording of requests for information and be sure to discharge its obligation to confirm whether the requested information is or is not held, assuming a "neither confirm nor deny" response is not being issued.</p>
	<p>The Commissioner has noted a pattern of requests brought to him in which DWP has failed to correctly interpret the request, locate all of the information falling within the scope of the request or has failed to confirm what information, if any, is held.</p>	<p>DWP should request a consensual audit of the DWP's FOIA policies and practices and procedures from the ICO.</p>
		<p>DWP should undertake a self-assessment via his online Toolkit, in particular Topic 1, modules 2 & 3 request handling and training. DWP should then implement any changes required following the outcome of the self-assessment.</p>

Area of Code	Non-conformity	Recommendation of steps to be taken
<p>Section 5 of the Section 45 Code of Practice</p> <p>Section 5.8 of the Code sets out that internal reviews should provide “a fair and thorough review” of relevant matters.</p>	<p>The Commissioner has noted a trend in DWP’s internal reviews to simply repeat the arguments set out in the refusal notice. This appears to be particularly prevalent in cases where DWP has relied on section 35(1)(a) or any of the limbs of section 36.</p> <p>The Commissioner also notes that where procedural errors occur, these are not always rectified at internal review, suggesting a lack of a thorough reconsideration of the request.</p>	<p>DWP should ensure that internal reviews are carried out in a “fair and thorough” manner. In order to ensure that this happens consistently, DWP should refresh its procedures for carrying out internal reviews and ensure that these are effective and robust.</p>

Area of Code	Non-conformity	Recommendation of steps to be taken
<p>Section 10 of the Section 45 Code of Practice</p> <p>Section 10.2 of the Section 45 Code of Practice sets out what exactly should be included in any initial response to a request for information under FOIA.</p>	<p>The Commissioner has noted the persistent use of standard templates in DWP’s refusal notices, particularly where DWP is relying on section 12, section 35(1)(a) or any of the limbs of section 36. DWP routinely fails to specify the nature of the prejudice envisaged under section 36(2)(c).</p>	<p>DWP should ensure that it responds fully to each request and that it provides the details and information required by sections 1 and 17 of FOIA.</p> <p>DWP should ensure that it does not solely rely on standard template responses and provides details on why the specific information requested is not held or cannot be disclosed including the specific circumstances surrounding the request.</p>

<p>The relevant requirements are:</p> <p>Confirmation that the requested information is held or not held by the public authority or a statement neither confirming or denying whether the information is held;</p> <p>If some or all of the information cannot be disclosed, details setting out why this is the case, including the sections (with subsections) the public authority is relying on if relevant. When explaining the application of named exemptions, however, public authorities are not expected to provide any information which is itself exempt.</p>	<p>The Commissioner considers that the use of standard wording does not provide the requester with details setting out why the particular request cannot be complied with or why the information requested cannot be disclosed. The Commissioner expects refusal notices to include specific explanations for why an exemption is engaged and public interest considerations based on the specific circumstances of the request.</p> <p>DWP also routinely fails to specify the subsection engaged, particularly when citing sections 12, 31 and 43.</p>	<p>Where issuing a section 12(1) or (2) response, DWP should ensure that it provides the requester with details of why the request would exceed the appropriate limit.</p>
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Reasons for issuing this Practice Recommendation

Through the evidence provided in a series of complaints, it appears that the handling of information requests within DWP has fallen below the expectations set out in the Section 45 Code of Practice. The Commissioner has set out examples of this in an annex at the end of this practice recommendation. The impression created by this evidence has been added to by the Commissioner's own experience of dealing with DWP. This is discussed in further detail in the "Other matters" section of this recommendation.

This practice recommendation formalises the Commissioner's concerns and holds DWP accountable for improving certain freedom of information request handling practices and, in turn, increase public confidence and trust in that regard. The purpose of this practice recommendation is to provide DWP with a constructive learning tool following which it can improve the areas of concern set out in this document.

Other Matters

The Commissioner acknowledges DWP's recovery from the difficulties encountered during the Covid pandemic which had a particular impact on it. DWP were required to redeploy staff from across the department to aid with the task of processing millions of new claims. DWP has confirmed to the Commissioner that it has recently seen an improvement in FOI processing and the Commissioner notes that in the latest Cabinet Office FOI statistics bulletin, DWP responded within the statutory timeframe in 98% of the requests received¹. The Commissioner is also mindful of the CFOIT's excellent engagement with his officers which aids his investigations.

However, the Commissioner has noted an increase in the number of complaints to him resulting in decisions ordering DWP to disclose the requested information. In its recent correspondence with the Commissioner, DWP stated that it had noted the Commissioner's change in position regarding the weight of the public interest in disclosure. The Commissioner respectfully disagrees that the increase in decisions requiring disclosure is due to a change in his approach. The Commissioner considers

¹ <https://www.gov.uk/government/statistics/freedom-of-information-statistics-july-to-september-2022/freedom-of-information-statistics-july-to-september-2022-bulletin-2>

Reference: FPR0987666

that there has been an increase in the amount of information being withheld by DWP where previously this information would have been disclosed or proactively published. The Commissioner notes that DWP has refused to disclose several research papers with one refusal to disclose resulting in the Committee for Work and Pensions using its Parliamentary powers to obtain the NatCen Report on The Uses of Health and Disability Benefits and publish this².

The Commissioner considers that, increasingly, cases are being brought to him where the public interest in disclosure is not being adequately considered. The nature and importance of DWP's responsibilities means that there is inherently a high public interest in disclosure of information held in the context of the vulnerable nature of the members of the public financially dependent upon it and the large amount of public money which funds the department and the benefits paid out.

As set out above, the Commissioner has been engaging with DWP regarding his concerns about request handling and as part of this correspondence DWP confirmed that it intended to undertake a review of its FOI training. The Commissioner allowed time for this review to occur and changes to be implemented. He recently asked DWP to provide him with details of the outcome of the review and changes made.

DWP confirmed that it had undertaken a light-touch exercise looking at its training needs and guidance material and as it was light-touch, no formal plan or report was produced. DWP confirmed that it had decided to offer refresher training based on the Central FOI team's (CFOIT) working interactions with teams across DWP, including where it was noted that similar errors were cropping up, where there were new staff and where staff wanted a refresher course. DWP confirmed that it was continuing to evaluate training needs based on CFOIT's interaction with teams.

However, DWP confirmed that there is no mandatory training that staff are required to undertake. Staff responding to requests under FOIA are not required to undertake any training or refresher training, although training, guidance and advice is available to them should they request it. Staff are also not provided with mandatory training confirming how to recognise a request for recorded information.

The Commissioner is concerned that DWP is not ensuring that staff are suitably trained to recognise requests and, where appropriate, respond to these requests. Whilst the Commissioner acknowledges that training and guidance resources are available to those that request them, he considers that DWP is failing to ensure that all staff have a minimum level of knowledge and training in the recognition and actioning of requests under FOIA.

² <https://committees.parliament.uk/committee/164/work-and-pensions-committee/news/160750/disabled-peoples-experiences-of-the-benefits-system-committee-publishes-government-commissioned-research/>

Reference: FPR0987666

Having engaged with the DWP during his investigations, the Commissioner considers that the CFOIT has extensive knowledge and experience of FOIA and its application. The Commissioner recommends that DWP uses this resource to ensure that the wider DWP is proactively equipped to recognise and respond to requests rather than waiting for recurrent issues to present themselves through ICO investigations.

Failure to comply

A practice recommendation cannot be directly enforced by the Commissioner. However, failure to comply with a practice recommendation may lead to a failure to comply with FOIA, 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.

DWP should write to the Commissioner by the end of **23 June 2023** to confirm that it has complied with his recommendations and how it has achieved this.

The Commissioner will have regard to this practice recommendation in his handling of subsequent cases involving DWP.

Annex: Evidence

In one case³, DWP responded to a request by confirming that where personal data or personal information of deceased individuals is requested, this is exempt under section 40 and 41. DWP failed to confirm the correct subsection and therefore whether it held the requested information or whether it was neither confirming or denying that it held the information. DWP then confirmed to the Commissioner during his investigation that it was neither confirming nor denying holding the information despite the request confirming that in another previous request, DWP had confirmed holding the information.

In several cases⁴ requesting information on the decision not to extend the £20 uplift to Universal Credit to Disability Benefits, DWP failed to locate all of the information falling within the scope of the request until one of the cases was at appeal to the First Tier Tribunal and the remaining cases were at investigation stage with the Commissioner. DWP originally only considered the formal documents falling within the scope of the request.

In one case⁵, DWP failed to confirm or deny whether it held a requested piece of analysis over several requests, instead providing explanations of how the analysis was undertaken and links to related information. At internal review, DWP failed to acknowledge that it had not confirmed whether it held the requested information and relied on sections 14(1) and 14(2) to refuse to comply with the request. Following the Commissioner's investigation, DWP was required to issue a fresh response confirming whether or not it held the requested information.

In another case⁶, in response to a clear request for recorded information, DWP advised that FOIA does not require a public authority to create information and that where a question is asked, public authorities should provide the recorded information held that best answers the question. DWP then provided an explanation and failed to confirm whether it held the specific requested information. The internal review upheld the original response but stated that it confirmed that the information was not held. Following the Commissioner's intervention, DWP issued a revised response confirming that it did hold the information.

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022756/ic-124082-g7t7.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020198/ic-55806-h6r8.pdf> & <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020053/ic-82880-s7k3.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020067/ic-92562-s2p6.pdf>

⁶ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4019385/ic-73570-v7p3.pdf>

Reference: FPR0987666

In a further case⁷, a request for the email addresses by which DWP could be contacted was responded to by stating that section 21 was engaged and providing a link to DWP's 'Contact Us' webpage which did not contain any email addresses. At internal review, DWP stated that its original use of section 21 was correct but it should have confirmed that section 36 was engaged for the remaining information. DWP failed to correctly identify what information was being requested.

The Commissioner received a complaint regarding a request for the latest version of a set of minutes⁸ and DWP denied holding the requested information because the minutes had not yet been finalised. DWP upheld this position at internal review.

The Commissioner has noted that in one case⁹, DWP confirmed that it held the requested information and stated that it was withholding the information under section 31(1)(a). The internal review upheld this position, however, following the Commissioner's intervention, DWP confirmed that the information was not held and the original refusal notice was sent following an internal error. The internal review in fact upheld the use of section 31(1)(a) to information that did not fall within the scope of the request.

DWP again failed to locate all of the information falling within the scope of a request for the recommendations made in Internal Process Reviews and the tracked progress in implementing them¹⁰. DWP identified the recommendations but stated that the tracked progress would be published in its annual report. During the Commissioner's investigation, DWP directed the complainant to its annual report which provided only a brief summary of the work surrounding Internal Process Reviews. The Commissioner was required to return to DWP on several occasions before DWP confirmed what information was held.

DWP failed to correctly interpret a request for the 'data and insights into the top areas of customer's concerns' previously confirmed to have been collated in a Parliamentary Written Question. The complainant confirmed what they would expect to receive in their request for internal review. DWP originally withheld the information under section 35(1)(a) but during the Commissioner's investigation confirmed that due to the passage of time, it would be content to disclose the information. At this point, DWP provided only the breakdown of the top areas of concern rather than the information held that led to this¹¹.

⁷ Complaint did not result in a decision notice.

⁸ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4023837/ic-206199-w8x8.pdf>

⁹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022747/ic-111848-d1q7.pdf>

¹⁰ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024207/ic-117969-p7c1.pdf>

¹¹ IC-162284-M3N9 Decision Notice issued but not published at time of Practice Recommendation