

# Freedom of Information Act 2000 (Section 48) Practice Recommendation

Public Record Office of Northern Ireland  
Part of the Department for Communities Northern Ireland  
15 January 2025

## Summary

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Section 48 of the Freedom of Information Act 2000 (FOIA) empowers the Information 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. Section 47 of FOIA sets out the Commissioner's duty to promote the following of good practice which extends beyond the requirements of the Codes of Practice. The Commissioner has addressed issues which do not fall within the scope of section 48 in the "Other matters" section below.

The Public Records Office for Northern Ireland (PRONI), part of the Department for Communities, is responsible for dealing with requests for transferred public records, ie historical records transferred to PRONI from other public authorities. PRONI has accumulated a significant backlog of overdue information requests. This is partly an unavoidable consequence of the absence of a devolved government in Northern Ireland during two periods: January 2017 – January 2020 and February 2022 – January 2024. PRONI was unable to process requests for historical records in the absence of a Minister for Communities, as set out in the annex below.

However the oldest unanswered requests date from well before either suspension, and 40 requests were more than five years old at the end of December 2024. While acknowledging the specific problems faced by PRONI, this is not acceptable under FOI law as it stands and the Commissioner is of the opinion that PRONI's request handling practice does not conform to Part 4 of the section 45 Code of Practice, issued by the Cabinet Office in July 2018 (the Code). Again, the Commissioner recognises that this is often due to external constraints to which it is subject in practice, particularly in relation to difficulties with the statutory consultation process, which are set out in more detail in the annex below.

## Reasons for issuing this practice recommendation

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The Commissioner has issued a practice recommendation at this time because of the extent of the backlog of outstanding requests. In setting these recommendations the Commissioner has taken into account PRONI's engagement regarding its FOI performance. These include the provision of quarterly statistics and information regarding the challenges faced by PRONI in discharging its duties in terms of identifying and consulting with the "responsible authority" as set out at section 15 of FOIA. PRONI has also provided the Commissioner with details of recent actions it has taken to improve its timeliness and details of its future plans to improve its FOI performance. The Commissioner welcomes these steps and the recent progress PRONI has demonstrated.

PRONI has proactively engaged with the Commissioner's staff regarding its request handling performance, and has been open and transparent about the challenges it has experienced. It is clear that PRONI is committed to facilitating the public right of access to information set out under FOIA. The Commissioner also recognises that PRONI has reviewed its request handling procedures and has implemented changes which should assist it in addressing the backlog of overdue requests. PRONI has streamlined the consultation process it is required to undertake with the responsible authority, and the Ministerial approval process. These modifications have simplified the respective processes and enabled them to be completed in a more timely manner.

Accordingly, the Commissioner has decided to issue this practice recommendation to both support and enhance PRONI's plans to clear the backlog of overdue requests, and return to compliance with legislative requirements, within a reasonable and proportionate timeframe. It will also serve to ensure transparency in relation to the steps both he, and PRONI, have taken in this regard to date.

The Commissioner has considered whether to issue an enforcement notice under section 52 of FOIA, which gives him the power to require a public authority to take steps in order to comply with the requirements of Part 1 of FOIA. However, as set out in the annex below, PRONI is in a unique situation in that it is not wholly responsible for making decisions regarding the application of exemptions. Nor is PRONI responsible for deciding the balance of the public interest test in respect of qualified exemptions. Responsibility lies with the responsible authority as set out at section 15(5) of FOIA, even though PRONI remains responsible for responding to requests.

In addition, PRONI has advised the Commissioner that the oldest outstanding requests are for voluminous information. PRONI believes that compliance with these requests would far exceed the appropriate limit of 24 hours as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.<sup>1</sup> Consequently PRONI believes it would be entitled to refuse these requests under section 12 of FOIA, although it has chosen not to do so because it considers that there is an overriding public interest in ensuring maximum transparency. PRONI has ensured that the requesters concerned have been kept informed about the delay and the reasons for it. The Commissioner notes that he has received only one complaint about delay in responding to an FOIA request in the last two years regarding PRONI's performance.

Accordingly the Commissioner has taken into account the particular circumstances and sensitivities in this matter, and considers that an enforcement notice right now is not appropriate, as it is right to give time for the consultation process changes made by PRONI to bed in. The Commissioner wishes to emphasise that the purpose of issuing this practice recommendation is not to act as a punitive measure, but to draw wider attention to the issue and formalise his Office's engagement with PRONI.

Specifically, the Commissioner has issued this practice recommendation in order to support PRONI to clear its backlog of overdue requests, and return to compliance with legislative requirements, within a reasonable and proportionate timeframe. While acknowledging the points made by PRONI in relation to section 12 of FOIA, the Commissioner is also required to regulate the law passed by Parliament and the age profile of PRONI's backlog is unacceptable. In setting these recommendations the Commissioner recognises that PRONI has made notable progress in addressing the backlog of overdue requests but more urgent work is clearly needed. The Commissioner therefore expects the following recommendations, set out in relation to the Code, to support and enhance the work already undertaken by PRONI. The Commissioner will expect regular updates on progress against the timing expectations set out in his recommendations and will keep the need for a formal enforcement notice under review.

The Commissioner is also aware that PRONI is carrying a backlog of requests made by individuals exercising their rights under the UK GDPR. The Commissioner's Public Advice and Data Protection Complaints Service is engaging with PRONI separately regarding this matter since it falls under a different legislative and regulatory regime.

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<sup>1</sup> <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

## Recommendations

Area of Code	Non-conformity	Recommendation of steps to be taken
<p><b>Part 4 – time limits for responding to requests</b></p> <p>Section 4.1 of the Code highlights the “clear” requirement that public authorities respond to requests for information promptly, and within 20 working days of receipt in accordance with section 10(1) of FOIA.</p> <p>Section 4.3 of the Code states that archives such as PRONI may exceed the 20 working day deadline in certain circumstances.</p>	<p>The Commissioner only received one section 50 complaint about PRONI failing to respond to an FOIA request in 2023-2024. However, through engagement the Commissioner is aware that PRONI has accumulated a significant backlog of overdue requests. As set out at Annex A below this is in part owing to the absence of the “appropriate Northern Ireland Minister” while the Northern Ireland Assembly was suspended. The other contributory factor was the difficulty experienced by PRONI in engaging in the consultation process with the responsible authority, also set out below.</p>	<p>PRONI should formalise the steps it has taken to date, and the further steps it intends to take, to improve its FOIA performance, in an Action Plan.</p> <p>In addition to setting out how it has met, or will meet, the recommendations in this practice recommendation, the Action Plan should also set out how PRONI intends to:</p> <ul style="list-style-type: none"> <li>• Clear the backlog of overdue requests (i.e. any open request over <b>30<sup>2</sup></b> working days old) by the end of 2025, including the 40 requests over 5 years old closed within 6 months of the date this practice recommendation was issued; and</li> <li>• Meet, and sustain, a percentage timeliness for answering FOIA requests of 90% (or above).</li> </ul> <p>PRONI should continue to provide the Commissioner with quarterly updates detailing its progress against the Action Plan.<sup>3</sup></p>

<sup>2</sup> The Freedom of Information (Time for Compliance with Request) Regulations 2004 (<https://www.legislation.gov.uk/uksi/2004/3364/contents/made>) extend the time for compliance, in relation to requests received by PRONI, from 20 working days to 30 working days.

<sup>3</sup> Further details are set out in the annex below.

<p><b>The Code</b> does not contain good practice recommendations in respect of sections 15 and 66 of FOIA (consultation with the responsible authority and responsibility for decision making).</p>	<p>At 25 April 2024 PRONI had 554 outstanding FOIA requests.</p> <p>By 31 December 2024 PRONI had 383 overdue FOIA requests outstanding. 320 requests were over one year old, 40 were over five years old.</p>	<p>PRONI should publish these updates on its website along with the Action Plan so that there is transparency about the progress PRONI is making in clearing the backlog of overdue requests.</p> <p>In accordance with part 8.5 of the Code, PRONI should publish its information access request statistics and make these easily accessible on its website.</p> <p>The statistics should include the number of information access requests that have not been processed and the number of completed requests where the processing took longer than <b>30</b> working days.</p>
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## Other Matters

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The Commissioner wishes to record his engagement with PRONI, including good practice advice provided, on matters that fall outside the recommendations set out in the Codes of Practice but which are nevertheless relevant to the issuing of this practice recommendation. This falls under the Commissioner's general duty to promote good practice under section 47 of FOIA.

### ICO engagement with PRONI

The Commissioner wishes to acknowledge that PRONI has engaged with his staff in a positive and constructive manner. The Commissioner recognises that PRONI has prioritised the public interest in transparency, and has taken into account the fact that PRONI has provided the Commissioner with detailed information about the backlog of outstanding requests.

### Issues with the Responsible Authority

In addition to the volume of requests received by PRONI, and the volume of requested information, the Commissioner also acknowledges the complexity of the process involved in handling requests for transferred public records. On receipt of a request for such information PRONI is required to identify and consult with the Responsible Authority (RA) before determining whether any exemption from disclosure (or exclusion from the duty to confirm or deny that the requested information is held) applies. PRONI is also required to consult with the RA in respect of the public interest test where a qualified exemption or exclusion is engaged.

PRONI has made the Commissioner aware of difficulties it has experienced in identifying and consulting the RA in a small but significant number of cases. Responsibility for identifying the RA within the meaning of section 15(5) of FOIA rests solely with the appropriate Northern Ireland Minister, ie the Minister for Communities. No other legal person is entitled to make this determination. However, the legal person identified as the RA has in some cases disputed that they should be the RA, and have declined to engage in consultation with PRONI. In the absence of consultation with the RA, PRONI suggests it is unable to process and respond to requests.

The Commissioner's regulatory position is that, once the Minister for Communities has identified the RA, PRONI may provide that person with a provisional determination for approval or comment. This is sufficient to comprise consultation within the meaning of section 66(2), as long as the RA has complete discretion to disagree and provide their reasons.

If the person identified as the RA declines or fails to respond to the provisional determination, the Commissioner's regulatory position is that PRONI may reasonably take the view that the consultation process is complete. It will be for PRONI to reach a view as to whether the person identified as the RA has satisfied its responsibility to make the appropriate determination in such circumstances. PRONI may also wish to take into account the reasonableness of its own actions in engaging with the person identified as the RA. At that point, however, the requester's statutory right to a response must be fulfilled.

#### Consultation with the RA

The Commissioner also wishes to record his concern at the time taken by the RA to complete the necessary consultation process. The Commissioner acknowledges that there is no statutory timescale for consultation, but is mindful that PRONI, whilst the public authority responsible under FOIA, does not have control over the process. The Commissioner considers it unsatisfactory that PRONI's ability to comply with the legislative requirements of FOIA should be dependent on the actions of a third party. The Commissioner also notes that he, as regulator of FOIA, does not have any power to require the person identified as the RA to complete the consultation promptly, or within what he would consider to be a reasonable timescale.

The Commissioner recognises that, given the nature of requests for historical records in Northern Ireland, there may be security implications of disclosure, and additional considerations may be required. However, FOIA sets out a clear right of public access to information, subject to exemptions, which in the Commissioner's view is being frustrated by the time taken to respond to requests.

Although this practice recommendation is issued to PRONI, the Commissioner would strongly recommend that those subject to consultation by PRONI take the necessary steps to ensure that they are completing the consultation process as promptly as possible, so as to assist PRONI in clearing its backlog of outstanding requests. The Commissioner believes that this is in the spirit of the legislation, and is clearly in the public interest. However, where those third parties do not take these steps as a result of this practice recommendation, the Commissioner will keep under review whether there is further action he can take.



## Failure to comply

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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 and/or result in a continued failure to comply, 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.

PRONI should write to the Commissioner by 15 April 2024, providing a copy of its action plan and quarterly update. PRONI should also publish the action plan and quarterly updates on its website so that there is transparency about the progress PRONI is making in clearing the backlog of overdue requests.

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

## Annex

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### Request handling in respect of requests made to archives

Section 66 of FOIA sets out how a public authority should consider requests for records transferred to archives such as PRONI ("transferred public records"). Section 66(2) of FOIA states that, before deciding whether any exemption applies either in respect of the duty to confirm or deny that information is held, or the duty to disclose information in response to a request, PRONI must consult the "responsible authority" (RA).

PRONI is required to identify, and consult with, the RA before deciding whether or not any exemption from disclosure, or exclusion from the duty to confirm or deny, applies to the requested information (s66(2)). PRONI is responsible for determining whether an exemption or exclusion is engaged with respect to the requested information (s66(2)). If PRONI determines that a qualified exemption or exclusion is engaged, it is for the RA, rather than PRONI, to determine where the public interest lies (s66(3) and s66(4)).

### Identification of "responsible authority" (RA) and the role of the appropriate Northern Ireland Minister

Section 15(5) sets out how the RA is determined in various scenarios:

"(c) in the case of a record transferred to the Public Record Office of Northern Ireland from a government department in the charge of a Minister of the Crown, the Minister of the Crown who appears to the appropriate Northern Ireland Minister to be primarily concerned".

"(d) in the case of a record transferred to the Public Record Office of Northern Ireland from a Northern Ireland department, the Northern Ireland Minister who appears to the appropriate Northern Ireland Minister to be primarily concerned".

FOIA does not prescribe any form and extent of consultation with the responsible authority. However PRONI is required to consult with the responsible authority, and reach a decision about whether or not an exemption or exclusion from the duty to confirm or deny applies to the requested information, within the time for compliance (30 working days).

The "appropriate Northern Ireland Minister" is defined at section 84 of FOIA as the Northern Ireland Minister in charge of the Department for Communities for Northern Ireland (the Minister for Communities).

Reference: FPR0987685

Following consultation with the responsible authority PRONI is required to decide whether or not an exemption or exclusion from the duty to confirm or deny applies to the requested information. If a qualified exemption is engaged, s66 says that it is for the RA, ie the Northern Ireland Minister or Minister of the Crown identified by the appropriate Northern Ireland Minister, to determine where the public interest lies.

#### Context under which the backlog of requests was accumulated

The Commissioner acknowledges that the backlog of outstanding requests is largely a consequence of the absence of a devolved government in Northern Ireland during two periods: January 2017 – January 2020 and February 2022 – January 2024. The Commissioner is of the opinion that the duties explicitly placed on Ministers under sections 15 and 66 of FOIA cannot be delegated to other persons, such as senior officials. Consequently the Commissioner accepts that PRONI was unable to comply with its obligations under FOIA in the absence of the Minister for Communities. This included identifying the RA, completing the statutory consultation process and ultimately responding to requests for information. As set out above, PRONI is required to consult the RA before determining whether any exemption or exclusion applies in respect of a particular request.

When Northern Ireland’s First Minister resigned on 3 February 2022 the deputy First Minister also lost her job as a consequence of the joint and equal nature of the two posts. However the remaining Northern Ireland ministers remained in post in a caretaking capacity, which meant that PRONI was able to continue processing requests for historical records.

The Commissioner set out his position in a decision notice in October 2022<sup>4</sup> regarding PRONI’s failure to issue a substantive response to a request for information made under FOIA. As part of the investigation in that case PRONI advised the Commissioner that it was working through a backlog of outstanding requests which had accumulated in the three years without a Northern Ireland Executive.

The Northern Ireland Assembly was restored, and a Northern Ireland Executive appointed, on 3 February 2024. As the Communities Minister, Gordon Lyons MLA is now the “appropriate Northern Ireland Minister” for the purposes of FOIA.

Consequently the Commissioner considered that PRONI should now be in a position to resume the processing of requests for historical records under FOIA and commenced the engagement that has led to this practice recommendation.

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022165/ic-185855-g5y0.pdf>