

Reference: FPR0987677

Freedom of Information Act 2000 (Section 48) Practice Recommendation

Foreign, Commonwealth & Development Office
29 February 2024

Summary

The FCDO has had a consistently poor level of performance in terms of the time limit for complying with information requests. This has been highlighted by the number of complaints the Commissioner has received about timeliness, data contained in the central government FOI performance statistics, and wider commentary from the information rights community about the FCDO's performance. The Commissioner also has concerns about the time it takes the FCDO to complete internal reviews. Following engagement by his staff with the FCDO about the underlying reasons for these failings, the Commissioner has reached the view that the FCDO's request handling practices do not conform to parts 1, 4 and 5 of the section 45 Freedom of Information Code of Practice, issued by the Cabinet Office in July 2018 (the Code).

Recommendations

In setting these recommendations the Commissioner recognises that the FCDO is in the process of implementing a number of improvements to its information request handling processes. The Commissioner has therefore designed the following recommendations to support and enhance the FCDO's plans to improve its information rights practices.

In considering these recommendations, the Commissioner expects the FCDO 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
<ul style="list-style-type: none">Part 1 – Right of access <p>Section 1.12 of the Code requires public authorities to search for requested information in order to communicate to</p>	<p>From the sample of internal case files provided to him by the FCDO, the Commissioner identified a number of requests where issues had occurred in</p>	<p>In relation to parts 1, 4 and 10 of the Code, the FCDO must ensure it has appropriate procedures in place to effectively and efficiently access official records. This is necessary to meet its obligations and respond fully, accurately and appropriately to information requests.</p>

<p>the applicant whether the information they are seeking is held or not held by that public authority. The Code explains that “These searches should be conducted in a reasonable and intelligent way based on an understanding of how the public authority manages its records.”</p>	<p>locating information in a timely manner. This was a result of delays in accessing material electronically or in hard copy, or as a result of initial searches for information needing to be extended a number of months after a request was submitted. This indicates to the Commissioner that the FCDO may not always meet the requirements of section 1.12 when processing requests.</p>	<p>The FCDO should ensure that searches for all information falling within the scope of a request are conducted as quickly as possible and that staff who need to access such information in order to process the request are able to do so without any delays.</p> <p>The FCDO 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.</p> <p>The FCDO should undertake a self-assessment via the ICO’s online Toolkit, in particular Topic 1, modules 2 & 3 request handling and training.¹ The FCDO should implement any changes required following the outcome of the self-assessment.</p>
<ul style="list-style-type: none"> • Part 4 – time limits for responding to requests <p>Section 4.1 of the Code highlights the “clear” requirement that public authorities respond to</p>	<p>Since January 2023², the Commissioner has issued 11 decision notices where the FCDO was found to have breached section 10 of FOIA (or the Environmental Information Regulations equivalent</p>	<p>The FCDO should ensure that requests for information are responded to in a timely manner. When chased to issue responses by the Commissioner’s Case Officers, the FCDO should respond in a timely and appropriate manner. This will avoid unnecessary decision notices and the subsequent further delays for the requesters.</p>

¹ <https://ico.org.uk/for-organisations/foi/foi-self-assessment-toolkit/>

² For the purposes of this practice recommendation, in terms of section 50 complaints, the Commissioner has focused on complaints he has closed since 1 January 2023. Some of these complaints will therefore relate to requests submitted to the FCDO prior to this date.

<p>requests for information promptly, and within 20 working days of receipt in accordance with section 10(1) of FOIA.</p> <p>Section 4.4 of the Code states that public authorities may exceed the 20 working day deadline if additional time is required to consider the public interest.</p> <p>Section 4.5 of the Code states that an extension is permitted “until such time as is reasonable in the circumstances”, taking account, for example, of where the information is especially complex or voluminous, or where a public authority needs to consult third parties.</p> <p>Section 4.6 of the Code advises that it is best practice for an extension to be no more than a further 20</p>	<p>provision, reg 5(2)). Such notices have either required the FCDO to respond to the request or recorded that the response, or information, was provided late. In addition, the Commissioner has closed 23 further such complaints since January 2023 which have involved a breach of section 10 but have not resulted in a decision notice being issued.</p> <p>Similarly, since January 2023 the Commissioner has issued 6 decision notices where the FCDO was found to have breached section 17(3) by taking an unreasonable period of time to consider the balance of the public interest. In addition, the Commissioner has closed a further 11 complaints since January 2023 which have involved a breach of section 17(3) but have not resulted in a decision notice being issued.</p>	<p>The FCDO should use the Commissioner's FOI self-assessment toolkit to improve its timeliness compliance.</p> <p>The FCDO’s request handling procedures should include provision for when a response is late, or is likely to be late, at any stage of the internal processes. Specifically, that it is clear when and who to escalate to; who is responsible for taking action; the action they will need to take; and by when. As part of this the FCDO should consider the Commissioner’s guidance on keeping internal consultations timely and transparent.⁵</p> <p>The FCDO must ensure that its information rights training is sufficient to ensure that it has adequate coverage in place in order that request handling times do not fall below a compliant level in the event of the departure of key staff members.</p> <p>The FCDO should ensure that it has adequate levels of resource within its Information Rights Unit (IRU) team to ensure that FOI requests, and internal reviews, are processed in a timely manner. The FCDO should also ensure that staff within its various departments responsible for request handling are also aware of the importance of processing requests in a timely manner.</p>
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⁵ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/keeping-internal-consultations-on-foi-requests-timely-and-transparent-a-short-guide-for-public-authorities/>

<p>working days although a longer extension may be appropriate depending on the circumstances of the case, including the complexity and volume of the material.</p> <p>Section 4.7 of the Code makes clear that when a public interest test extension is required, the public authority must inform requestors which exemption or exemptions it is relying on.</p>	<p>This pattern of complaints is reflective of the FCDO's timeliness performance as reported in the centralised statistics.³ For 2022 just 51% of requests were answered within the deadline, with 79% answered within the deadline or within the permitted extension. For the period January to September 2023, these figures averaged 49% and 72% respectively. The figures for the quarter July to September were significantly lower at 33% and 53% respectively.</p> <p>Based on the sample of cases files provided to him by the FCDO the Commissioner has concerns that sufficient resources are always not devoted to the processing of requests, both those subject to the public interest test (PIT) extension under section 17(3) and those which are not.</p> <p>In respect of section 17(3) cases, whilst an extension may have been applied because of</p>	<p>The FCDO should formalise the steps it has taken, and intends to take, to improve its FOI performance in an Action Plan which should be published on its website for full transparency about the improvements it is making.</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 the FCDO intends to:</p> <ul style="list-style-type: none">• Meet, and sustain, a percentage timeliness for answering FOI requests of 90% (or above), including requests subject to a permitted extension; and• Clear any overdue requests it has (i.e. any open request subject to the PIT over 40 working days old and any open request not subject to the PIT over 20 working days old) and any backlog of internal reviews (i.e. any internal review request over 40 working days old). <p>The FCDO should provide the Commissioner with a quarterly update (beginning on 31 May 2024) detailing:</p> <ul style="list-style-type: none">• Any completed requests that were subject to the PIT extension under section 17(3) of FOIA that were answered more than 40 working days after the request was submitted; and
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³ <https://www.gov.uk/government/collections/government-foi-statistics>

	<p>the complexity of the request or voluminous nature of the information, the time taken to consider the PIT is not always minimised.</p> <p>Rather, the issues as described above in locating relevant information have, in some instances, contributed to delays. Whilst it is may be reasonable to extend the PIT to consider the complexity of a request, it is not reasonable to use this provision of FOIA to offset resource issues or other processing problems in respect of a request. As result the Commissioner does not consider that the FCDO is consistently complying with the relevant requirements of the Code (or his guidance on this issue which adopts the approach set out in the Code⁴).</p> <p>Furthermore, based on the information provided to him by the FCDO the Commissioner also has concerns that the</p>	<ul style="list-style-type: none">• Any open requests subject to the PIT extension over 40 working days old. <p>It should also publish these updates on its website alongside the Action Plan recommended above so that there is transparency about the progress it is making to improve its performance.</p>
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⁴ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#timelimits>

	<p>FCDO is not always regularly updating all requesters as to whether it has extended its PIT considerations as it is required to do so by section 4.7 of the Code.</p>	
<p>• Part 5 – Internal reviews</p> <p>Sections 5.4 and 5.5 of the Code set out that a reasonable time for the completion of an internal review is 20 working days following the receipt of the request for review, and that, usually, no more than 40 working days will be required.</p>	<p>Since 1 January 2023, based on complaints he has received, the Commissioner has identified 12 instances where the time taken by the FCDO to complete the internal review has exceeded 40 working days. From the evidence he has seen, it is clear that some of these cases do not meet the type of exceptional criteria he would expect for cases taking so long to conclude.</p>	<p>The FCDO should ensure that internal reviews are carried out, and the outcome communicated to the requester, in a timely manner, and in line with both the Code and the Commissioner’s guidance.⁶ In order to ensure that this happens consistently, the FCDO should refresh its procedures for carrying out internal reviews and ensure that these are effective and robust.</p>

Reasons for issuing this Practice Recommendation

The Commissioner has issued a practice recommendation at this time because of the FCDO’s consistently poor record over a number of years of complying with information requests in a timely manner. As noted above, in setting the recommendations the Commissioner has taken into account the submissions the FCDO has provided to him regarding its FOI performance.

⁶ As above.

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These include the information provided to him by the FCDO in response to an Information Notice⁷ he served on 20 October 2023, under his powers in s.51(1)(b) of FOIA. This required the FCDO to provide the Commissioner with a copy of all requests over 6 months old; for all such requests copies of the correspondence the FCDO has exchanged with the requester; for the five oldest requests subject to a PIT extension and the five oldest requests not subject to a PIT extension, a copy of the FCDO's entire case file for each such request.

In addition to providing these case files, the FCDO has also explained to the Commissioner that in the last two years both the effect of international crises, and resource challenges within its IRU, have impacted on its ability to respond to FOI requests in a timely fashion. The FCDO 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 the FCDO has taken.

However, the Commissioner has decided to issue this practice recommendation to both support and enhance the FCDO's plans to improve its information rights practices and to also ensure transparency in relation to the steps both he, and the FCDO, have taken in this regard to date.

A particular area of concern in respect of the FCDO's performance for the Commissioner is the extent to which it relies on section 17(3) of FOIA to extend its public interest test considerations, and the amount of time some of these considerations then take. The Commissioner notes that the FCDO's timeliness for responding to requests, without reliance on section 17(3) has been historically low, i.e. not simply in the last two years, and that it is also consistently one of the lowest, if not the lowest, performing public authority in respect of this metric compared to other government departments.⁸ The FCDO's deterioration in the terms of performance in these central government statistics, allied to the Commissioner's own intelligence from section 50 FOIA complaints, means that he has taken this decision to issue this practice recommendation at this stage in line with the aims of his Regulatory Manual.

The FCDO highlighted that its use of section 17(3) in many cases reflects the complex nature of FOI requests that it receives. The FCDO explained that its work is often complex, sensitive, high profile and of particular media interest. As a result it takes time to consider the balance between disclosure of the withheld information and the risks of doing so. The FCDO also emphasised that as much of its work involves relations with third parties, it often has to consult such parties when considering the balance of the public interest test, which also requires significant time and resource.

⁷ <https://ico.org.uk/media/action-weve-taken/information-notices/4028631/ic-263041-w8k6.pdf>

⁸ 2020 – 56%; 2021 – 56%; 2022 – 51%, source: <https://www.gov.uk/government/collections/government-foi-statistics>

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The Commissioner acknowledges the profile of the requests that the FCDO receives. He also acknowledges that there is evidence from the case files provided to him by the FCDO of it taking a diligent approach to the assessment of the PIT to information in scope of the requests. However, in his view the profile of such requests only serves to emphasise the importance of having effective and efficient processes in place for processing requests, including those subject to PIT considerations, to ensure that the quality of responses to requests does not come at the expense of unreasonable delays. This practice recommendation formalises the Commissioner's concerns, and builds upon recent intelligence received by him in response to the Information Notice as well as his analysis of section 10 and section 17(3) decision notices, and holds the FCDO accountable for improving its freedom of information request handling practices and, in turn, increase public confidence and trust in its information rights practices.

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.

The FCDO should write to the Commissioner by the end of 31 May 2024 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 the FCDO. Furthermore, the decision to issue this practice recommendation at this stage does not preclude the Commissioner from taking subsequent action in line with the steps set out in his FOI and Transparency Regulatory Manual.⁹

⁹ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Annex

Sections 1.12, 4.1, 4.5 and 4.6 of the Code

There is evidence from the full internal case files provided to the Commissioner by the FCDO that demonstrate delays in the processing of requests, both those subject to 17(3) extensions and those which were not. In respect of requests subject to s17(3), whilst there is evidence of the FCDO conducting diligent PIT assessments, there is also clear evidence of significant delays due to the resource issues, failures to conduct timely and/or thorough searches for information, and some issues in accessing requested information. Similar issues are replicated in cases not subject to the PIT extension.

The Commissioner has provided his analysis of these cases files to the FCDO to help it further understand his consideration of the evidence contained within these files and therefore to help the FCDO comply with this practice recommendation.

Section 4.7 of the Code

There is also evidence from some of the case files provided to the Commissioner that in requests where the PIT extension had been applied the FCDO failed to provide requesters with regular updates on the progress of such requests. Again, the Commissioner has provided the FCDO with his analysis of the case files in question.

Sections 5.4 and 5.5 of the Code

With regard to the 12 complaints since January 2023 in which the Commissioner has identified internal review delays, the longest period the FCDO took to complete an internal review was 141 working days for a request seeking information about the awarding of an honour to a particular individual. The request for review being submitted on 9 December 2021 and the internal review being completed on 5 July 2022.¹⁰

However, such instances are not simply historic ones. For example, ICO case IC-237175-K5K3 concerned a request for

¹⁰ IC-174577-C1S7

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information about the FCDO's involvement with a historic archive.¹¹ The internal review request was submitted on 15 March 2023, and at the point the complainant submitted a section 50 complaint to the Commissioner on 8 June 2023, 57 working days later, the internal review remained outstanding. ICO case IC-254608-K3S8 concerned a request for information about the use of a government procurement card at a restaurant in New York by a party including the then Prime Minister Boris Johnson. The internal review was requested on 30 June 2023 but not completed until 22 November 2023.

The average time taken to complete an internal review across these 12 complaints was 90 working days.

¹¹ <https://ico.org.uk/media/4027479/ic-237175-k5k3-in.pdf>