

Information Champions and Central Government members of the
Freedom of Information Practitioners Group

18 February 2005

Dear Colleague,

Memorandum of Understanding with the Information Commissioner

We have now obtained MISC 28 clearance for the Memorandum of Understanding with the Information Commissioner. This document is attached at Annex A.

We would like to extend our thanks to you for your contribution towards the MoU. I am sure you will agree that it is essential to have this document in place, ahead of the first complaints coming through to the Information Commissioner. We have agreed, with the Information Commissioner that it would be sensible to review the MoU in the Summer, in light of actual operation. We look forward to working with you again, on this document, at this point.

As the MoU covers the working relationship between the ICO and each and every Department we believe that consideration should be given to putting it on your Departmental website. Alternatively a link to the document on the DCA website would achieve the same effect.

PAUL BOYLE



Annex A : MoU

Memorandum of Understanding (MoU) between the Secretary of State for Constitutional Affairs (on behalf of government Departments) and the Information Commissioner, on co-operation between government Departments and the Information Commissioner in relation to sections 50 and 51 of the Freedom of Information Act 2000 (the “FOI Act”) (including ss.50 and 51 as applied, as amended, by Regulation 18 of the Environmental Information Regulations 2004).

Roles of the Information Commissioner and government Departments under the FOI Act and the Environmental Information Regulations 2004 (EIRs)

Purpose of the MoU

1. The purpose of this Memorandum of Understanding is to promote good standards of co-operation between Departments and the Commissioner:
 - (a) in dealing with applications made to the Commissioner for a decision under section 50 of the FOI Act ; and
 - (b) where the Commissioner is considering serving a notice under section 51 of the FOI Act.
2. This MoU does not apply in situations in which an exemption under one or any of sections 23 or 24 of the FOI Act, or the exception in regulation 12(5)(a) (insofar as that regulation relates to national security) of the EIRs is engaged. Such situations are dealt with at Annex 2 to this MoU.
3. The Definitions in Annex 1 apply to this MoU. The respective roles and responsibilities of the ICO and DCA under the FOI Act and the EIRs will be summarised in a separate document, to which this document is subject. This MoU sets out guideline procedures designed to apply in the majority of cases. It is recognised that, because of unusual complexity or sensitivity, or where the information is voluminous, there may be some exceptions to these procedures. Departments may need to consider procedural issues on a case by case basis in the particular circumstances arising, but will continue to have regard to the procedures set out in the MoU as far as possible.
4. This MoU takes effect subject to the FOI Act, the EIRs and any other relevant legal provisions. For the avoidance of doubt nothing in this MoU shall operate to restrict or otherwise inhibit the exercise of the Commissioner’s or Department’s powers and duties under the FOI Act or the EIRs.

5. This MoU seeks to minimise the costs of complying with the FOI Act and to promote the efficient administration of its requirements within Departments and the Commissioner's office.

Steps to be taken where an application is made for a Decision under s.50 of the FOIA

6. The Commissioner will contact the relevant Department(s) (via nominated contact, where known) when he receives an application under section 50 of the FOI Act, as soon as practicable and in any event within 10 working days of such receipt. At this time he will:
 - provide the Department with details of the Complainant's application;
 - request the Department to provide all information relevant to the application; and
 - invite the nominated contact to comment on the case;
 - aim to establish a single channel of communication.
7. The Department will:
 - provide all relevant information requested as quickly as possible and in any event within 20 working days of being contacted by the Commissioner, unless the Commissioner otherwise agrees;
 - provide any additional relevant information subsequently requested by the Commissioner as quickly as possible and in any event within 10 working days of it being requested;
 - provide all the information requested, including any information that has been redacted;
 - inform the Commissioner, giving reasons, where it is not able to provide the information within the time periods set out in this paragraph and provide an indication of when it expects to be able to do so.

Information notices

8. The Commissioner will not normally serve an Information Notice under section 51 of the FOI Act on any government Department unless he believes that relevant information is being withheld from him or that there has been undue delay in providing the information requested. Where the Information Commissioner intends to serve an Information Notice, wherever possible he will inform the Department in advance.

Obligations in relation to information provided in accordance with this MoU

9. The Commissioner will not disclose to the Complainant or to any third party any information provided to him by a government Department either under the terms of this MoU, or as a result of serving a notice under section 50 or 51 of the FOI Act unless:
 - the Department consents to the disclosure, or
 - subject to paragraph 26, all appeal proceedings have been exhausted.
10. Where a request is made to the Commissioner (whether under the FOI Act or otherwise) for information that has been supplied to him in accordance with this MoU, or where release of such information seems to the Commissioner to be necessary under or in connection with any enactment, Community obligation, proceedings or otherwise, the Commissioner shall inform the Department as soon as possible.
11. Where the circumstances mentioned in para 10 arise, the Commissioner acknowledges that he will resist release of the information, where in all the circumstances it is reasonable to do so, and by all reasonable means including the use of any appeals processes.
12. Where a Department relies upon an exemption from the duty to confirm or deny whether it holds the information of the description specified in the request, the Commissioner will not seek access to that information where it is possible to judge the strength of a decision neither to confirm or deny the holding of information without inspecting such information as may actually be held by the Department.
13. The Commissioner will not hold information provided to him under this MoU for longer than is necessary for the discharge of his statutory functions. The Commissioner shall, in consultation with the Department, arrange for the return or other disposal of the information, where necessary.
14. The Commissioner will ensure that any information that is protectively marked will be kept under the conditions of security required by the Manual of Protective Security for as long as he retains the information.
15. The Commissioner agrees to inspect *in situ* papers which are particularly sensitive and therefore would not be circulated beyond the offices of the Department in question.
16. Where stringent security or similar consideration so demand, the Department may indicate that it would, in their view, be more appropriate

for the Commissioner himself, or nominated members of staff, to inspect the information, rather than be provided with it. The Commissioner will take full account of such a view and not refuse any such representations unless there are overriding reasons why provision of the information to or inspection by other staff would significantly obstruct the discharge of his statutory functions.

17. Inspection of the information may also be agreed in other cases where to do so would be in the mutual interests of the Commissioner and the Department, for instance where the information involved is voluminous, or where it would be helpful to have matters of a technical nature explained to a member of the Commissioner's staff.

Processes on whether to issue a Decision Notice

18. The Commissioner will consider all information provided to him in reaching a decision whether to serve either a Decision Notice or an Information Notice on the Department.
19. The Commissioner will contact both the Department and the Complainant, whenever appropriate, throughout his consideration of a complaint and, in any event, will normally provide progress reports every 28 days.
20. Wherever practicable, the Commissioner will explore the scope for a settlement of the complaint, which would be acceptable to the Complainant and to the Department. Where such settlement can be achieved – for example, by disclosure of some of the information requested – he will invite the Complainant to withdraw the complaint.

Preliminary Decision Notices

21. Before serving a Decision Notice, the Commissioner will consider issuing a (non-statutory) Preliminary Decision Notice and invite the Department to comment on it within 28 working days. The Commissioner undertakes to consider any such comments before deciding to serve a Decision Notice under section 50 of the Act. The decision as to whether to serve either a Preliminary Decision Notice or a Decision Notice shall be informed by the policy set out in Annex 2 of the Commissioner's paper "Regulation under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004" which, for convenience, is attached at Annex C of this MoU.
22. Where a Department does not agree to the steps suggested in the Preliminary Decision Notice, it will inform the Commissioner accordingly, setting out its reasons. Efforts will be made between the Commissioner and the Department in question to understand why the Preliminary Decision Notice has not been accepted and to explore alternatives.

Decision Notices

23. If the Commissioner decides to issue a formal Decision Notice under section 50(3)(b) of the Act, he shall serve the Notice on the Department and the Complainant simultaneously. He will give both Departments and complainants a reasonable period of time to digest the Notice before himself making the Decision Notice publicly available.
24. Where the Department proposes to serve a certificate under section 53 of the FOI Act, it will, wherever possible, inform the Commissioner in advance.
25. The Commissioner shall not serve a Decision Notice, which may reveal or refer to “market sensitive” information, without first being satisfied as to the relevant regulatory requirements.
26. The Commissioner will only publish complaint case summaries after the period for appeal to the Information Tribunal has passed, or otherwise following the conclusion of any appeal proceedings. He may, however, comment upon Decision Notices once these have been made public without, of course, revealing any information which might be subject to an appeal. Any complaint case summaries will not reveal information which may be exempt under the FOI Act or the EIRs.

General

27. Wherever possible, the Commissioner and Departments shall communicate by means of electronic communication.
28. This MoU shall be kept under review and will be amended, as necessary, in the light of experience.
29. The Department for Constitutional Affairs shall ensure that this MoU is widely disseminated within government and shall encourage compliance with it.
30. The Commissioner and the Secretary of State for Constitutional Affairs shall place copies of this MoU on their respective websites.

Annex 1: Definitions

In this Memorandum of Understanding:

“the DCA” means the Department for Constitutional Affairs

“The Commissioner” means the Information Commissioner

“MoU” means Memorandum of Understanding

Department means –

- a) where the information to which the request relates is governed by the Freedom of Information Act 2000, a government department as defined in that Act. In the case of the Ministry of Defence, the term includes armed forces of the Crown (except the special forces and units assisting GCHQ), and the Ministry of Defence Police;
- b) where the information to which the request relates is governed by the Environmental Information Regulations 2004, a government department as defined in those Regulations. In the case of the Ministry of Defence, the term includes armed forces of the crown and the Ministry of Defence police.

“The FOI Act” means the Freedom of Information Act 2000 and references to the Act include, where the context so requires, the Act as amended by the Environmental Information Regulations.

“The EIRs” means the Environmental Information Regulations 2004.

“The Tribunal” means the Information Tribunal.

“Complainant” means a person who has applied to the Commissioner for a decision, under section 50 of the FOI Act .

“Information Notice” and “Decision Notice” have the meanings assigned to them in the FOI Act.

Annex 2: Information to which s.23 and s.24 FOI Act and regulation 12(5)(a) EIRs apply

1. It is recognised that cases involving information relating to, or obtained from, the bodies specified in section 23 of the FOI Act and those where information has been withheld on national security grounds (section 24 of the FOI Act/ regulation 12 (5) (a) of the EIRs), are likely to be particularly sensitive. It is also accepted that the sensitivity of such cases means that there is likely to be a need for greater dialogue between the Commissioner and Departments before reaching any final conclusions.
2. Wherever practicable, the Commissioner will explore the scope for a settlement of the complaint which would be acceptable to the Complainant and to the Department. Where such settlement can be achieved, the Commissioner will invite the Complainant to withdraw the complaint.
3. It is envisaged that, in most cases, the issue will be resolved by dialogue between the Commissioner and the relevant Department(s). This will include discussion of the reasons and justification for relying on the exemptions under section 23 or 24 (or regulation 12(5)(a)) in a particular case).
4. Where the Commissioner requests access to information which has been withheld on the basis of the exemption in section 23 or 24 FOI Act (or regulation 12 (5) (a)), the relevant Department does not commit itself to providing the withheld information to the Commissioner, but will consider any request to so on a case by case basis.
5. It is envisaged that Departments will only seek a Ministerial Certificate under section 23 or 24 (or under regulation 12(5) (a) of the EIRs) where (i) the individual whose request for information has been refused complains to the Commissioner and (ii) the Commissioner indicates that he is minded to pursue the complaint and embark on the enforcement procedure under the FOI Act.
6. With this in mind, where the Information Commissioner intends to serve an information notice, wherever possible he will inform the relevant Department in advance.
7. By the same token, where the relevant Department proposes to serve a certificate under section 23 or 24 of the FOI Act or under regulation 15 of the EIRs, wherever possible it will inform the Commissioner in advance.

Annex 3: Annex 2 of the Commissioner’s paper “ Regulation under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.”

(Preliminary Notices)

General Policy

1. The Commissioner may serve three legally binding notices. These are Decision Notices, Enforcement Notices and Information Notices. The Council on Tribunals has previously advised that in serving Enforcement Notices under the Data Protection Act it is good practice to first serve Preliminary Notices. The Commissioner’s policy in relation to preliminary notices under the FOI Act and EIRs builds upon this approach.
2. The purpose of a preliminary stage is not to layer an additional bureaucratic procedure onto the enforcement process, but rather to reduce the number of appeals to the Information Tribunal by allowing all parties, the public authority, the applicant (where applicable) and the Information Commissioner, to reach agreed solutions without the expense, effort and delay which appeals inevitably entail.
3. The governing principle which will be followed is that preliminary notices will be served in those cases where the Commissioner judges that this is likely to lead to a swifter and more equitable outcome both for applicants and public authorities.
4. In the final analysis the decision as to whether to serve a preliminary notice is a matter of judgement. However, the Commissioner will be guided by the following general “rules of thumb”. Except in most clear-cut cases, for instance when an organisation clearly falling within the definition of public authority denies any obligations under the Act, the Commissioner will make an informal approach to a public authority suspected of failure to meet its obligations in order to establish basic facts before serving either a preliminary or a final notice.

Preliminary decision notices

5. The following is a series of general scenarios ranging from cases where a preliminary stage would be unlikely through to ones in which it would be probable.
 - The Commissioner does not consider that it would be appropriate to specify any steps to be taken by a public authority. A complaint may be clearly unjustified, for instance if it is obvious that the authority can legitimately rely upon an absolute exemption. In other cases, complaints may be justified. For instance there may have been a delay in supplying information. However, once the information has now been provided, there will be no steps that can be usefully specified in a decision notice adverse to the public authority. It is unlikely that he will issue preliminary decision notices in these cases.
 - The issues raised in a complaint are simply of a procedural nature. For instance the Commissioner does not consider that a proper refusal notice has been issued or it seems to him that it would be reasonable for the authority to have provided further

advice and assistance to the applicant. These cases would be unlikely to merit a preliminary decision notice.

- A public authority has failed to identify a relevant exemption in refusing a request. In this case, the Commissioner is more likely than not to issue a decision notice, either ordering the disclosure of information or requiring the authority to reconsider, perhaps relying upon a more appropriate exemption. Such cases are less clear cut than the earlier ones.
- An authority has identified a relevant exemption but has refused information having applied the public interest test. The Commissioner will generally issue a preliminary decision notice unless the Information Tribunal has previously ruled in similar cases that information should be disclosed on public interest grounds.
- The investigation of a complaint has suggested other exemptions upon which the public authority could credibly rely or other public interest arguments for or against disclosure have transpired. Such cases are likely to be more complex involving large quantities of information and requiring careful judgement by the public authority, including decisions about the detailed redaction of documents. Preliminary decision notices are likely to be served in these cases.