



Freedom of Information Act 2000 (Section 48)

Practice Recommendation

Date 10 August 2009

Public Authority: Ministry of Defence

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In accordance with his enforcement strategy, the Information Commissioner has conducted an audit of a number of section 50 complaints concerning the Ministry of Defence (the 'MOD'). As a result, the Commissioner is of the view that the MOD's internal review procedures do not conform to the following Code of Practice issued by the Secretary of State for Constitutional Affairs in November 2004:

- Discharge of Public Authorities' Functions under Part 1 of the Freedom of Information Act 2000 issued under section 45 of the Act (the 'Code')

A full copy of the Code can be found at:

<http://www.dca.gov.uk/foi/reference/impref/codepafunc.htm>

Summary

In October 2008 the Commissioner conducted an audit of section 50¹ complaints received in relation to the MOD. The audit found a number of examples where the MOD's internal reviews had taken significantly longer than 40 working days to complete. The Commissioner also examined the Ministry of Justice's (MOJ) 'Third Annual Report on the operation of the FOI Act in Central Government 2007'² which provided further evidence of the MOD's performance in relation to internal reviews.

Paragraph 39 of the Code states that internal reviews should be clear and simple and should "...encourage a prompt determination of the complaint."

¹ Section 50 'Application for decision by the [Information] Commissioner'

² Published online here: [http://www.justice.gov.uk/publications/docs/foi-report-2007-final-web\(1\).pdf](http://www.justice.gov.uk/publications/docs/foi-report-2007-final-web(1).pdf)



Having viewed the available evidence, the Commissioner was concerned that the MOD was failing to conduct reviews promptly and that in so doing was failing to adhere to his published guidance³ in this respect.

The guidance, published in February 2007, sets out the Commissioner's expectations regarding the time which public authorities should take to complete internal reviews. It echoes the Code's focus on promptness and explains that:

- A reasonable time for completing an internal review is considered to be 20 working days from the date of receipt;
- there may be a small number of exceptional cases in which it may be reasonable to take longer;
- in no case should the time taken exceed 40 working days.

In addition to his concerns that the MOD was failing to conform to the Code and to his guidance, the Commissioner also found that the standard target for internal review completion set in the MOD's procedure and in correspondence it sent to requesters was 40 working days⁴. It appeared to the Commissioner, therefore, that non-conformity to his recommendations was built into the MOD's review procedure.

In October 2008, and in keeping with his [FOI Enforcement Strategy](#), the [FOI Practice Recommendations Policy Statement](#) and the [Better Regulation Task Force Principles](#), the Commissioner, via his FOI Good Practice and Enforcement Team, wrote to the MOD and informally sought assurances that its internal review procedure would be amended to reflect his recommendations.

The MOD provided the Commissioner with statistics regarding the timeliness of its reviews. It acknowledged that its performance required improvement and gave assurances in this regard. The MOD declined to make the recommended changes to its internal review procedure, despite being advised that failure to do so would increase the likelihood that a practice recommendation would be issued, particularly if further complaints regarding this issue were received.

The MOD's failure to follow the Commissioner's informal recommendations and the evidence of its continuing poor performance has led to the issuing of this practice recommendation which finds that the MOD has failed to conform to the following parts of the Code:

- Part VI – Complaints Procedures

³ "Good Practice Guidance No. 5, published February 2007, available on the ICO's website here: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_5.pdf

⁴ See "MOD FOI AND EIR COMPLAINTS AND APPEALS PROCEDURES", MOD reference: D/DG Info/3/1/6, published 9 February 2005.



The Commissioner's Role

1. The Commissioner's duty is to promote observance of the Code of Practice under section 45 as a means of encouraging good practice by public authorities in carrying out their obligations under the Act.
2. Section 48 of the Act empowers the Commissioner to issue a Practice Recommendation, where it appears to him that the practice of a public authority does not conform to the Code. Such a recommendation will identify the provisions of the Code with which, in the Commissioner's opinion, the authority's practice does not conform and will specify the steps which he considers are necessary to promote conformity.
3. Section 47 (2) of the Act allows for the Commissioner to disseminate, in such form and manner as he considers appropriate, information that appears expedient to him to provide to the public on:
 - the operation of the Act
 - good practice
 - other matters within the scope of his functions under this Act

Chronology

4. On 31 October 2008 the Commissioner contacted the MOD and asked it to provide:
 - details of its internal review procedure;
 - assurances that, where the MOD's internal review procedure did not conform to his own guidance and recommendations, appropriate amendments would be made;
 - statistics regarding the number of requests for internal review received during 2008 to include the time taken for each review and the outcome (whether the original decision was overturned or upheld).
5. The MOD responded on 27 November 2008, providing details of its internal review procedure, confirming that the procedure set 40 working days as a standard target for completion. The MOD explained that it considered that this target to be both reasonable and in conformity with the criteria that a complaint be determined 'promptly', as recommended in paragraph 39 of the Code. The MOD also acknowledged that it was aware that the Commissioner's guidance set 20 working days from the date of receipt as a reasonable timescale for review completion and that the Commissioner considers that no review should exceed 40 working days.



6. In relation to the informal recommendation that the MOD change its internal review procedure to reflect the Commissioner's recommended 20 working day standard target, the MOD explained why it did not propose to make this amendment. The MOD explained that it considered that lengthier, thorough internal reviews averted the likelihood of subsequent appeals to the Commissioner. The time taken for the MOD's reviews, it was argued, is proportionate to the quality and thoroughness of its review decisions. The MOD added that to reduce its target date from 40 to 20 working days would inevitably compromise the thoroughness of the MOD's internal reviews, leading to increased dissatisfaction amongst requesters and more appeals to the Commissioner.
7. The MOD also provided statistics which showed that for 2008 (as of 27 November 2008), 17.5% of its internal reviews had been completed within 20 working days and 22.5% between 20 and 40 working days. In relation to the Commissioner's recommendations, the MOD was, therefore, only conforming to the 40 working day outer limit in 40% of its internal review responses. In relation to the MOD's own target, the statistics showed that it failed to meet this in 60% of its internal reviews during this period.
8. On 4 December 2008, the Commissioner wrote to the MOD to reiterate that he was unable to endorse a standard target of 40 working days. The Commissioner acknowledged the MOD's laudable focus upon the quality of its internal review responses but explained that he did not consider that this should be at the expense of timely responses. He confirmed that he did not accept that the MOD's default timescale of 40 working days equated to the prompt response recommended in the Code and did not conform to the recommendations of his own guidance.
9. The Commissioner further explained that if he were to accept similar arguments from all public authorities, i.e., that the deadlines they set reflect the standards they have set themselves, this would constrain his ability to set consistent standards. The Commissioner restated his advice that the MOD realign its internal review process to work towards a standard deadline of 20 working days (or 40 working days in exceptional cases). In addition and, in order to monitor the steps taken by the MOD to address its performance, the Commissioner asked the MOD to provide him with quarterly statistics in relation to its handling of internal reviews over a twelve month period.
10. On 12 January 2009 the MOD responded and clarified that its approach to internal reviews was based upon paragraph 42 of the Code, which states:

"Authorities should set their own target times for dealing with complaints; these should be reasonable and subject to regular review."



11. The MOD explained that it was not complacent and was committed to reducing the time taken on internal reviews as far as possible and that it would continue to redeploy internal resources to address this issue. However, the MOD clarified that it was reaching the limits of its flexibility in this regard and that its internal review performance had to be balanced against its other priorities, specifically its statutory duties to respond to requests and to develop and maintain a publication scheme.
12. The MOD acknowledged that it was failing to consistently meet its 40 working day target but did not see the benefit of 'arbitrarily' reducing this target in line with the Commissioner's recommendations. The MOD explained that halving its target would not improve the speed of review completion and maintained its previous position.
13. In the same response the MOD also questioned the Commissioner's emphasis on the timeliness of internal reviews and suggested that a more meaningful view of performance could be gained by comparing the number of appeals to the Commissioner with total requests handled by the MOD. By the argument proposed, poorer quality (i.e., shorter) internal reviews would result in requester dissatisfaction and an increase in complaints to the Commissioner.
14. On 16 January 2009, having still not received the assurances requested from the MOD in his initial letter of 31 October 2008, the Commissioner contacted the MOD for a third time. In response to the MOD's querying of his approach, the Commissioner clarified that he did not consider his recommendation in relation to internal review targets to be 'arbitrary' but that it reflected his view of what constitutes a reasonable timescale for the conducting of the majority of reviews.
15. In relation to the MOD's suggestion that timeliness of internal reviews was not a meaningful indicator of performance, the Commissioner clarified that he was not advocating timely responses at the expense of the content of reviews or the manner in which reviews are conducted. The Commissioner explained that he considered public authorities should have internal review procedures which allow for complaints to be addressed within the timescales set in his guidance. The Commissioner further explained that if he were to allow a public authority to operate an internal review procedure which integrated targets not conforming to his recommendations, this would amount to legitimising non-conformity; clearly a contradictory position for the Commissioner to take. The Commissioner explained that he would be unable to perform his duty under section 47 of the Act in a consistent manner if he were to accept the MOD's argument.
16. The Commissioner expressed his concern that the MOD was either unable or unwilling to conduct internal reviews within his recommended timescales. He again sought assurances from the MOD that it would amend its standard target for internal review completion to reflect his recommendations and that it would seek to address its performance in this regard.



17. The MOD responded on 4 February 2009 and disputed the Commissioner's assertion that his target for internal review completion was not arbitrary. The MOD explained that, as the target had been set at an early stage in the implementation of the Act when there was little experience of the internal review task, it did not have an empirical basis and was, therefore, an arbitrary target⁵. In relation to its performance, the MOD explained that it hoped to reduce timescales to a minimum and that the impact of the steps taken to address this would be evident by the end of the monitoring period.
18. On 11 February 2009 the Commissioner contacted the MOD for a fourth time. In his response the Commissioner commented upon the MOD's proposal that the targets set within his guidance should reflect public authorities' actual experience of conducting internal reviews and have a more 'empirical' basis.
19. Whilst acknowledging this approach initially appeared plausible, the Commissioner explained to the MOD that, ultimately, it would not provide useful evidence because: (i) it would not be practical to approach all public authorities (to solicit internal review statistics and views on the timescales they consider they reasonably require for review) and, more fundamentally, (ii) the principle itself was flawed as it assumes that the authorities involved are performing adequately and that the statistics and input they provide are representative of or can form the basis for a model of good practice.
20. The Commissioner clarified with the MOD that his role under section 47 of the Act was not to accommodate existing practices or performance by public authorities but to define and promote desirable practice. He explained that, the available evidence shows that many public authorities do not follow the good practice recommended by the codes of practice or set within his guidance. It is, therefore, likely, the Commissioner explained, that any guidance or targets based upon the proposed empirical approach would simply reflect and reinforce poor performance.
21. In order to explain the basis for his calculation of a standard twenty working day target to the MOD, the Commissioner pointed to the equivalent provision set in the Freedom of Information (Scotland) Act 2002, section 21(1) of which requires public authorities to comply with requests for review "...promptly; and in any event by not later than the twentieth working day after receipt..."⁶
22. In further explaining the basis for his target, the Commissioner also directed the MOD to section 10 of the Act, which requires authorities to comply with requests made under section 1 "...promptly and in any event not later than the twentieth working day following the date of receipt." and the recommendation of paragraph 39 of the Code that reviews should "...encourage a prompt determination of the complaint." The Commissioner's interpretation of a 'reasonable' timescale for review, therefore, reflects

⁵ The Commissioner's target appears in Freedom of Information Good Practice Guidance No. 5: "Time limits on carrying out internal reviews following requests for information under the Freedom of Information Act 2000", published February 2007. See footnote 3 above for relevant link to ICO website.

⁶ http://www.opsi.gov.uk/legislation/Scotland/acts2002/asp_20020013_en_2#pt1-pb4-l1g21



the statutory target set within section 10 of the Act and, in its equivalent recommendation for promptness, honours the intentions behind the code of practice⁷.

23. Having explained the rationale behind his approach, the Commissioner again asked the MOD to amend its internal review procedure and any associated standard paragraphs used in its responses to requesters to reflect the timescales set within his guidance. A timescale of 20 working days was set for the MOD to respond to this point. The Commissioner explained that, if the changes were not made and, particularly if he received subsequent complaints concerning the MOD's timescales for review, he would have to consider issuing a practice recommendation.
24. When no response was received, the Commissioner sent a reminder to the MOD on 25 March 2009.
25. Subsequent to being issued with the request contained within the Commissioner's letter of 11 February 2009, the MOD published a document titled "MOD FOI and EIR complaints and appeals procedures"⁸ on its website. Having viewed the section headed "MOD Independent Internal Review", which describes the MOD's internal review process, the Commissioner noted the appearance of the following text:

"On receipt of a request for an internal review, the CIO Access Review Team acknowledges receipt and informs the complainant of the target date by which the Head of Corporate Information aims to respond. (The target date set by the Department is 40 working days but many reviews will be completed in a shorter period.)"

26. In addition, on 20 March 2009, the following text appeared in correspondence from the MOD to a requester who, in addition to requesting an internal review, had queried the reasonableness of the MOD's internal review target:

"I am familiar with the ICO Good Practice Guide and the Commissioner's view on the length of time that can be considered reasonable for an internal review. Paragraph 42 of the Secretary of State for Constitutional Affairs' Code of Practice issued under section 45 of the Freedom of Information Act obliges public authorities to: "set their own target times for dealing with complaints; these should be reasonable, and subject to regular review." Although the target date set by this Department is 40 working days, many reviews will be completed in a shorter period. I am hopeful that yours will be one of them."⁹

⁷ The Commissioner also directed the MOD to the guidance of the MOJ which mirrors the Commissioner's standard timescale of 20 working days for straightforward internal reviews. Guidance viewable online here: <http://www.justice.gov.uk/guidance/foi-procedural-unhappy.htm>

⁸ Document dated 11 March 2009, viewable on the MOD's website here: http://www.mod.uk/NR/rdonlyres/FE887ED6-E894-45AE-9FEC-EC91B252A75D/0/mod_appeals_procedures_mar09.pdf

⁹ MOD FOI internal review ref 02-12-2008-080030-002. Identical wording appears in the MOD's response to a similar enquiry from another requester (sent 13 March 2009), viewable online here: http://www.whatdotheyknow.com/request/value_of_counter_narcotics_assis#incoming-20433



27. In April 2009 the Commissioner received two complaints which provided evidence, subsequent to the Commissioner's Good Practice and Enforcement team contacting the MOD, of internal reviews which had taken in one instance 80 working days¹⁰ and, in another, 89 working days to complete¹¹.

Nature of non-conformity

28. In issuing this practice recommendation, the Commissioner recognises the assurances made by the MOD in respect of steps it has already taken and will be taking in order to improve the timeliness of its internal review responses. However he considers that in declining to follow the Commissioner's recommendations in respect of the setting of targets, despite being given several informal opportunities to do so, the MOD has failed to demonstrate an appropriate level of commitment to improvement. Furthermore, the Commissioner considers that the extent of the internal review delays and the MOD's repeated failure to meet its own targets should be a matter of public record, in keeping with his general functions to disseminate information on the operation of the Act under section 47 (2).
29. The Commissioner considers that the practice of the MOD in relation to the exercise of its functions under the Act does not conform to the following provision of the Code:

Part VI – Complaints Procedure

30. Part VI, paragraph 38 of the section 45 Code of Practice states that any written reply from an applicant which expresses dissatisfaction with an authority's response to a request for information should be treated as a complaint (request for internal review).
31. In the Commissioner's opinion, a reasonable time for completing an internal review is 20 working days from the date of the request for review. In a small number of cases which involve exceptional circumstances it may be reasonable to take longer, however in no circumstances should the total time taken exceed 40 working days. The Commissioner's view is set out in his Freedom of Information Good Practice Guidance No. 5, published in February 2007. A copy of this guidance is available at:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_speci alist_guides/foi_good_practice_guidance_5.pdf
32. At the time that the Commissioner initially approached MOD, its internal review procedure set 40 working days as a standard target for completion. This does not conform to the timescale set within the Commissioner's guidance.

¹⁰ ICO reference: FS50245966; MOD reference: D/DG Info/3/18/1 (19-12-2008-153909-011); internal review requested 6 October 2008, response issued 30 January 2009.

¹¹ ICO reference: FS50246244; MOD reference: D/DG Info/3/18/1 (19-12-2008-150713-011); internal review requested 21 October 2008, response issued 27 February 2009.



33. Subsequent to the Commissioner approaching the MOD and advising it to amend its internal review procedure to align with his recommendations the MOD published (in March 2009) a new internal review procedure which retained 40 working days as its standard target¹².
34. In addition to declining to adopt the targets set within his guidance, the Commissioner is disappointed that, despite making reference to paragraph 42 of the Code as justification for the reasonableness of its target, the evidence suggests that the MOD is repeatedly failing to meet its own target:
- As referred to in paragraph 27 above, requests for review received by the MOD on 6 October 2008 and 21 October 2008 received responses, respectively, after 80 working days and 89 working days.
 - A request for review received by the MOD on 20 August 2008 received a response on 20 February 2009, after 127 working days.
 - In one case, the MOD received a request for review on 21 February 2008. A response was provided after over 120 working days.
 - In another case, the MOD received a request for review on 3 January 2008. Information supplied to the Commissioner from the MOD confirms that the review took in excess of 170 working days to complete.
 - Additionally, a request for review submitted on the 19 July 2007 received a response on 11 April 2008, over 180 working days later.
 - In another case, a request for review submitted on 11 May 2007 received a response on 25 February 2008, over 190 working days later.
35. The Commissioner has also considered the statistics provided by the MOD (on 27 November 2008) in relation to its 2008 internal review performance, which record the following:
- 21% of reviews ongoing over 40 working days;
 - 26% took an excess of 51 working days to complete,
 - 13% took 41-50 working days to complete;
 - 22.5% took between 21-40 working days and
 - 17.5% were completed within 20 working days.

¹² Viewable on the MOD website here:

http://www.mod.uk/NR/rdonlyres/FE887ED6-E894-45AE-9FEC-EC91B252A75D/0/mod_appeals_procedures_mar09.pdf



36. Further evidence of poor performance is also provided by the MOJ's Annual Reports on the Operation of the FOI Act in Central Government. The Third Annual Report records that, during 2007, 29% of the MOD's internal reviews were completed within 20 working days, 20% between 20 and 40 working days and 51% in excess of 40 working days¹³. The MOJ's Fourth Annual Report records that, during 2008, 20% of the MOD's internal reviews were completed within 20 working days, 30% between 20 and 40 working days and 50% were completed after over 40 working days¹⁴.
37. The Commissioner considers that these delays demonstrate non-conformity with Part VI, paragraph 39 of the section 45 Code which states that complaint procedures should encourage a prompt determination.

Action Recommended

Part VI – Complaints procedure

38. The MOD should change its standard target for internal review completion to 20 working days (40 working days in exceptional circumstances). The MOD's internal review procedure should be amended accordingly, as should any associated standard wording used by the MOD in its responses to requesters.
39. The MOD should ensure that there are adequate procedures and resources in place to expedite internal reviews and conduct them within the recommended timeframe of 20 working days (40 days in exceptional circumstances). If it has not already done so, the MOD should consider assigning temporary resource to internal reviews which have not been completed within this timeframe.
40. The Commissioner believes that these steps are necessary to ensure the timeliness of responses to internal reviews.
41. The Department should refer to the resources available on the Commissioner's website (www.ico.gov.uk) or contact the ICO directly should it require any further guidance or assistance when implementing these recommendations.

¹³ Viewable on the MOJ website here:

[http://www.justice.gov.uk/publications/docs/foi-report-2007-final-web\(1\).pdf](http://www.justice.gov.uk/publications/docs/foi-report-2007-final-web(1).pdf)

¹⁴ The 2008 report is available on the MOJ website here:

<http://www.justice.gov.uk/publications/docs/foi-statistics-report-2008.pdf>



Failure to conform

42. A Practice Recommendation cannot be directly enforced by the Commissioner. A failure to conform with the Practice Recommendation will result in closer scrutiny of the MOD's future performance in relation to internal reviews.

Dated the 10 August 2009

Signed.....

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