

## **Freedom of Information Act 2000 (Section 48)**

### **Practice Recommendation**

**Date:** 5 September 2022

**Public Authority:** Department for Business, Energy and Industrial Strategy ("BEIS")

**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### **Foreword**

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1. The Cabinet Office publishes<sup>1</sup> quarterly figures on central government Freedom of Information (FOI) activity, including statistics on the timeliness of responses to FOI requests by monitored bodies. Those statistics have now indicated across several quarters<sup>2</sup> a consistently low level of performance from BEIS. Following engagement by his staff with the department about the underlying reasons for these failings, the Information Commissioner (the Commissioner) has reached the view that BEIS's request handling practices do not conform to the [Freedom of Information Code of Practice](#), issued under section 45 by the Secretary of State in July 2018 (the Code).
2. The Commissioner considers that BEIS's practices do not conform with:
  - part 4 of the Code relating to time limits for responding to requests.

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<sup>1</sup> <https://www.gov.uk/government/statistics/freedom-of-information-statistics-january-to-march-2022/freedom-of-information-statistics-january-to-march-2022-bulletin#timeliness>

<sup>2</sup> <https://www.gov.uk/government/collections/government-foi-statistics>

3. Therefore, in accordance with section 48(1) of the Freedom of Information Act 2000 (FOIA), the Commissioner has elected to issue this practice recommendation to support improvements in the departments performance.

## **Background and Summary**

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4. From his consideration of applications to him for a decision under section 50 of FOIA, the Commissioner is of the view that the substantive content of responses to FOI requests and internal reviews provided by BEIS is generally of a high standard. He is also satisfied with the quality and timeliness of submissions provided to him by BEIS as part of the Commissioner's section 50 investigations. Furthermore, the Commissioner has not seen many complaints submitted to him about BEIS over the past two years – certainly when accounting for the volume of requests received by BEIS - in which timeliness issues have been of a particular concern.
5. However, he is concerned by the quarterly statistics published by Cabinet Office which demonstrate a consistently low level of performance by BEIS regarding its compliance with the statutory time limits set out in FOIA. The Commissioner considers that it is appropriate to take the external FOI statistics for central government bodies into account when making recommendations for improvement. This is because he sees via his casework only a small percentage of the overall information requests made to public authorities. The statistics help provide a broader picture of compliance by monitored bodies regarding their statutory duties under FOIA and the experience of citizens trying to exercise their statutory rights.
6. The Commissioner has decided to issue this practice recommendation to formalise his concerns and hold BEIS accountable for improving its performance in respect of its statutory FOI request handling duties.

## **Nature of non-conformity**

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7. The Commissioner considers that the practices of BEIS in relation to the exercise of its functions under FOIA do not conform with part 4 of the Code.

## **Part 4 – time limits for responding to requests**

8. 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.
9. 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 (classified as "permitted extension" in the published statistics).
10. Section 4.6 of the Code advises that it is best practice for an extension to be no more than a further 20 working days<sup>3</sup> although a longer extension may be appropriate depending on the circumstances of the case, including the complexity and volume of the material.
11. BEIS has explained to the Commissioner the process in place for handling requests and its own proactive on-going actions to help rectify its timeliness performance. The Commissioner understands that the FOI Information Rights Team contacts the appropriate official from over 40 different policy teams working in the department, which reflects the diverse nature of BEIS' work. The Information Rights officer advises the policy team on the legislation and compliance with same. When the request response is complete and agreed it passes to the Deputy Director for the particular policy area for clearance. Following this clearance, it is sent to the Newsdesk and to one of the two Special Advisors in BEIS.
12. The clearance or "sighting" procedure adds considerable time to the issuing of responses to, primarily, requests but also internal reviews where there has been a change from the initial response, for example, when information is disclosed at internal review. A snapshot of the position at 22 August 2022 shows that 70 cases are with the Special Advisers waiting for clearance to be sent out to requesters. Of those 70 cases, 65 were already past the statutory deadline (i.e. either 20 working days or the permitted extension).
13. The Commissioner considers that this process of clearance is neither proportionate nor necessary. He believes that the most effective method of progressing requests promptly is to limit the number of stages through which a request passes. He recommends that professional FOI practitioners, enabled by sufficient resources in terms of staff qualified

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<sup>3</sup> The Commissioner has published guidance on this point at:

<https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

in information rights, should be routinely entrusted with determining the ultimate decision on transparency following input from a policy official. The Commissioner accepts that in some particularly sensitive cases the ultimate decision may lie with others, but this should be the exception and request handling procedures should still be designed to comply with statutory timeframes where such escalation is necessary. The Commissioner expects there to be a level of quality assurance of responses to requests for information but not at the expense of compliance with the statutory timeframe for compliance.

14. The Commissioner appreciates that on occasion it will be necessary for others, for example Special Advisors or Ministers, to be consulted when considering an exemption such as at FOIA section 36<sup>4</sup>, which requires the opinion of the qualified person. However, he would expect this to be limited to these requests and any other exceptional cases, rather than a routine step in all cases. This is particularly relevant when such procedures introduce delays which result in non-compliance with the statutory timeframe set by parliament.
15. The Commissioner notes the 55% increase in the volume of requests received by BEIS<sup>5</sup> when comparing quarter one statistics in 2020 with quarter one 2022. He acknowledges that this increase could easily bring with it an adverse impact on BEIS' timeliness. Notwithstanding this the Commissioner expects government departments to be sufficiently resourced to meet demand within statutory timescales. BEIS has seen a steady and sustained decline in its performance over recent statistical bulletins.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

<sup>5</sup> [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment\\_data%2Ffile%2F1082491%2Ffoi-statistics-q1-2022-statistical-tables.ods&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F1082491%2Ffoi-statistics-q1-2022-statistical-tables.ods&wdOrigin=BROWSELINK)

Year	Quarter	Volume of requests	Timeliness percentage
2020	Q1	219	89%
	Q2	128	83%
	Q3	242	81%
	Q4	259	78%
2021	Q1	322	78%
	Q2	366	75%
	Q3	371	70%
	Q4	299	54%
2022	Q1	341	63%

16. The Commissioner acknowledges the likely impact of the pandemic and the increased volume of requests BEIS has received on these figures. However, he considers that the consistent failure over a lengthy period of time to perform to statutory deadlines so far below the average performance of other departments now justifies issuing a practice recommendation in line with the Commissioner's recently published FOI and Transparency Regulatory Manual<sup>6</sup>.
17. The Commissioner is issuing a Practice Recommendation at this time rather than, for example, an Enforcement Notice because BEIS has engaged openly with the Commissioner over a period of time about the procedural problems it has faced and the clear impact that increased volumes have had on the department, as indicated by the gradual decline in performance highlighted by the statistics.
18. The Commissioner also notes from his engagement with BEIS that the Information Rights Team is currently proactively considering and implementing additional actions to improve its timeliness performance, which again it has shared with us openly. For example, the team now provides a weekly reminder to the Special Advisors with a list of cases waiting for their clearance, including highlighting the oldest cases. The official leading this work has also restructured their small team to differentiate between the handling of the oldest cases and newer cases to provide specific focus on the former.

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<sup>6</sup> [https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1\\_0.pdf](https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf)

## Action recommended

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19. In relation to part 4 of the code, BEIS should ensure that requests for information are responded to in a timely manner, including when it is necessary to consult with Special Advisors or Ministers.
20. The Commissioner recommends that BEIS should consider using the Commissioner's FOI self-assessment toolkit to improve its timeliness compliance<sup>7</sup>.
21. BEIS should create an action plan, incorporating any recovery plan already in development, with appropriate processes put into place to ensure 89% timeliness is achieved by the end of December 2022. This action plan should be supported by a 'lessons learned' exercise, which examines the root cause of delays from allocation through to clearance at different stages, with mitigations for any recurring problems addressed specifically in the plan.
22. The Commissioner recommends that BEIS's request handling procedures include provision for when a response is late, or is likely to be late at any stage of the internal processes, it is clear when and to who to escalate, who is responsible for taking action, the action they will need to take, and by when.
23. The Commissioner further recommends that the action plan is published on BEIS' website for full transparency about the improvements it is making.
24. The Commissioner also recommends an action to increase BEIS' teams and policy areas' understanding and engagement with the role of the FOI professionals. In particular, this should include understanding and accepting BEIS' obligations under FOIA.
25. BEIS should write to the Commissioner by the end of December 2022 to confirm that it has complied with its recommendations and how it has achieved this.

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<sup>7</sup> [FOI self-assessment toolkit | ICO](#)

## **Failure to comply**

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26. 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, in this matter, likely further non-compliance regarding timeliness, which in turn may result in further regulatory action. 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.
27. The Commissioner will have regard to this practice recommendation in both his consideration of both subsequent cases and timeliness statistics involving BEIS.

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