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Response to Cabinet Office consultation

on

The Freedom of Information Code of Practice

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INTRODUCTION

This response relates to the Cabinet Office's consultation over a proposal to issue a revised code of practice under section 45 of the Freedom of Information Act (FOIA). The new code would replace the current draft issued in November 2004, shortly before the Act came fully into force.

Although the draft code is said to provide guidance on 'best practice' under the Act we think it needs to go significantly further to justify that description. As it stands the proposed code:

- **does not fully reflect changes in the interpretation of the Act resulting from Upper Tribunal and court decisions**

- **describes as 'best practice' some measures which are *required* under the Act, implying that these statutory requirements are *optional***

- **is weaker in key respects that the 2004 version of the code it is intended to replace, omitting numerous helpful passages from it. The effect is to limit rather than extend the spread of good practice.**

In our view the new code should be substantially improved before it is introduced.

1. RIGHT OF ACCESS

Requested information

Para 1.1 of the proposed code states that FOI applicants are entitled to have: *'information relating to the request* communicated to them'. It would be more accurate to say that the right is to have the *requested information* communicated to them.

Form in which information is held

Para 1.2 states that by virtue of section 84 of FOIA the right of access is to '*recorded information held in any form, electronic or paper'.* This should say '*including'* electronic or paper. The right is not limited to electronic and paper records but includes information held in other formats including video tape, film, photographic negatives, microfiche, etc.

New information

Para 1.3 states that authorities '*are not required to create new information'* to answer a request. This issue has been clarified by tribunal decisions which the code should reflect:

- the 'simple collation' of information which can be extracted from records held by an authority does *not* constitute the creation of new information

- the extraction of information from a database whether by running an existing 'report' or creating a new report also does not involve the creation of 'new' information.

Both points have featured in decisions of the First-tier Tribunal (FTT) subsequently endorsed by the Upper Tribunal and are now precedents binding on the Information Commissioner and FTT. [1]

Appropriate access regime

Para 1.5 explains that the FOIA, the Environmental Information Regulations and the subject access provisions of the Data Protection Act are in effect mutually exclusive but adds: *'Sometimes it may be necessary to consider a request under more than one access regime.'* Those statements may appear to conflict.

[1] *Kirklees Council v Information Commissioner and PALI Ltd*, [2011] UKUT 104 (AAC) at paragraphs 75-76

It may be clearer to say something like: *'Sometimes the response to a request may involve a combination of different types of information, each of which will need to be dealt with under the appropriate regime.'*

Recorded information

Para 1.7 states:

> *'There will be occasions where a request is made under the Act but does not in fact meet the above description of being a request for recorded information. This may include requests for explanations, clarification of policy, comments on the public authority's business, and any other correspondence that does not follow the definition of recorded information in section 84.' (emphasis added)*

The reference to 'correspondence' appears misplaced. Correspondence is 'recorded information'.

The above passage could also be taken to imply that requests for explanations, clarification or comments are *not* subject to the Act. It should be made clear that where such explanations can be found in recorded information they must be provided.

The guidance should make clear that information about an authority's business held on mobile devices, including emails and messaging systems, is subject to the Act.[2]

Private email accounts

The code fails to address the position of official information held in private email accounts. It should state that information about the public authority's business may be 'held' by the authority for FOI purposes even if it is held by an official on their home computer, on a personal mobile device or in a private email account. This position is set out in the Information Commissioner's guidance which states:

> *'FOIA applies to official information held in private email accounts (and other media formats) when held on behalf of the public authority'*[3]

[2] See Information Commissioner Decision Notice FS50667128, Cabinet Office, 26 July 2017
Information Commissioner's Office, Official information held in private email accounts, version 1.2, 20170309

Having previously asserted that official information in their private email accounts was *not* subject to FOIA the Cabinet Office has since acknowledged the correct position, noting:

> *'In exceptional circumstances, it may be necessary to ascertain whether there is Government information in an individual's possession that is not accessible to Government'.*[4]

The correct position should be reflected in the code.

Information held on another person's behalf

Paragraph 1.10 states *'Where a public authority holds or stores information on behalf of another person or body that material will also not be 'held' by that authority for the purposes of the Act.'*

This should be amended to make clear that it is only true where information is held *'solely'* on behalf of another person. If information is *to any extent* also held for the authority's purposes, it is subject to the Act. These statements have been endorsed by the Upper Tribunal.[5]

Deleted information

Paragraph 1.11 states that information which an authority has deleted but which is still available in electronic back up files '*should generally be regarded as not being held'*.

In fact, the FTT has in a number of cases held that back-up information *was* 'held' for the purposes of the FOIA. For example:

> One request concerned an email sent to a US institution by a member of the Climate Research Unit at the University of East Anglia (UEA). The member of staff had deleted the email from his personal computer. The FTT concluded that the email was likely to be held on a UEA back-up server. It found that *'it was a matter of common-sense that information backed-up onto a back- up server in the control of UEA, but deleted from the computer on which the original email was composed, was still 'held' by UEA.'* [6]

[4] Cabinet Office, Guidance to Departments on the Use of Private Email, June 2013
[5] See: *University of Newcastle upon Tyne v Information Commissioner and BUAV*, [2011] UKUT 185 (AAC) at 21-22.
[6] EA/2011/0152, *Dr Don Keiller & Information Commissioner & University of East Anglia*, 18 January 2012.

Request for information

Paragraph 1.15 states that authorities do not have to comply with a request that does not meet the section 8 requirements (that is, that an application should be in writing, provide a name and address and describe the requested information). It continues: '*It is good practice to write to the applicant and explain this if this is the case.'*

This should not be described as 'good practice'. The failure to do so would be a breach of the statutory duty to advise and assist under section 16 of the Act. An authority is not free to simply ignore and discard a request because, say, the required information has not been adequately described.

Redaction costs

Paragraph 1.20 states that authorities can charge for the *'actual production expenses'* of providing information and says these include the cost of *'redacting exempt information'.*

We do not see any statutory basis for charging for redaction costs. The only charges permitted under regulation 6(2) of the fees regulations[7] are those incurred in *informing* the applicant whether information is held and *communicating* the information to the applicant, and these must exclude any staff costs.[8] Redaction is not part of either process.

Examples of the costs that can be charged are provided in regulation 6(3). These are the costs of:

'(a) complying with any obligation under section 11(1) of the 2000 Act as to the means or form of communicating the information,
(b) reproducing any document containing the information, and
(c) postage and other forms of transmitting the information.'

These are all examples of costs attributable to *informing* the applicant whether information is held or *communicating* the information. The redaction of exempt information does not fall into the pattern described by these examples.

[7] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004
[8] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, regulation 6(4).

Fees where the cost limit is exceeded

Paragraph 1.21 of the draft code deals with the fee that may be charged where an authority is prepared to supply information even though it is under no obligation to do so because the cost limit has been exceeded. The draft code states that in these circumstances the authority:

> *'can charge for the staff time needed to do so. In such circumstances staff time is chargeable at a standard rate, including the cost of making redactions (but only the physical cost of making redactions and not staff time or considering whether exemptions apply), to be included in the initial fees notice.'*

This passage contradicts itself. It first states that charges can be made for staff time spent redacting information *('staff time is chargeable at a standard rate, including the cost of making redactions'*) and then that such staff time cannot be charged for *('but only the physical cost of making redactions and not staff time'*).

Specifying software

Paragraph 1.24 states that authorities should aim to comply with the applicant's preference for the format in which access should be provided, for example where the applicant asks for information to be supplied in *'electronic or hard copy format'.*

The code should acknowledge that applicants are also entitled to specify the *particular software format* that should be used to provide electronic information: for example, Word, Excel or PDF.

This was established by a 2014 Court of Appeal judgment, *Innes & Information Commissioner & Buckinghamshire County Council*.[9] The requester, Mr Innes, had asked for information to be provided as Excel spreadsheets. The council held the information in Excel but contrary to his preference supplied it as PDFs. The Court of Appeal held that if

[9] [2014] EWCA Civ 1086

applicants expressed a preference for a specific software format the authority was required to provide it in that format, so long as it was reasonably practicable to do so.[10]

The court's rationale must also mean that if an applicant expresses a preference for a hard copy in the form of a *photocopy* of a paper record, the authority *must* comply with that preference unless it is not reasonably practicable to do so. It does not have the option of supplying a print-out instead, unless it is not reasonably practicable to supply the photocopy.

2. ADVICE AND ASSISTANCE

Contact details

Paragraph 2.3 says authorities should 'as a matter of best practice' publish a postal address and email address for requests. We wonder why this mundane suggestion is described as 'best practice'. An authority which does not publish an address for requests is likely to be breaching its duty to provide reasonable advice and assistance.

Moreover, the draft code drops a provision from the existing code which recommends that:

> *'A telephone number should also be provided, where possible that of a named individual who can provide assistance.'*[11]

[10] In the leading Court of Appeal judgment Lord Justice Underhill held that the reference in section 11(1)(a) of FOIA to the option of receiving information in permanent form or another form acceptable to the applicant did not refer to a distinction between paper or electronic form, as both were 'permanent'. It was more likely to indicate a choice between receiving the information in an unspecified permanent form or orally. But this would mean that an authority could ignore the applicant's request for an electronic copy and supply it in hard copy instead, or vice-versa. It was unlikely that Parliament had intended this as it was inconsistent with what Parliament had been told during the FOI Act's passage, with the finding of a Scottish court ruling and with what all the parties to this case believed to be the position. He continued:
'I thus finally come back…to the question to which the parties' submissions were principally directed, namely whether an applicant's right to choose to have information provided to him in electronic form extends to a right to choose the software format in which it is embodied. On this aspect too I have not found the decision entirely easy, but on balance I prefer Mr Innes's submissions…
Once it is accepted that an applicant can require provision of information in electronic form it seems to me only a small step to hold that he can also choose the format in which that electronic information is provided: the one naturally follows from the other…
If an authority is asked to provide information in a software format in which it is not already held (or into which it cannot readily be converted) it would be entitled to seek to rely on the reasonable practicability qualification…
I would allow the appeal on the section 11 complaint…The most straightforward outcome would be for the Council forthwith to supply the information sought in the form of an Excel file or files…' [2014] EWCA Civ 1086, paragraphs 37, 38, 40 and 51.

[11] Section 45 Code, 2004 edition, paragraph 5

The Information Commissioner's guidance makes a similar recommendation.[12] We think it should be reinstated.

Informing potential applicants of the Act

The draft code drops this passage from the existing code:

> *'Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential applicants who appear unaware of them.'*[13]

This seems appropriate and should be retained.

Advice before a request is made

The duty to provide advice and assistance applies both to those who have made requests and those *'who propose'* to do so.[14] However, it is often difficult for applicants to obtain guidance from authorities *before* making a request. Where a request for advice is made in writing, it is sometimes treated as an FOI request in its own right, only to eventually be refused under an exemption.[15] The code should encourage authorities to respond to informal requests for advice in an appropriate manner.

Citing the Act

Paragraph 2.4 rightly states that a request is valid even if it does not specifically mention the FOI Act. It goes on to say that where an authority receives a request for recorded information that complies with section 8(1)[16] it *should 'consider the request under the Act'.*

The fact that section 8(1) has been complied with does not necessarily indicate an *FOI* request: it may be for environmental information or the applicant's personal information. The code should state that it is the authority's responsibility to identify and apply the *correct* regime. It should also draw attention to the parallel code of practice issued under regulation 16 of the Environmental Information Regulations.

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[12] Information Commissioner, Duty to Provide Advice and Assistance (section 16), 20160623, version 1.1 paragraph 24.
[13] Section 45 Code, 2004 edition, paragraph 6.
[14] FOIA section 16(1)
[15] See for example: *Ganesh Sittampalam & Information Commissioner & BBC*, EA/2010/0141, 4 July 2011, paragraphs 8 & 9
[16] That is, it is in writing, provides the requester's name and address and describes the information sought.

We question the need for separate codes under the FOIA and EIR: it would be more sensible to publish a single code covering both regimes, as the Scottish Government has done.

Confirming the applicant's name

Paragraph 2.7 states that if the authority considers that an applicant has not provided their real name it can notify them that it will not respond to the request until their real name has been provided. We think the code should follow the equivalent Scottish Government code of practice in stating:

> *'The use of a surname plus a title (e.g. Mrs Jamieson) will generally be sufficient. There should be a presumption that any full name provided is genuine, unless there is a clear and demonstrable reason to believe otherwise.'*[17]

Clarifying a request

Paragraph 2.9 states that where an authority seeks clarification of a request, the 20 day response period will not start until clarification is provided. The code should make clear that under section 1(3) of the Act clarification must be '*reasonably'* required. An *unreasonable* requirement to clarify a request which does not require clarification will not justify delay and may leave the authority in breach of the Act's time limits.[18]

Seeking clarification promptly

A frequent complaint by applicants is that requests for clarification are not made until near the end of the 20 working day period. As the clock only starts once the clarified request has been received, a late request for clarification may cause significant delay.

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[17] Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004, 1 December 2016, SG/2016/225 (Hereafter *'Section 60 FoISA Code'*) paragraph 4.6.1

[18] See Information Commissioner Decision Notice FS50094591 which states: 'although the Public Authority asked the complainant to clarify his request, the Commissioner finds that as it was able to provide the requested information without receiving any further clarification, the original request was clear enough for it to identify what was required. The twenty working day time limit then runs without pause, and the Public Authority has exceeded this limit.'

The existing code addresses this is issue saying:

> *It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.*[19] *(emphasis added)*

The proposed code inexplicably drops this important recommendation. It should be reinstated.

Purpose of clarification

Another passage in the existing code which has been omitted states:

> *'Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not).'*[20]

This remains relevant and should be reinstated.

Advice and assistance when seeking clarification

The draft code drops the existing code's guidance on the advice and assistance that may be appropriate when seeking clarification of a request. The existing code suggests this might include:

> '• *providing an outline of the different kinds of information which might meet the terms of the request;*
>
> • *providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;*
>
> • *providing a general response to the request setting out options for further information which could be provided on request.'*[21]

[19] Section 45 Code, 2004 edition, paragraph 9
[20] Section 45 Code, 2004 edition, paragraph 9
[21] Section 45 Code, 2004 edition, paragraph 10

These are helpful suggestions which should be retained or improved upon - not simply omitted.

Training

The draft code makes no reference to training and drops the existing passage from the foreword to the current code. This states that staff dealing with correspondence should recognise that a written request for information may be an FOI request; that staff should receive 'proper training' and that larger authorities should have staff with 'particular expertise' in FOI who can advise others when necessary.[22]

An authority which allows untrained staff to deal with FOI requests is not following 'best practice'. The omitted passage should be reinstated and moved from the foreword (which is not technically part of the code) into the code itself.

The code should also reflect the provisions of the equivalent code in Scotland. This advises authorities to ensure that training is also provided for staff who cover for FOI staff during periods of absence or increased FOI workload, that specific training is provided for those carrying out internal reviews and that training is refreshed regularly.[23]

3. CONSULTATION WITH THIRD PARTIES

Suitable for disclosure

Paragraph 3.1 says that authorities may sometimes need to consult third parties in order to consider whether '*information is suitable for disclosure'.* The term '*suitable'* is not helpful as it may be taken to refer to the *quality* of the information. The purpose of consultation is to help the authority reach decisions on exemptions and the public interest.

Expert views

Paragraph 3.3 says:

> *'The expert view of a third party may, as long as it is reasonable, be helpful if the applicant appeals against any refusal.'*

[22] Section 45 Code, 2004 edition, Forward, paragraph 15
[23] Section 60 FoISA Code, para 1.3.4

This is not an appropriate comment. The purpose of the code is not to help an authority defend its decisions from challenge but to encourage it to adopt best practice in complying with the Act. The value of a well-informed view from a third party is that it may help the authority reach the *right decision* on disclosure.

The use of the term 'expert' in the above passage is also questionable. The persons consulted will be those who have provided information to the authority or who may be affected by its disclosure. They may not be 'experts' even in relation to the impact of disclosure on their own affairs. Some may provide well-informed comments, others may make sweeping generalisations or, as the FTT said of the managing director of a major contractor, 'be rather partisan'.[24]

4. TIME LIMITS FOR RESPONDING TO REQUEST

Ensuring time limits are met

The foreword to the proposed code states:

> *'For any Freedom of Information regime to be truly effective it is important that both its users and those subject to it have faith in it.'*

Users often experience significant delays in responding to requests, which inevitably undermines faith in the Act. The code should stress the importance of adopting measures to ensure that this does not occur.

Measures should include:

- steps to ensure that staff or third parties who may need to be involved are consulted at an early stage and respond promptly

- the use of appropriate software to ensure that staff are aware of impending deadlines and take steps to ensure they are met

[24] *Gloucestershire County Council & The Information Commission& Costas Ttofa & UBB Waste (Gloucestershire) Ltd*, EA/2015/0254-6, paragraph 73.

- the monitoring by the authority of its compliance with time limits, which should identify problems and lead to action to address them

- the publication of information about such problems and remedial action.

Promptly

Paragraph 4.1 describes the section 10(1) requirement that requests must be responded to *'promptly and within 20 working days'.* However, it has nothing to say about the significance of 'promptly'. It should include the Upper Tribunal's observation that:

> *'Contrary to a common interpretation, the public authority is not given an entitlement to take 20 days to answer the request; the 20 day limit is intended as a long stop.'*[25]

Acknowledging requests

Neither the existing code nor the proposed code encourages authorities to acknowledge receipt of an FOI request. This is surprising as both advise that requests for *internal review* should be acknowledged.

The code should state that FOI requests should always be acknowledged. An applicant who has not received an acknowledgement within a few days of making the request would then have reason to question whether it had been received.

Public interest extensions

Section 10(3) of the Act states that a public interest extension is only available 'if, *and to the extent* that' a qualified exemption is engaged. The code should make clear that, if before the end of the 20 working day period, the authority has concluded that some of the requested information is not exempt *that information should be disclosed* - even if other information is still withheld pending the outcome of the public interest test.

We welcome the statement that a public interest extension should normally not exceed a further 20 working days.

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[25] *All Party Parliamentary Group on Extraordinary Rendition & Information Commissioner & Ministry Of Defence*, [2011] UKUT 153 (AAC) at 41

Notification of a new deadline

Paragraph 4.7 states that authorities relying on the public interest extension should *'ideally'* notify the applicant of the date by which they expect to be able to respond to the request. The word '*ideally'* should be removed. Notification of the expected response date is a legal requirement under section 17(2) of the Act.

5. INTERNAL REVIEWS

Timescale for requesting internal review

Paragraph 5.3 states that a request for an internal review should be made within 40 working days of the authority's decision and that authorities *'are not obliged'* to accept internal reviews after this date. The term 'not obliged' is misplaced. Authorities are not *obliged* to provide an internal review process at all, so there is no *obligation* from which they are freed after a particular deadline. This is an area which should be described in the language of good practice rather than requirements.

Form of request for internal review

The draft code omits the following from the existing code:

> *'Any written reply from the applicant…expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint'*[26]

This guidance is valuable and should be retained. It ensures that applicants who do not understand the FOI process nevertheless enjoy full rights under it. Applicants who may not even know of the Act's existence may make a valid request if it satisfies the modest requirements of section 8(1). A written expression of dissatisfaction with the authority's response, also made in ignorance of the Act's requirements, is currently treated as triggering the internal review process – and should continue to do so.

This means that if an authority (i) fails to treat an initial valid request under the Act, then (ii) fails to notify the applicant of the right to internal review, and then (iii) fails to treat a written expression of dissatisfaction as a request for internal review, the applicant is free to complain to the Information Commissioner without further delay (if they then learn of

[26] Paragraph 38.

the Commissioner's role). That is a reasonable outcome, which prevents the authority from benefitting from its own mishandling of the request.

Person carrying out internal review

The draft code drops the existing code's suggestion that an internal review:

> *'should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable.'*[27]

Instead, the draft code merely says that internal review should, where possible, be carried out by someone *other than* the original decision taker.[28] This implies that someone *junior* to the original decision taker may carry out the review (e.g. that an official may review a decision of their minister or chief executive). That does not seem sensible or likely to inspire public confidence. The omitted guidance permits flexibility (it only applies 'where…reasonably practicable') and should be reinstated.

6. COST LIMIT

We think this section of the proposed code, in particular, fails to give appropriate weight to the duty to advise and assist, and in this respect is significantly weaker than the existing code.

An indication of what information could be provided

The proposed code says that where a request is refused on cost grounds authorities:

> *'should consider what advice and assistance could be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is narrowed.'*[29]

However, it omits a significant provision in the existing code. This states that where the cost limit would be exceeded:

[27] Paragraph 40
[28] Paragraph 5.9
[29] Paragraph 6.9

> *'the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling.'*[30]

That statement is an important benchmark, which has been quoted in over 120 decisions of the Information Commissioner and tribunals.[31] **There would need to be compelling justification for omitting it. None is given.**

The Information Commissioner's guidance explains:

> *'Advising requestors to narrow their requests without indicating what information a public authority is able to provide within the limit, will often just result in requestors making new requests that still exceed the appropriate limit.'*[32]

Taken to extreme, the failure to provide advice and assistance may, in the FTT's words:

> *'Reduce…a citizen's right to request information to a game, which the citizen is forced to play blindfold with the public authority declining to say whether or not successive attempts are getting any closer to the target.'*[33]

Aggregating requests in relation to the cost limit

Paragraph 6.6 of the proposed code states:

> *'If responding to one part of a request would exceed the cost limit, public authorities do not have to provide a response to any other parts of the request.'*

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[30] Code of Practice, November 2004, paragraph 14

[31] See for example Information Commissioner Decision Notice FS50644458, Liverpool City Council, 27 July 2017, paragraphs 29-32, which states:

'Paragraph 14 of section 45 of the Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

"…should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or refocusing their request, information may be able to be supplied for a lower, or no, fee."

In this case the Commissioner has not been provided with any correspondence to show the council has ever offered the complainant any indication of what it could have provided within the cost limit to the complainant in order for a possible refinement of the request…

…the Commissioner finds that the council breached section 16 of the FOIA.'

[32] Information Commissioner, Requests where the cost of compliance exceeds the appropriate limit, 20150909, Version: 1.2, paragraph 62

[33] *Mark Joseph McCarthy & Information Commissioner & Ofsted*, EA/2015/0009, 26th June 2015

That is an incomplete account which does not describe good practice. It should not stand without a direct reference to the duty to advise and assist. The following points should be made:

- If answering *one* part of a request would exceed the cost limit, but *other* parts could be answered within the limit, the authority would be expected to tell the applicant this and identify the answerable parts.[34]

- if the other parts of the request involve an *unrelated* subject, the cost of answering them cannot be aggregated with the cost of answering the first part. They would have to be answered unless their costs, on their own, exceeded the cost limit.

- where the authority could provide *either* one part of the requested information within the cost limit *or* another (but not both) it should say so and invite the applicant to indicate which, if either, they prefer to receive. It should not unilaterally disclose either, as this would deprive the applicant of the opportunity to exercise their own choice.

How the costs have been estimated

The Information Commissioner's guidance recommends that when refusing a request on cost grounds the authority should explain to the requester how its cost estimate has been reached.[35] We think the code should do the same.

This would allow the requester:

- to judge whether the request was only slightly above the cost limit, in which case only a modest refinement might be needed to bring the request within the limit.

- to recognise that what they may regard as a non-essential aspect of the request is responsible for a disproportionate cost. Omitting it may solve the problem.

- to appreciate that the request is so far over the limit that only a wholesale revision of the request will have any chance of success at all.

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[34] For example, in one case the Information Commissioner found that an authority had been entitled to refuse to answer a series of 6 related requests as the cost of answering them all would have exceeded the cost limit. However, if the applicant had been prepared to drop any 1 of the 6 requests, the remaining 5 could have been answered within the cost limit. The authority's failure to tell the applicant this constituted a breach of the duty to advise and assist. Decision Notice FS50274478, University of Warwick, 20 September 2010

[35] Information Commissioner, Requests where the cost of compliance exceeds the appropriate limit, 20150909, Version: 1.2, paragraphs 37-38

- to appreciate that there is no realistic way of bringing the request within the cost limit at all, for example, because the information is held in so large a volume of unindexed records that no reformulated request will produce results of any value.

7. VEXATIOUS REQUESTS

Justification for the request

The proposed code sets out factors and circumstances that should be taken into account when considering whether a request is vexatious. Almost all of these tend to point *towards* a finding of vexatiousness. Although code lists '*the value or purpose of the request*' as a relevant factor, its significance in light of the Upper Tribunal[36] and Court of Appeal[37] judgments in *Dransfield* is not properly acknowledged.

The essence of this approach is that while a request (or the latest in a series of requests) may impose a significant burden on an authority the request will only be vexatious if that burden is *disproportionate* in light of the *value of the information sought*. There should be an express statement along these lines.

Insofar as the draft code refers to any weighing of competing interests it does so in this awkward statement:

> *'public authorities should note that the public interest in obtaining the material does not act as a 'trump card', overriding the vexatious elements of the request and requiring the public authority to respond to the request.'*[38]

We recognise the source and context of this observation[39] but here it is out of context and imprecisely expressed. In any particular case, the public interest in disclosure may (depending on the facts) override any indication that the request is vexatious. The converse may equally be true. It would be more accurate to say neither set of factors *automatically* trumps the other.

The necessary balancing test is set out in the Information Commissioner's guidance:

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[36] *Information Commissioner v Devon County Council and Dransfield*, [2012] UKUT 440 (AAC)
[37] *Dransfield v Information Commissioner*, [2015] EWCA Civ 454
[38] Paragraph 7.11
[39] *CP v The Information Commissioner,* [2016] UKUT 427 (AAC)

> *'The key question to consider is whether the purpose and value of the request provides sufficient grounds to justify the distress, disruption or irritation that would be incurred by complying with that request. This should be judged as objectively as possible. In other words, would a reasonable person think that the purpose and value are enough to justify the impact on the authority.'*[40]

We suggest the code provide a similar explanation.

Examples of vexatiousness

Paragraph 7.9 of the code describes *'examples public authorities may want to use when considering whether a request is vexatious'.* All three examples point towards a finding that the request is vexatious. No example indicating when a request may be justified is given.

The Commissioner's guidance, by contrast, provides examples of both outcomes. It notes that requests likely to be vexatious would include those where the burden is 'so grossly oppressive' that the authority cannot be expected to comply no matter how legitimate the subject; those making threats against employees or using racist language; and those where the requester has expressly stated an intention to disrupt the authority's work.

But it also refers to cases why the burden might be justified because the authority's answers to a previous request have been contradictory, the requester is pursuing a legitimate grievance for which information is needed or the authority's publicised failings give genuine grounds for concern.

The code should adopt a similarly even-handed approach.

An issue already addressed

Paragraph 7.6 states that one factor that may be relevant in deciding whether a request is vexatious is whether the requester is *'unreasonably persisting in seeking information in relation to issues already addressed by the public authority*?' (emphasis added)

The question should not be whether the authority has '*addressed'* the issue but whether it has been, as the Commissioner's guidance puts it, '*conclusively resolved'* by the authority or

[40] Information Commissioner, Dealing with vexatious requests (section 14), 20151218, Version: 1.3, paragraph 52.

'subjected to some form of independent investigation'.[41] The point of this provision is to consider whether disclosure would serve any purpose. There may well be a purpose where the decision is still open to challenge, whether by further complaint to the authority or to a regulator or at law.

Paragraph 7.14 suggests that section 14(1) (vexatious requests) should be considered when section 12 cannot apply *'for the reasons set out in paragraphs 7.10 to 7.11 above'.* This should presumably refer to paragraphs 7.12 to 7.13.

Refusal notice

Paragraph 7.17 states that if authorities consider that section 14 (vexatious or repeated requests) applies authorities should provide a refusal notice *except* in the circumstances referred to in paragraph 7.14. It is not clear why any of the circumstances referred to in that paragraph justify a refusal without a refusal notice.

Explaining why a request is vexatious

Paragraph 7.17 also states that where an authority considers that section 14 applies *'There is no obligation to explain why the request is vexatious'.* We do not understand the rationale for this statement.

'Vexatious' is an emotive term, which will often appear inappropriate and offensive. It implies an adverse comment about the requester's character or conduct, not the request's workload implications - though workload is often the basis. Failing to explain why a request has been refused as vexatious is likely to be needlessly provocative. It is certainly not good practice.[42]

To withhold an explanation:

- denies the requester the opportunity to revise a burdensome request to make it less demanding

- makes a reasoned challenge to the decision impossible

- is, prima facie, a breach of the duty to advise and assist.

[41] Information Commissioner's Office, Dealing with vexatious requests, 20151218, Version: 1.3,

[42] If a requester whose previous requests have been refused as vexatious continues to repeat them, section 17(6) of the Act itself excuses the authority from having to respond where it would be unreasonable to expect it to do so.

(If the code is attempting to limit the scope of the duty to advise and assist, by including a statement which itself has quasi-legal force we think that is misguided.[43])

A request which is refused as vexatious because of its disproportionate burden is analogous to a request refused for exceeding the cost limit. The former may involve the number of hours required to *redact* exempt information; the latter the number of hours needed to *search* for information. Both cases should attract advice and assistance. In the vexatious case, the authority should explain why the request is considered so burdensome, advise on how it may be refocused and indicate what information could be provided without causing this burden. The duty to advise would still be qualified by the proviso that it need not be more than is 'reasonable' in the circumstances.[44]

8. PUBLICATION SCHEMES

Statistics

We welcome the proposed recommendation in paragraphs 8.5 to 8.6 that larger authorities should publish their FOI statistics, and do so quarterly, in line with central government practice. Although the code is made under the FOI Act, we think it should recommend that publication should cover *both* FOI *and* EIR requests - as the central government statistics do.

In addition to the proposed statistics, the code should recommend that authorities should also publish:

- the length of time by which deadlines have been exceeded, where this has occurred
- the number of internal reviews completed within 20 working days and the length of time by which that target has been exceeded, where that has occurred
- the outcomes of internal reviews
- the number of times individual exemptions and sections 12 and 14 are used.

We think a template should be published, to encourage authorities to publish data in a standard and open data format.

[43] Section 16(2) provides that an authority which conforms with the provisions of the section 45 code in relation to the duty to advise and assist has satisfied the section 16(1) duty to provide 'reasonable' advice and assistance.
[44] FOIA, section 16(1)

Disclosure logs

The suggestion that authorities with over 100 staff should publish their compliance statistics is a response to the Burns Commission, which recommended that this should be required by law.

The Burns Commission also recommended that larger authorities should also be required by law to publish disclosure logs, showing all requests which have resulted in at least some disclosure together with the released information. We are disappointed that this significant recommendation has been dropped.

The Commission said:

> *'Answers to requests already are published where they are made through public websites like WhatDoTheyKnow.com, but we think that this should be the norm. We consider that this will have a number of benefits, such as helping requestors to obtain information which has in fact already been released without needing to make a request, reducing unnecessary requests for information that has already been published, and allowing public authorities to avoid answering duplicate requests where they can simply point to information on their websites.'*[45]

The code should reflect that recommendation.

9. TRANSPARENCY AND CONFIDENTIALITY OBLIGATIONS IN CONTRACTS AND OUTSOURCED SERVICES

Paragraph 9.3 discusses the circumstances in which information will be held by a contractor 'on behalf' of a public authority and says they will include cases where the contract *'stipulates that certain information about service delivery is held on behalf of an authority for FOI purposes'*

[45] Report of the Independent Commission on Freedom of Information, chaired by Lord Burns, March 2016, page 17

It is not necessary for the contract to state that the information is held on the authority's behalf '*for FOI purposes*'. If the information is contractually available to the authority, it is held on its behalf, regardless of any reference to FOI.

For example, the FTT has held that the names of sub-contractors used by a contractor were held on the authority's behalf because:

> *'Clause 85 of the contract between the DRD [Department for Regional Development] and the main contractor confirms that the DRD could have insisted on provision of the names of the sub-contractors…the disputed information in this case was held by the main contractor on behalf of the DRD since they were required under the terms of the contract to seek approval of the subcontractors from the Public Authority'*[46]

In another case, the FTT held that requested information ('the Carillion report') was *not* held by the contractor ('Mercia') on the authority's behalf because:

> *'I am satisfied on the balance of probabilities… (i) that the Trust does not itself hold the Carillion Report; (ii) that the Agreement did not impose an express obligation on Mercia to disclose the Carillion Report to the Trust; (iii) that the relationship between the Trust and Mercia is not one of agency or partnership so as to impute knowledge from Mercia to the Trust; and (iv) that the Trust had no power within the terms of the Agreement to compel Mercia to provide it with a copy of the Carillion Report. For these reasons, I conclude that Mercia did not hold the Carillion Report on behalf of the Trust'*[47]

In neither case did the FTT consider that the test was whether the contract stated that it was held on the authority's behalf *'for FOI purposes'*. The test was whether the authority had the contractual power to require the provision of the information for its *own purposes*. The code should make clear that that is the position.

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[46] EA/2011/0246, *Conscape Ltd & Information Commissioner & Department for Regional Development (Northern Ireland)*, paragraphs 15-16
[47] EA/2016/0125, *Ryan & Information Commissioner & Wye Valley NHS Trust*, 7 April 2017, paragraph 51

10. COMMUNICATING WITH A REQUESTER

Paragraph 10.2 describes the information which an authority's initial response to a requester should provide. We repeat our earlier point, that the initial response should be an acknowledgement that the request has been received.

The second bullet point states that the authority's response should either confirm whether the requested information is held or provide '*a statement neither confirming nor denying whether information is held'.* This should be amended to read: *'or, where the Act specifically permits, a statement neither confirming nor denying whether information is held'.*

The third bullet point says authorities should provide details of their internal review process. They should also, at this stage, draw the requester's attention to the right to subsequently complain to the Information Commissioner. This is required under section 17(7) of the Act.

Paragraph 10.3 describes the information that should be provided when communicating the results of an internal review. This should include the identity and position of the person carrying out the internal review.

11. DATASETS

Open Government Licence

We have no specific comment on datasets. However, we think the code's encouragement for the use of the Open Government Licence should not be restricted to datasets. It should state that *any information* disclosed under the Act should, wherever possible, be disclosed under that licence.

Some FOI disclosures are still made subject to the condition that the information is only for the applicant's personal use and that any other use or any use which might involve commercial or financial gain can only take place with the authority's express permission. Recent examples include:

- The number of recounts of votes cast in the June 2017 General Election in the Hastings and Rye constituency.[48]

- The number of sightings of pumas, panthers and wild cats reported to Northumbria Police during 2014, 2015 and 2016.[49]

- The number of FOI complaints upheld by the Information Commissioner's Office against West Sussex County Council in the first 7 months of 2017 and the action taken by the council as a result.[50]

- The results of a 2017 consultation exercise over a North Norfolk District Council proposal to create a Public Spaces Protection Order to control dogs. The requested information included the number of people supporting or opposing the proposed restriction in each area and the number complaining that the online consultation forms did not work.[51]

The code should encourage authorities to routinely make FOI disclosures subject to the Open Government Licence, permitting the information to be reused without further reference to the authority, subject only the modest conditions which attach to that licence.

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[48] https://www.whatdotheyknow.com/request/count_and_recount_8th_june_2017
[49] https://www.whatdotheyknow.com/request/big_cat_sightings
[50] https://www.whatdotheyknow.com/request/ico_decision_fs50690732_dated_19
[51] https://www.whatdotheyknow.com/request/pspo_consultation_results_dog_re#incoming-960342