



Cabinet Office

Freedom of Information Code of Practice

Consultation on revisions to the FOI Code of
Practice

15 November 2017

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Alternative format versions of this report are available on request from [foicodofpracticeconsultation@cabinetoffice.gov.uk].

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Foreword by the Minister for the Constitution

Freedom of Information is one of the pillars upon which open government operates and the Government is committed to supporting the effective operation of the Freedom of Information Act. That is why, in response to the Independent Commission on Freedom of Information's Report, the Government agreed with the Commission's recommendation to review and update the Code of Practice in the light of experience gained over more than ten years of the operation of Freedom of Information in the UK.

It is right to look again at the guidance the Code should provide. The last Code of Practice was published in 2004 and the Freedom of Information Act has now been in force for over a decade. Freedom of Information has transformed the landscape of transparency and the Government is committed to ensuring both the public and public authorities have confidence in the functioning of the Act and the access to information it affords. 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. The best practice guidance in this draft Code will set a standard for all public authorities when considering how to respond to Freedom of Information requests and provide certainty for FOI practitioners and requesters alike.

The draft Code also makes clear the Government's continued commitment to proactive transparency and goes further than the previous Code in this area. The public should not have to resort to making FOI requests for information that should be made consistently and routinely available. The draft Code makes clear public authorities' obligations to provide enhanced transparency data about senior pay and benefits and FOI performance as part of their existing commitments to maintain a publication scheme.

Overall, this revised Code seeks to provide public authorities with clear guidance for how to operate their responsibilities under the Freedom of Information Act with confidence, setting a standard to maintain the principles of open government as the information access landscape continues to develop.

Chris Skidmore

General Information

Purpose and duration of this consultation

The Government is seeking views on the revised Code of Practice proposed for issue under section 45 of the Freedom of Information Act.

The consultation will begin on 15 November 2017. The consultation will run for 12 weeks and will close on 2 February 2017. All responses should be received by no later than 2 February 2017.

Geographical scope

This consultation applies to all parts of the UK.

Audience

Comments and views are sought from all public authorities subject to the Freedom of Information Act as the recipients of the best practice guidance set out in any Code of Practice issued under section 45 of the Act. Comments and views are also sought from individuals or groups with an interest in the operation of the FOI Act.

How to respond

Consultation questions are posed throughout the document and summarised at the end of the paper. You can respond by email or by post. When responding please make it clear which questions you are responding to.

To respond by email please contact: foicodeofpracticeconsultation@cabinetoffice.gov.uk

To respond by post please contact: FOI Policy Team
Room 401
Cabinet Office
70 Whitehall
London
SW1A 2AS

When responding, it would be helpful if you can confirm whether you are replying as an individual or submitting an official response on behalf of an organisation and include:

- Your name
- Your position (if applicable)
- The name and address of your organisation (if applicable)
- An address, and
- An email address (if you have one)

Confidentiality and data protection

The Cabinet Office intends to publish the responses received to this consultation. We will not publish the names or contact details of respondents, but will include the names of organisations responding. If you want the information that you provide to be treated as confidential it would be helpful if you could explain to us why you regard the information you have provided as confidential. Any information not published, including personal information, may still be subject to disclosure in accordance with the Freedom of Information Act. If we receive a request for disclosure of such unpublished information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. We will not take a standard confidentiality statement included in an email message as a specific request for non-disclosure.

The Department will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Quality Assurance

All data received will be processed fairly and accurately and will be correctly stored and managed.

Enquiries

If you have any questions about the consultation or how to respond please contact:

Publication of responses to this consultation

We will publish consultation responses alongside the final version of the Code of Practice.

Introduction

Following the report of the Independent Commission on FOI, published on 1 March 2016, the Government announced it would review and update the current Code of Practice issued under section 45. The Code of Practice provides best practice guidance to public authorities on how to fulfil their functions under Part I of the FOI Act. It has not been revised since it was issued in late 2004, before the rights of access introduced by the Act took effect, and so does not reflect subsequent developments in good practice.

Section 45 requires that any Code of Practice includes best practice guidance for public authorities on the following areas: advice and assistance; transferring requests; consultations with interested parties; contractual provisions about FOI; complaints handling; and the disclosure of datasets. These have all been reflected in the revised Code of Practice. The draft Code of Practice also provides new, updated or expanded guidance on other issues, including:-

- transparency about public authorities' FOI performance and senior pay and benefits, to mandate FOI Commission recommendations for greater openness in both areas.
- the handling of vexatious and repeated requests. The FOI Commission specifically recommended the inclusion of guidance on vexatious requests.
- fundamental principles of FOI not currently included in the Code, e.g. general principles about how to define "information" and that which is "held" for the purposes of the Act.

The Government would welcome views and contributions from stakeholders about this revised Code, particularly the areas and questions set out in this consultation document. The full list of questions is summarised on page 4 of this document and details of how to respond to the consultation are set out at page 7 of this document.

Following the conclusion of this consultation, the Government will consult the Information Commissioner before issuing any revised Code of Practice, as required by section 45 of the Freedom of Information Act.

Summary of Questions

1. Is the guidance in chapter 1 of the Code clear and helpful for public authorities to understand the right of access to information in the FOI Act and how to manage requests on this basis?

Are there any other areas where it would be helpful for this guidance to be more detailed or where it could be clearer?

2. Does the guidance about publication of FOI compliance statistics provide enough detail for public authorities to start publishing their own compliance statistics? If further guidance on this would be helpful what should this cover?
3. Is the guidance about the publication of information about senior pay and benefits clear and helpful? Are there any areas of this guidance where further detail would be useful?
4. Does the proposed guidance on vexatious and repeated requests provide the right level of detail about the circumstances in which public authorities might want to consider using section 14? If further guidance on this would be useful what should this cover?
5. Is it helpful to merge the datasets Code of Practice with the main section 45 Code so that statutory guidance under section 45 can be found in one place?
6. If you agree the datasets Code should be merged is it helpful to split the datasets guide into a section on release of datasets and a section on guidance on re-use of datasets?
7. Are there any other areas in Part I of the Act where it would be helpful to have additional guidance in the Code? If so, what do you think the additional guidance should cover and why?

Right of Access

The previous version of the section 45 Code of Practice was issued in 2004 and before the FOI Act came into force. After more than a decade there have been a number of developments in good practice that have evolved while the Act has been in operation. On this basis the government considers that it would be helpful to include some guidance in Chapter 1 of the Code about the fundamental principles that underpin the right of access to information in the FOI Act. This chapter includes guidance on:

- what constitutes 'information' for the purposes of the FOI Act
- how to define 'information held' for the purposes of the Act
- what constitutes a valid request for information

It is important that public authorities have a clear understanding of their obligations under the Act in order to ensure that FOI requests are dealt with promptly and effectively. The aim of this chapter therefore is to provide public authorities with clear guidance on how to understand the key principles that underpin the operation of the FOI Act as well as to provide some procedural guidance based on these principles.

Is the guidance in chapter 1 of the Code clear and helpful for public authorities to understand the right of access to information in the FOI Act and how to manage requests on this basis?

Are there any other areas where it would be helpful for this guidance to be more detailed or where it could be cleared?

Transparency publications

The government has welcomed the Independent Commission on Freedom of Information's recommendations to enhance transparency. This government remains fully committed to transparency and is pleased that the Commission made a series of recommendations to increase accountability across the public sector.

The government agreed to implement the Commission's recommendation that public authorities with over 100 full time equivalent employees should publish statistics on the operation of the FOI Act. Central government departments already publish these statistics on a quarterly and annual basis, but it is important that other public authorities achieve a similar level of transparency. The publication of this data will provide greater accountability to both the public and the Information Commissioner.

The government also agreed the Commission's recommendation to take further steps to increase transparency on senior executives pay and benefits. Although many public authorities already publish this information it is important there is a consistent standard across all public authorities where appropriate. The default position should be that all relevant public authorities publish information on senior executive pay and benefits and that this information is easily accessible to members of the public.

The government has drafted guidance setting out a recommended minimum standard of transparency that all public authorities should aim to achieve as part of the revised Code of Practice. The government proposes to include this guidance in chapter 8 in the revised Code of Practice.

Does the guidance about publication of FOI compliance statistics provide enough detail for public authorities to start publishing their own compliance statistics? If further guidance on this would be helpful what should this cover?

Is the guidance about the publication of information about senior pay and benefits clear and helpful? Are there any areas of this guidance where further detail would be useful?

Guidance for vexatious requests

The government welcomed the Independent Commission on Freedom of Information's recognition of the difficulty that genuinely 'vexatious' requests can place on a public authority. The Government agreed to implement the Commission's recommendation of improved guidance, via a revised code of practice, to encourage public authorities to use section 14(1) in those cases where it is necessary and appropriate.

The government has drafted guidance on the appropriate handling of vexatious requests as part of the revised Code of Practice. It is important that public authorities have the confidence to refuse a request under section 14(1) where it is appropriate to do so and the guidance seeks to provide clarity as to the circumstances in which section 14(1) should be applied. It is similarly important that those who make requests have confidence in the decisions made by public authorities regarding requests for information, particularly regarding a decision to treat a request as 'vexatious'.

The government proposes to include chapter 7 in the revised Code of Practice which sets out best practice guidance for when a public authority can consider using section 14 and to provide an explanation of the relationship between section 14(1) and section 12.

Does the proposed guidance on vexatious and repeated requests provide the right level of detail about the circumstances in which public authorities might want to consider using section 14? If further guidance on this would be useful what should this cover?

Data sets

A second Code of Practice was issued under section 45 of the FOI Act in July 2013 to provide guidance on the provisions relating to the release and re-use of datasets introduced through the Protection of Freedoms Act 2012.

Since this guidance was issued, the Re-use of Public Sector Information (PSI) Regulations 2015 have taken effect. Access to datasets continues to be governed by the FOI Act, but the re-use of datasets within the scope of the PSI Regulations is now provided for by those regulations rather than the Act. The FOI Act now only governs the re-use of the relatively small number of datasets not covered by the PSI Regulations, for example those held by educational establishments. The datasets Code of Practice is therefore out of date and needs to be updated.

The government considers it would be helpful to merge the two section 45 codes into a single Code of Practice. A single set of guidance will provide more streamlined and readily accessible advice to public authorities on meeting all their obligations under the FOI Act, including in one place the guidance on when the FOI Act does apply to datasets and when it does not, because they are covered by the PSI Regulations. It is suggested that the datasets guidance is split into two sections: a chapter on release of datasets which will form part of the main document; an annex providing guidance on the re-use of datasets under the FOI Act given its limited application following the introduction of the PSI Regulations.

The National Archives as policy lead and the Information Commissioner as regulator will continue to provide comprehensive guidance about the PSI Regulations.

Is it helpful to merge the datasets Code of Practice with the main section 45 Code so that statutory guidance under section 45 can be found in one place?

If you agree the Codes should be merged is it helpful to split the datasets guide into a section on release of datasets and a section on guidance on re-use of datasets?

Other areas within Part I of FOIA

As set out in the Introduction, the Code of Practice is required by law to contain guidance on advice and assistance, transferring requests, consultations with interested parties, contractual provisions about FOI, complaints handling, and the disclosure of datasets. The current Codes of Practice issued under section 45 only provide guidance on these issues. However, it is open to the Government to include guidance on other issues relating to the discharge of public authorities' functions under Part I of the FOI Act.

In the light of the Independent Commission of Freedom of Information's recommendation that the Code of Practice is reviewed and updated, the Government has expanded the Code to provide more comprehensive and up to date guidance about the operation of the FOI Act. This guidance is designed to assist both public authorities and requesters in understanding current best practice and addressing a number of areas where confusion can arise. This consultation document has highlighted some of the areas where further guidance has been provided and where the views of stakeholders would be particularly welcome. However, we would also welcome views about whether there are other issues regarding functions under Part I of the Act, not covered in the current draft Code, where additional guidance would also be useful to ensure the Government has considered all the areas where guidance would be most helpful.

Are there any other areas in Part I of the Act where it would be helpful to have additional guidance in the Code? If so, what do you think the additional guidance should cover and why?

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