

235/01

3 May 2001

To Chief Executives (local authorities)

Clerks to Police, Joint Fire and Passenger Transport Authorities

Please circulate to: Chief Officers; Head of Legal Services, Information Manager

Freedom of Information Act 2000

Alerts member authorities to the Secretary of State's draft Code of Practice on discharge of functions under the Freedom of Information Act, and to **seeks your comments by Friday 8 June**.

Contact: Alison Sutherland (020 7664 3246) alison.sutherland@lga.gov.uk

Dear Colleague

LGA circular 149/01 dated 15 March 2001, alerted authorities to the provisional timetable for implementation of the Freedom of Information Act 2000 (FOIA).

The Home Secretary is required under FOIA to issue a Code of Practice giving guidance to all public authorities on good practice which he considers they should follow in discharging their duties under the Act. Matters on which the Code of Practice must include advice on are:

- the provision of advice and assistance to people requesting information;
- the transfer of requests to another public authority;
- consultation with people whose interests are likely to be affected by the disclosure of information;
- contract clauses relating to disclosure of information;
- complaints procedures.

A draft Code of Practice has been available on the Home Office website for some months. This has now been revised, and the Home Office has invited comments on the revised draft before the Code is laid before Parliament for approval. A copy of the Code is **attached** and it can also be obtained from the Home Office website at <http://www.homeoffice.gov.uk/foi/dftcp00.htm>

Your attention is drawn in particular to issues not covered in the earlier draft Code:

- timeliness in dealing with applications that involve the authority considering whether the public interest in withholding information requested outweighs the public interest in disclosure - and the suggestion that wherever possible such decisions on the public interest should be made within 20 days;
- the statement in the Code about accepting information in confidence;
- guidance on discharging the duty to advise and assist persons requesting information.

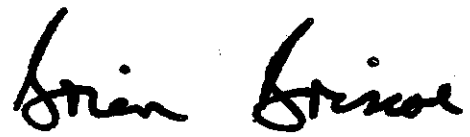
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If you have comments on the draft please send them to the LGA (for the attention of Alison Sutherland) **by the 8th June 2001**.

Yours sincerely

A handwritten signature in black ink, appearing to read "Brian Grice". The signature is written in a cursive style with a large initial 'B' and 'G'.

FOREWORD TO THE CODE OF PRACTICE

I INTRODUCTION

1. The Code of Practice, to which this is a foreword, fulfils the duty on the Secretary of State set out in section 45 of the Freedom of Information Act 2000, to provide guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of their functions under Part I of the Act. This foreword does not form part of the Code itself.

2. It is the Government's intention that the Freedom of Information Act will further the Government's stated aim of greater openness in the public service. Conformity with the Code will assist this.

3. The Code is a supplement to the provisions in the Act. It is not a substitute for legislation. Public authorities should seek legal advice as considered necessary on general issues relating to the implementation of the Act, or its application to individual cases.

4. Under the provisions of section 47 of the Act, the Information Commissioner has a duty to promote the observance of this Code by public authorities. If it appears to the Commissioner that the practice of a public authority in the exercise of its functions under Part I of the Act does not conform with that proposed in the Code of Practice, he may give to the authority a recommendation (known as a "practice recommendation") specifying the steps which should, in his opinion, be taken to promote such conformity.

5. A practice recommendation must be given in writing and must refer to the particular provisions of the Code of Practice with which, in the Commissioner's opinion, the public authority's practice does not conform. A practice recommendation is simply a recommendation and cannot be directly enforced by the Information Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the Act. Further, a failure to take account of a practice recommendation may lead to an adverse comment in a report to Parliament by the Commissioner.

6. If the Commissioner reasonably requires any information for the purpose of determining whether the practice of a public authority conforms with that proposed in this Code, under section 51 of the Act he may serve on the authority a notice (known as an "information notice") requiring it to furnish him with such information relating to conformity with the Code of Practice as is specified.

7. Under the provisions of section 54 of the Act, if a public authority fails to comply with an information notice, the Commissioner may certify in writing

to the court that the public authority has failed to comply with that notice. The court may then inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of, the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court.

8. Section 16 of the Act places a duty on public authorities to provide advice and assistance to applicants. A public authority is deemed to have complied with this duty in any particular case if it has conformed with the Code in relation to the provision of advice and assistance in that case. The duty to assist and advise is enforceable by the Information Commissioner. If a public authority fails in its statutory duty, the Commissioner may issue a decision notice under section 50, or an enforcement notice under section 52.

II MAIN FEATURES OF THE ACT

9. The main features of the Freedom of Information Act 2000 are:

- i. a general right of access to information held by public authorities, subject to certain conditions and exemptions;
- ii. in cases where information is exempted from disclosure, except where an absolute exemption applies, a duty on public authorities to:
 - a. inform the applicant whether they hold the information, and
 - b. communicate the information to him,unless the public interest in maintaining the exemption in question outweighs the public interest in disclosure;
- iii. a duty on every public authority to adopt and maintain a scheme, approved by the Commissioner, which relates to the publication of information by the authority, and to publish information in accordance with the scheme. An authority may adopt a model scheme approved by the Commissioner, which may have been prepared by the Commissioner or by other persons;
- iv. a new office of Information Commissioner with wide powers to enforce the rights created by the Act and to promote good practice, and a new Information Tribunal;
- v. a duty on the Secretary of State and the Lord Chancellor to promulgate Codes of Practice for guidance on specific issues.

III TRAINING

10. All communications in writing to a public authority potentially fall within the scope of the Act, if they seek information, and must be dealt with in accordance with the provisions of the Act. It is therefore essential that everyone working in a public authority, who deals with correspondence, or who otherwise may be required to provide information, is familiar with the provisions of the Act, of the Codes of Practice issued under its provisions, and any relevant guidance on good practice issued by the Commissioner. Authorities should ensure that proper training is provided in this regard .

DRAFT

CODE OF PRACTICE

ON THE DISCHARGE OF THE FUNCTIONS OF PUBLIC AUTHORITIES UNDER PART I OF THE FREEDOM OF INFORMATION ACT 2000

The Secretary of State, after consulting the Information Commissioner, issues the following Code of Practice pursuant to section 45 of the Act.

Laid before Parliament on [] pursuant to section 45 (5) of the Freedom of Information Act 2000.

I INTRODUCTION

1. This code of practice provides guidance to public authorities as to the practice which it would, in the opinion of the Secretary of State, be desirable for them to follow in connection with the discharge of their functions under Part I (Access to Information held by public authorities) of the Freedom of Information Act ("the Act").

2. The aims of the Code are to:

- facilitate the disclosure of information under the Act by setting out good administrative practice that it is desirable for public authorities to follow when handling requests for information, including, where appropriate, the transfer of a request to a different authority;
- protect the interests of applicants by setting out standards for the provision of advice which it would be good practice to make available to them and to encourage the development of effective means of complaining about decisions taken under the Act;
- ensure that the interests of third parties who may be affected by any decision to disclose information are considered by the authority by setting standards for consultation; and
- ensure that authorities consider the implications for Freedom of Information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally.

3. Although there is a statutory duty on the Secretary of State to issue the Code, the provisions of the Code themselves do not have statutory force. The statutory requirements for dealing with requests for information are

contained in the Act and regulations made under it and public authorities must comply with these statutory provisions at all times. However, section 47 of the Act places a duty on the Information Commissioner to promote the following of good practice by public authorities ("good practice" includes compliance with the provisions of the Code), and section 48 of the Act enables the Information Commissioner to issue a "practice recommendation" to a public authority if it appears to him that the practice of the authority does not conform with that proposed in the Code. Further, section 16 of the Act places a duty on public authorities to provide advice and assistance to applicants and potential applicants. Authorities will have complied with this duty in any particular case if they have conformed with the Code in relation to the provision of advice or assistance in that case.

4. Words and expressions used in this Code have the same meaning as the same words and expressions used in the Act.

II THE PROVISION OF ADVICE TO PERSONS MAKING REQUESTS FOR INFORMATION

5. Every public authority should provide advice and assistance (as set out below) to those who propose to make, or who have made, requests for information to it, in order to facilitate their use of the Act.

6. Public authorities should publish their procedures for dealing with requests for information, which should include an address (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. These procedures should be referred to in the authority's publication scheme.

7. A request for information must be made in writing (which includes a request transmitted by electronic means which is received in legible form and is capable of being used for subsequent reference). Where a person is unable to frame their request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. Appropriate assistance could include:

- advising the person that another person or agency (such as a Citizens Advice Bureau) can assist them with the application, or make the application on their behalf;
- offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

8. Where insufficient information is provided by the applicant to enable the authority to identify and locate the information sought or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him to describe more clearly the information requested. The aim of such assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Appropriate assistance could include:

- the provision of an outline of the different kinds of information which might meet the terms of the request;
- the provision of detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
- the provision of a general response to the request setting out options for further information which could be provided on request;
- where a request would be refused on cost grounds an indication of what information could be provided within the cost ceiling.

9. If, following the provision of such assistance, the applicant has failed to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification, though it must disclose any information relating to the application, which has been successfully identified and found, and which is disclosable under the provisions of the Act, and should explain to the applicant why it cannot take the request any further.

10. An authority cannot seek information from an applicant which he cannot reasonably be expected to possess, such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

11. An authority is not expected to provide assistance to applicants whose requests are vexatious within the meaning of section 14 of the Act.

III TIMELINESS IN DEALING WITH REQUESTS FOR INFORMATION WHERE THE PUBLIC INTEREST MUST BE CONSIDERED

12. Where a public authority needs to consider where the public interest lies in respect of an application for exempt information, although there is no statutory time limit on the length of time the authority may take to reach its decision, it must, under section 17(2), give an estimate of the date by which it expects to reach such a decision. Authorities are expected to give estimates which are reasonable in the circumstances of the particular case, and they are expected to comply with their estimates in the majority of cases.

13. Public authorities should aim to make all decisions within 20 working days, wherever possible.

IV TRANSFERRING REQUESTS FOR INFORMATION

14. Where a public authority receives a request for information which it does not hold, within the meaning of section 3(2) of the Act, but which it believes is held by another public authority, it should consider whether it should consult that authority with a view to ascertaining whether it does hold the information and, if so, whether it should transfer the request to it. If the request is for information some of which is held by the authority and some of which is not, the provisions in respect of transfer of requests in the code only apply to that part of the request which relates to information which the authority does not hold.

15. The process of consulting another authority does not relieve the first authority of its obligations under the Act to advise the applicant that it does not hold the information (or part of it). It should consider whether it is appropriate at that stage to inform the applicant that the information is held by the other authority and, if it does so inform him, to ask him whether he wants the request transferred.

16. Before transferring a request for information to another authority, the authority should consider:

- whether a transfer is possible;
- if it is, it should consider whether the applicant would have any grounds to object to the transfer;
- if the authority reasonably concludes that the applicant would not object, it may transfer without going back to the applicant, but should tell him it has done so (as well as complying with its obligations under the Act);
- in any case where there are reasonable grounds to believe an applicant will object, the authority should only transfer with his consent.

17. The authority receiving the initial request must always disclose such information relating to the request as it holds, before transferring a request to another authority. A request or part of a request transferred to another public authority, with the agreement of that authority, would be a request within the meaning of the Act to that authority. Consequently the receiving authority must comply with its obligations under Part I of the Act in the same way as it would for a request which is received direct from an applicant.

18. All transfers of requests should take place promptly.

19. Where a public authority is unable to facilitate the transfer of a request for information to another authority or considers it inappropriate to do so, it should consider what advice, if any, it can provide to the applicant to enable him to pursue his request.

20. When a request for information has been transferred to another authority, with the agreement of the receiving authority, the first authority has no further responsibility for handling the request.

V CONSULTATION WITH THIRD PARTIES

21. In some cases the disclosure of information pursuant to a request may affect the legal rights of a third party such as the right to have certain information treated in confidence or rights under Article 8 of the European Convention on Human Rights. Where the consent of the third party would enable a disclosure to be made an authority should consult that party prior to reaching a decision, unless it is clear to the authority that the consent would not be forthcoming.

22. Where the interests of the third party which may be affected by a disclosure do not give rise to legal rights, the public authority should consider whether it should consult the third party.

Consultation will be unnecessary where

- the public authority does not intend to disclose the information relying on some other legitimate ground;
- the views of the third party can have no effect on the decision of the authority, for example, where there is other legislation preventing or requiring the disclosure of this information; or

A public authority may consider that consultation is not appropriate where the cost of consulting with third parties would be disproportionate.

23. Consultation should take place where:

- the views of the third party may assist the authority to determine whether information is exempt from disclosure under the Act; or
- the views of the third party may assist the authority to determine where the public interest lies under section 2 of the Act.

24. Where the interests (but not the legal rights) of a number of third parties may be affected by a disclosure and those parties have a representative organisation which can express views on behalf of those

parties, the authority may, if it considers consultation appropriate, consider that it would be sufficient to consult that representative organisation. If there is no representative organisation, the authority may consider that it would be sufficient to consult a representative sample of the third parties in question.

25. The fact that the third party has not responded to consultation does not relieve the authority of its duty to disclose information under the Act, or its duty to reply within the time specified in the Act.

VI FREEDOM OF INFORMATION AND PUBLIC SECTOR CONTRACTS

26. When entering into contracts public authorities should refuse to include contractual terms which purport to restrict the disclosure of information held by the authority and relating to the contract beyond the restrictions permitted by the Act. Public authorities should not agree to hold information 'in confidence' which is not in fact confidential in nature.

27. When entering into contracts with non-public authority contractors, public authorities may be under pressure to accept confidentiality clauses so that information relating to the terms of the contract, its value and performance will be exempt from disclosure. Public authorities should not accept such clauses where this is commercially viable.

28. Any acceptance of such confidentiality provisions must be for good reasons and capable of being justified to the Commissioner.

29. Except where paragraph 30 below applies, it is for the public authority to disclose information pursuant to the Act, and not the contractor. However, the public authority may need to protect from disclosure by the contractor information which would be exempt from disclosure under the Act, by appropriate contractual terms. Apart from such cases, public authorities should not impose terms of secrecy on contractors.

VII ACCEPTING INFORMATION IN CONFIDENCE FROM THIRD PARTIES

30. A public authority should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority's functions. In addition, public authorities should not agree to hold information received from third parties "in confidence" which is not confidential in nature. And again, acceptance of any confidentiality provisions must be for good reasons, capable of being justified to the Commissioner.

VIII COMPLAINTS PROCEDURE

31. All public authorities should have in place a procedure for dealing with complaints from people who consider that their request has not been properly

handled, or who are otherwise dissatisfied with the outcome of the consideration of their request, and the issue cannot be resolved in discussion with the official dealing with the request.

32. When communicating any decision made in relation to a request under the Act, public authorities should provide details of their complaints procedure, including how to make a complaint.

33. The complaints procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should be possible to reverse or otherwise amend decisions previously taken. Complaints procedures should be clear and should be capable of producing a prompt determination of the complaint.

35. Where practicable, complaints procedures should be handled by a person who was not a party to the original decision.

36. In all cases, the complainant should be informed of the outcome of his complaint.

37. The public authority should publish target times for determining complaints and information as to how successful it is with meeting those targets. Records should be kept of all complaints and of their outcome. Authorities should have procedures in place for monitoring complaints and for reviewing, and, if necessary, amending, policies where such action is indicated by regular reversals of initial decisions.

38. Where the outcome of a complaint is that information should be disclosed which was previously withheld, the information in question should be disclosed as soon as practicable.

39. Where the outcome of a complaint is that the procedures within an authority have not been properly followed by an individual within an authority, the authority should apologise to the applicant and take appropriate steps to reduce the likelihood of errors of this type occurring in future.

40. Where the outcome of a complaint is that an initial decision to withhold information is upheld, or is otherwise in the authority's favour, the applicant should be informed of his right to apply to the Commissioner, and be given details of how to make an application, for a decision whether the request for information has been dealt with in accordance with the requirements of Part I of the Act.