

Codes of Practice — more guidelines than rules?

Paul Gibbons aka FOIMan, consultant and blogger, discusses the significance of Codes of Practice issued under FOIA and the EIRs

Codes of Practice are central to the successful implementation of the Freedom of Information Act 2000 ('FOIA') by public authorities, yet they receive next to no attention in text books and studies of freedom of information in the UK. Perhaps this is due to a misconception that the Codes have no legal status, and are not important from a compliance perspective. There is a view that, like the 'Pirate Code' in *Pirates of the Caribbean: The Curse of the Black Pearl*, the Codes are 'more what you'd call 'guidelines' than actual rules.'

As we will see, this is not an accurate assessment, and the successful FOI practitioner will need to have due regard for the content of the FOIA and Environmental Information Regulations ('EIRs') Codes of Practice.

What Codes exist?

There are now four Codes of Practice covering FOIA and the EIRs. None of these are to be confused with the Codes of Practice that the Commissioner can issue under the Data Protection Act 1998 or the Local Government Transparency Code introduced by Secretary of State Eric Pickles at the Department for Communities & Local Government ('DCLG').

Section 45 FOIA obliges the Secretary of State (at the time the Act was drafted, this was the Home Secretary; later it was the Secretary of State for Constitutional Affairs and then the Secretary of State for Justice) to issue a Code of Practice 'providing 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 the authorities' functions under Part I' FOIA. In other words, it sets out the practical steps authorities should take to comply with FOI requests and publication scheme requirements.

The Protection of Freedoms Act, passed in 2012, amended section 45 FOIA to require another Code of Practice, this time addressing the implementation of the new dataset requirements. This was issued in 2013, and it supplements the original section 45 Code, rather than replaces it. (It is unclear why it needed to be a separate

Code of Practice rather than just forming a part of a revised section 45 Code, but nonetheless that is the case).

Section 46 FOIA requires the Lord Chancellor (which these days is just another title of the Secretary of State at the Ministry of Justice) to issue a Code of Practice providing guidance on the way that records should be managed by public authorities. The foreword to the Code famously notes: 'freedom of information legislation is only as good as the quality of the records and other information to which it provides access.'

Finally, Regulation 16 of the EIRs empowers (though it does not require) the Secretary of State to issue a Code of Practice on compliance with the Regulations. In this case, the Secretary of State is the Secretary of State for the Environment, Food and Rural Affairs – DEFRA, and a Code has been issued.

What is the status of the Codes?

It is true to say that the Codes of Practice are not statutory documents. Whilst they are required or facilitated by law, they do not establish legal requirements on public authorities.

Having said that, one aspect of the section 45 Code does have an elevated status on account of the fact that it is referred to explicitly within its parent Act. At section 16(2) FOIA, it is stated that conformity with the section 45 Code in respect of providing advice and assistance will 'be taken to comply with the duty imposed...in relation to that case.' If a public authority follows the guidance in the Code when providing advice and assistance, it will be found to have complied with the section 16 requirement. It does not automatically follow that departing from the Code will be a breach of section 16, but it is clearly safest to stick to the guidance provided.

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The Information Commissioner's decisions and the Codes of Practice

The legal requirements are, of course, only part of the story. Over time it has become clear that the Commissioner takes compliance with the Codes seriously, and to an extent this is something that is required of him.

In his section 50 decisions, the Commissioner regularly refers to the Codes in establishing whether an authority is complying with the requirements of the Act. It can be argued that the Commissioner has no option but to take the Codes into consideration when reaching decisions. Section 47 FOIA gives him a 'duty...to promote the following of good practice' and explicitly states that this includes compliance with the section 45 and 46 Codes.

In *King v Information Commissioner & the Department for Work and Pensions (EA/2007/0085)*, the First-Tier Information Tribunal took the view that 'the provisions of the section 45 Code [are] something to which the Commissioner will always have regard' (para 66).

In Decision Notice FS50541424, the Commissioner cites the section 45 Code's guidance to public authorities on providing advice and assistance to requesters when refusing requests that exceed the appropriate limit. He criticises the Ministry of Justice for not following this guidance (para 39).

In Decision Notice FS50144199, the Commissioner is forthright in tackling Peterborough City Council's lack of awareness of what the section 45 Code requires when handling complaints (para 50). In cases where a public body has been accused of delaying its internal review of a decision, the Commissioner quotes the Code's expectation that they be conducted in 'reasonable timescales'. The Cabinet Office has often found itself falling short in this regard, most recently in FS50493496 (paras 176-180).

It is fair to say that it is primarily the (original) section 45 Code that receives this degree of attention in ICO decisions. However, the section 46 Code also makes occasional appearances. In some cases, it is used by the Commissioner to demonstrate that an authority has acted properly.

In FS50476906, Nottinghamshire County Council had cited section 12 (the appropriate limit) in refusing part of a request, and the Commissioner used the council's compliance with the section 46 Code to support his decision in favour of the local authority (paras 20-22). Ensuring that information systems conform to the records management Code will often benefit public bodies, especially if they do happen to come to the regulator's attention.

The Commissioner and Practice Recommendations

The Information Commissioner has an explicit power under section 48 of the Act to issue a Practice Recommendation if he believes that an organisation is failing to comply with one of the Codes. The Recommendation must state how the authority concerned has departed from the practice set out in the relevant Code, and what it must do to put that right.

In 2008, the Department of Health received two Practice Recommendations from the Commissioner in relation to its failure to follow the section 45 and section 46 Codes respectively. The Department was criticised for failing to provide effective advice and assistance to requesters, for taking too long to answer requests, and for poor records management.

The primary impact of Practice Recommendations is reputational — the Commissioner publishes them on the ICO's website and reports their issue to Parliament. Beyond this though, they have little impact and cannot be further enforced. This may explain why they have fallen from favour in terms of the ICO's use. It is now impossible to find any examples of Practice Recommendations on the ICO website. These days, the Commissioner tends to prefer his informal Undertakings to fulfil the role of Practice Recommen-

dations, such as the one issued last year to Wirral Metropolitan Borough Council. They may not have any statutory basis, but they have the same effect — to draw attention to poor practice, and focus the minds of senior executives within the authority concerned on the importance of improving their management of FOIA requirements.

So why should we follow the Codes?

In the final analysis, it's going to be almost impossible to demonstrate compliance with FOIA without following the Codes. They may be a dry read, but they contain sensible advice which, if followed, is likely to keep public authorities on the right side of the regulator.

The Codes of Practice are an essential part of the FOIA regime — not an optional extra — and public authorities should pay heed to their requirements as closely as they do to the wording of the legislation itself. Not doing so will make an adverse decision from the Information Commissioner much more likely.

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