



Furthermore, the Commissioner considers that during the early stages of the consultation regarding this practice recommendation the Council failed to show the levels of cooperation expected. Regrettably, he notes that this behaviour is consistent with both the handling of the request and that experienced by the Information Tribunal (and noted in their decision). He believes the Council could have been more collaborative during the proceedings and urges its senior staff to demonstrate a firm commitment to FOI both internally and externally.

## The Commissioner's Role

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1. The Commissioner's duty is to promote observance of the Code of Practice under section 45 as a means of encouraging good practice by public authorities in carrying out their obligations under the Act.
2. Section 48 of the Act empowers the Commissioner to issue a practice recommendation, where it appears to him that the practice of a public authority does not conform to the Code. Such a recommendation will identify the provisions of the Code with which, in the Commissioner's opinion, the authority's practice does not conform and will specify the steps which he considers are necessary to promote conformity.

## Brief chronology

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3. On 8 January 2005 the following information was requested from Nottingham City Council under section 1 of the Freedom of Information Act 2000 (the "Act"):
  - "All documents concerning the handing over of the former Margaret Glenn Bott School to Bluecoat. This should include enquiries from members of the public and responses to them and details of who was consulted."
  - "All contracts and other agreements between any public body and Bluecoat."
  - "Any agreements between Bluecoat School and the Council regarding the use of land and buildings on the former Margaret Glenn Bott site."
4. In summary the information requested related to the closure of a school and its handover to another school. The Council responded outside the twenty day limit advising that the information they held was exempt under section 22 and directing Dr Bowbrick to Bluecoats School for the remaining information. The applicant complained to the Commissioner about the Council's response and their handling of his request.
5. On 5 July 2005, the Commissioner issued a Decision Notice in relation to Dr Bowbrick's complaint identifying a breach of section 10 (1) but advising that no further action was required by the Council.

6. On 10 July 2005, the applicant appealed the Commissioner's decision to the Information Tribunal on the basis that he had still not received the information he had originally requested.
7. On 28 September 2006, following several hearings, the Tribunal issued its decision on the case, ordering the release of a number of documents held by the Council and confirming the breach of section 10. During the appeal many documents relating to the request came to light, some being released, others being withheld. However, the Tribunal was very concerned about the unsatisfactory way the disclosures took place and awarded costs against the Council. In their decision they noted the following:

“73. Quite frankly the Tribunal is dismayed at the way the Request has been handled and the conduct of the Council since the commencement of this appeal. The Council appears to have misled Dr Bowbrick and then the IC during his investigation”

“75. ....The Council did not comply with the direction in the [Joinder] notice. Following the disclosures in October 2005 it did not respond to Dr Bowbrick's analysis of the disclosure which clearly indicated that further investigation was necessary, which then necessitated holding the December Hearing. The Council then made further disclosures but not in a timely way so that it could be considered at that hearing, so a further response was required from Dr. Bowbrick after the December Hearing. The Council did not seek to take any further action in relation to this response before the Full Hearing some 6 months later, when it did eventually properly co-operate through the good offices of its Counsel, Mr Jones, after which further disclosures have been made. In the meantime there have been substantial claims for exemption of information, the most recent being after the adjournment of the Full Hearing. In addition there has been duplication of disclosures, giving cause for confusion. It has taken nearly 21 months since Dr Bowbrick's request to undertake anything like a proper investigation and only after various Tribunal orders and prompting.”

8. On 31 October 2006, the Commissioner organised an initial meeting at Nottingham City Council to discuss the issues raised by the handling of Dr Bowbrick's request and the Tribunal decision in relation to the section 45 Code. Unfortunately, the Council failed to advise of their ongoing internal investigation into the handling of the request which they maintained prevented discussion of the case.
9. As a result the Commissioner had to wait until the completion of the investigation before returning to the Council on 15 January 2007 to conduct the fact-finding necessary to compile this practice recommendation.

## Nature of non-conformity

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10. The Commissioner considers that the practice of Nottingham City Council in relation to the exercise of its functions under the Act do not conform with the following provisions of the section 45 Code of Practice:

### **Part II - The provision of advice and assistance to persons making requests for information.**

11. The Commissioner has examined the Council's procedure for dealing with requests for information currently published as part of its publication scheme. Although strictly this meets the requirements of the Code, he considers its content to be rudimentary, and its tone to be discouraging to applicants and contrary to the spirit of section 16 of the Act. In addition, the address for requests is different from that available elsewhere and it does not provide email and telephone contact details (although these are available elsewhere on the Council's website).
12. Following his request, Dr Bowbrick found himself in correspondence with three different members of the Council's staff. This combined with a lack of published procedures for transferring requests caused considerable confusion for the applicant and hindered the effective processing of the request. The Commissioner also wishes to point out that he is currently dealing with a separate FOI complaint which similarly lacked a single point of contact at the Council.
13. The Council's education department quickly advised the Information Governance Team that Dr Bowbrick's original request was "very wide and could run into 6-7 lever arch files". It added "it will probably take more than 2 days to extract information from the files and therefore I think he needs to be more specific about what he wants".
14. The Commissioner believes that this advice correctly suggests the need to both clarify the request and to consider the cost of compliance exemption under section 12. Although the Council claimed to have telephoned the applicant on two separate occasions to clarify the request, the Commissioner was never presented with evidence to this effect due to the fact that no procedure existed for the recording of such calls.
15. During the appeal to the Information Tribunal Dr Bowbrick provided several analyses of the information which he considered had not been supplied by the Council. The Council's response was slow and incomplete. The Commissioner considers that this is inconsistent with the general provision of advice and assistance required by the Code and that in any case where an applicant provides such a list, a public authority should respond in a manner appropriate to its obligations under the Act.

16. Good practice suggests that the authority should also ensure that all information, whether released or not, is checked for references to additional information that may itself relate to the request.

### **Part III - Transferring requests for information**

17. On 25 January 2005 internal correspondence in the Council identified a significant volume of information potentially covered by the request although at this stage they were unsure as to what relevant information was held. Despite this, as part of their refusal notice of 15 February, the Council advised the applicant that Bluecoat School “would probably hold the information you request”.
18. It seems likely that in this particular situation some of the information was held by the Council, some by the school and some by both. In such a case the Code states that a request should not be transferred without confirmation from the second authority that it holds the information. The Commissioner therefore considers that it was inappropriate for the Council to transfer or redirect the request knowing that they themselves held some information but not knowing the specifics of that information.
19. In addition, the refusal notice failed to detail any published procedures for transferring the request and failed to make it clear as to whether the Council would transfer the request or whether Dr Bowbrick was expected to do this.

### **Part VI - Complaints procedure**

20. The Council has advised the Commissioner that at the time of the request their existing complaints procedure was used to handle FOI complaints and that this had later proved ineffective for this purpose. This combined with the fact that several different Council staff responded to Dr Bowbrick’s request, may go some way to explaining why a proper internal review of the original decision was never carried out. As a consequence the applicant wrote to the Commissioner who used his discretion to accept the complaint at that stage.
21. That said it would appear to the Commissioner that due to the unstructured involvement of several individuals, the Council would have struggled to implement a fair and impartial review of both the handling of the request and the decision in this case.

### **Action Recommended**

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22. In order for Nottingham City Council to conform to the above mentioned Code, the Commissioner recommends the following action be taken:

## Advice and assistance

23. The Council should review its published procedure for handling FOI requests and produce a more comprehensive explanation of the process removing any bias to non-disclosure. This procedure, which should include an address, email address and telephone number for the Information Governance Team, should be published both separately on the Council's website and as part of its publication scheme.
24. The Commissioner advises that this procedure is reviewed along with those relating to transferring requests and complaints (see below).
25. In future, when dealing with "wide" requests for information, the Council should seek to clarify the request at the earliest opportunity. Where appropriate, public authorities can invoke the cost limit exemption at section 12 but should not do so until they have exhausted all reasonably practicable steps to enable the applicant to describe the information requested more clearly. Examples of such steps can be found at paragraph 10 of the Code although it should be noted that this list is not exhaustive.
26. The Council should properly record and document all communications relating to the clarification and indeed the handling of any request.

## Transferring requests

27. The Council should develop a clear procedure for transferring requests for information. This should be published on the Council's website and included in its publication scheme. In particular, this procedure should outline the steps the authority will take to assist an applicant whose request concerns information partly held by the Council and partly held by another public authority. At a minimum this will involve consulting with the other authority to confirm that the information is held, considering any objections the applicant may have to transfer and ensuring that the applicant is kept informed of any action taken prior to actual transfer.
28. Whilst recognising that this procedure cannot be too prescriptive and must allow for the unique circumstances of any given case, the Commissioner believes it must build in consideration of the most helpful manner in which to assist the applicant.
29. As an example, in the circumstances of this request, the Commissioner believes the Council should have **considered** the following options to assist the applicant:
  - Identifying what it held, and contacting the school to determine whether they held any information before transferring the relevant parts of the request
  - Consulting fully with the school and coordinating a joint response

## Complaints procedure

30. The Council should produce a definitive FOI complaints procedure ensuring it is clear, fair and impartial. As above, this should be published both separately on the Council's website and as part of its publication scheme. The procedure should enable a full re-evaluation of the case, examine any handling issues and allow for a fresh decision based on all the relevant factors.
31. The procedure should be invoked when the Council receives any written reply from an applicant expressing dissatisfaction with the authority's response to a valid FOI request. The complaint should be handled by someone senior to the person who took the original decision and who was not party to that decision.
32. The Council should ensure that any such complaint is acknowledged and that the complainant is informed of the target date for determining the complaint. Where this date is likely to be exceeded the Council should advise of the reasons for the delay and indicate a new target date.
33. The complainant should always be informed of the outcome of his or her complaint.
34. The Council should set reasonable, defensible target times for determining complaints and should publish performance information on how successful it is in meeting these targets.
35. The Council should keep records of all complaints and their outcomes, ensuring that repeated reversals of initial decisions are monitored and appropriate action taken. These records should be administered in accordance with the authority's retention and disposal policy.

## Failure to comply

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36. A practice recommendation cannot be directly enforced by the Commissioner. However, a failure to comply with a practice recommendation may lead to a failure to comply with the Act which in turn may result in the issuing of an enforcement notice. Further, a failure to take account of a practice recommendation may lead in some circumstances to an adverse comment in a report to Parliament by the Commissioner.

## Other matters

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37. Although it does not form part of this Practice Recommendation, the Commissioner wishes to highlight the following matters:

- 38. In their refusal notice, the Council applied the section 22 exemption (Information intended for future publication) without identifying the actual information held and without indicating the intended date of publication. In addition, this is a qualified exemption requiring consideration of the public interest, and the notice failed to properly specify those public interest factors for and against disclosure which formed the basis of the decision to withhold the information.
- 39. The Commissioner is also concerned that the refusal notice went on to identify a number of reports which the applicant "may find helpful" but failed to enclose these in the response, instead advising Dr Bowbrick to obtain them from the Education Department at the Council. He considers that this advice conflicts with the rest of the notice, confuses the overall response and is contrary to the Council's duties under the Act.
- 40. Although the Commissioner did not raise these matters in his original Decision Notice he wishes to remind the Council of its obligations under section 17 of the Act particularly as he is also aware of another failure to comply with that section in his decision of 24 November 2005 in case FS50068396.
- 41. In closing, the Commissioner recognises and welcomes the fact that the Council have started to address some of the matters raised in this practice recommendation and he looks forward to the anticipated improvements in performance.

Dated the 13 day of February 2007

Signed.....

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