mySociety WhatDoTheyKnow Alaveteli

A response to the consultation on a Revised Freedom of Information Code of Practice

on behalf of mySociety, operators of WhatDoTheyKnow.com and developers of the international Freedom of Information software, Alaveteli.

Key Points

- Freedom of Information requests should be responded to promptly. We welcome the proposed sections in the code of practice on time limits for both internal reviews and public interest tests. We would like to see the code of practice urge quicker responses in other cases too, for example where requests are made for a copy of a Freedom of Information response which is in the news, or which has prompted public debate.
- We want to see a culture of openness and transparency in public bodies; this code of practice should set an appropriate tone. We would rather see proactive publication of material than information having to be requested from public bodies. Every Freedom of Information request should prompt consideration of if the type of information requested can practically be routinely published online.
- The relationship between the code of practice and other sources of official guidance, such as the excellent material produced by the Information Commissioner's Office, needs consideration. Duplication should be avoided. Perhaps the code of practice could formally endorse, or incorporate, some or all of the Information Commissioner's guidance?

About mySociety, WhatDoTheyKnow and Alaveteli

1. WhatDoTheyKnow.com is a public web-based service that has helped people make over 450,000 Freedom of Information (FOI) requests in public since 2008 and lists over 23,000 public authorities. Our own recent research[1] shows that around 22% of requests to central government in the UK, are made and published via the site.

[1] http://research.mysociety.org/sites/foi/bodies/year/2016/

2. WhatDoTheyKnow has over 148,000 registered users, who use the site either to make requests themselves or to follow requests made by others and read the responses provided. Around seven million people a year read material published on the site. Our users include elected representatives, journalists and campaigners as well as many contacting public bodies for the first time.

3. mySociety has made Alaveteli, the software behind WhatDoTheyKnow, openly available for use by others.The mySociety team actively works with groups around the world setting up local services using the software to open up access to governments and other public bodies. Alaveteli has been translated into 20+ languages, and deployed in 25 jurisdictions. We are part of a global community of digital civic practitioners, a group which includes those who use other software and approaches to promote access to public information.

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?

Timeliness of responses

4. The code of practice should stress the importance of a prompt response. Copies of material already released in response to a request should be provided to other requesters, and ideally placed online, without delay. During working hours in a large organisation with a dedicated FOI / communications staff such responses should be provided within a matter of hours. Public bodies should consider prioritising responses to requests which will inform current public debate. For example when news articles are based on Freedom of Information responses others requesting access to the released material should be able to obtain it rapidly.

5. We support bringing the time limits for internal review & public interest test extensions into the code of practice; we understand the limitations of the code of practice and consider bringing these time limits into law to be preferable. The lack of enforceable time limits can mean in practice that valid requests can be stalled effectively indefinitely in these stages. We suggest strengthening the language in paragraph 4.7 by removing the word ‘ideally’. The overriding principle of ensuring a

response is provided promptly should be retained even when a public interest test, or internal review, is being carried out.

6. Extensions of the time limits for the purposes of carrying out a public interest test should be fully justified and explained, the nature of the consideration being undertaken, and the reasons for the delay should be shared with the requestor.

Pseudonymous requests

7. Paragraph 7.10 allows use of a pseudonym to form part of broader considerations about if a request or series of requests is vexatious. This represents a departure from current ICO guidance: 'Dealing with vexatious requests (section 14) v1.2'[2] which currently doesn't contain pseudonyms in its list of indicators of a vexatious request. Paragraph 2.7 also explicitly references the use of a pseudonym as a reason for not responding to a request.

8. While acknowledging that authorities are not legally required to process a pseudonymous request, there may be many valid motivations behind an attempt to use a pseudonym. Ideally, we would like to see the code of practice explicitly reflect the paragraphs 18-19 of the Information Commissioner's guidance: 'Recognising a request made under the Freedom of Information Act (Section 8) v1.3'[3], that, while not required to, public bodies can process pseudonymous requests at their own discretion (with diminished ability for requesters to appeal).

9. We believe that in circumstances where a possible pseudonym is being used as part of a determination of the validity of a request there should be sufficient alternate indicators to allow requests to be evaluated appropriately. Our concern is that where the most prominent association of pseudonyms in the code of practice is with vexatiousness, public bodies will see this as more explicitly negative than the current guidance – which acknowledges the request is invalid but encourages public bodies to exercise discretion in their treatment.

10. We would also like the code to reinforce the Information Commissioner's guidance that 'real name' should be interpreted to include any name by which a person is widely known, including allowing use of maiden names and names of an organisation or company.

[2]https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf
[3]https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf

Application of exemptions

11. The code of practice should make clear that exemptions which may allow public bodies to withhold information don't always have to be applied, often a public body will be free to choose to release material, and it should consider doing so. The wording of paragraph 1.1 of the proposed code of practice needs to be amended to reflect this. There should be a presumption of transparency.

Publication schemes

12. Publication schemes should ideally include links to information which is available online. Currently the potential benefits of publication schemes are not being realised; they are not generally useful documents.

Proactive publication

13. Provisions relating to datasets in the Freedom of Information Act (introduced by the Protection of Freedoms Act 2012) require public bodies to publish whole datasets when requests are made for information contained in them as well to proactively publish updated versions of datasets which have been requested and released. These principles could be extended to other information accessible via Freedom of Information requests. For example if a request is made for the papers of a particular committee meeting that request should prompt a public body to consider proactively publishing the papers for that committee in the future.

14. Asking public bodies to consider proactive, future, publication of the type of information requested should not be onerous for public bodies, it should lead to more information being made available to the public without requests having to be made, reducing staff time spent responding to individual requests.

15. The reasons information is not already being proactively published, or cannot practically be proactively published, by public bodies may be of interest, and value, to the public. Information which cannot easily be prepared for release may also not be easily accessible to those charged with management or oversight of public bodies.

Understanding, and sharing, the nature of problems with information management within public bodies may lead to those problems being addressed.

16. We would like to see a section in the code of practice on disclosure logs. Disclosure logs are webpages where material released under the Freedom of Information Act (and other access to information legislation) is made available to the public. Major public bodies, such as Government departments, principle councils, should run comprehensive disclosure logs which are updated at the same time as information is released to the requestor. Policies for the excluding material, including rejected requests, from disclosure logs should be published.

Requests for requesters' own personal data

17. Sometimes a requestor's own personal data is included in information requested, but, anyone seeking the information under the Freedom of Information Act could expect to receive it as its release would not breach the provisions of the Data Protection Act.

18. An individual whose personal data is included in requested material should not have the Freedom of Information element of their request dealt with in any way differently from a request made by someone whose personal information is not contained in the information requested.

19. For example someone asking a provider of NHS primary care services for details of policy changes made in response to complaints into a certain area of work should receive the same response if they had raised one of the complaints in question themselves, or not. Individuals making Freedom of Information requests for information which may include their own personal information should be offered the opportunity to make a Subject Access Request under the Data Protection Act (or any replacement regime) for any material which can only be released to them. This is a complex area and public bodies need to provide appropriate advice to requestors.

Fees

20. The code of practice, and public bodies, should make clear that Freedom of Information requests almost always involve no charges to the person making them,

and no liability to pay a fee will be incurred without express agreement from a requestor.

21. The code of practice, and public bodies, should make clear that any charges for photocopying, printing and postage can be usually be avoided by conducting request by email.

22. Many public bodies, on Freedom of Information web-pages, or in initial responses to Freedom of Information requests, make what can be quite scary statements about fees and costs which can frighten those considering making requests for information. We advise our users to ignore such statements.

23. The suggestion in paragraph 1.22 that public authorities can charge for the physical cost of making redactions and not staff time or considering whether exemptions apply could usefully be clarified. Is there generally any clear distinction between the two processes in the modern digital world? If the reference is intended to refer to physical techniques such as using a scalpel to physically cut out parts of documents perhaps that could be clarified.

Means of communication

24. By making a request by email a requestor is clearly, if they don't specify otherwise in the body of the message, expressing a preference to receive a response by email.

25. One problem we see from time to time is a public body using an address it holds for other purposes to respond to a Freedom of Information request. That could result in someone making a request by email receiving a response by post, or receiving a response to another email address.

26. Specifically in relation to WhatDoTheyKnow.com if a request is made via the service a response should be sent to the specific @whatdotheyknow.com email address associated with the request which has been provided for the purpose of receiving the response.

27. Public bodies should consider the ease of use of released material. Text, and numerical/financial data should not be supplied as images, but in structured

computer-readable formats. Guidance on this point is present in paragraph 11 of the proposed code of practice in relation to datasets, the same guidance should apply more widely. Open formats should be used rather than formats which require software from particular companies to access. Public bodies should be aware that members of the public requesting information will often not have access to computer software which may be common within the public sector and take that into account when preparing material from release.

28. Public bodies should make it easy for people to make Freedom of Information requests. While a request is valid irrespective of who within an organisation receives it, it is good practice for public bodies to publish the email address to which they prefer Freedom of Information requests to be sent.

Clarification requests

29. The code of practice should make clear bodies requiring clarification of a request should seek such a clarification promptly. This may be another area in which the code could set out an expected timescale. Too often clarifications are requested after many weeks have elapsed since a request was made, delaying the response to a request.

Acknowledging requests for information

30. Freedom of Information requests should be promptly acknowledged, this gives requestors an assurance their request has been received and is being dealt with. Routine provision of acknowledgements may enable communication problems to be identified at an early stage, and allow for requests to be re-sent if required. Sometimes currently the first indication of a communication problem can be the lack of a response within the statutory time limit. Paragraph 10 of the proposed code could be extended to make reference to acknowledgments, and should be amended to distinguish an “initial response” from an acknowledgement.

Information accessible by other means

31. Use of the “information accessible to applicant by other means” exemption in Section 21 of the Freedom of Information Act[4] should be carefully considered. This exemption enables public bodies to essentially exempt any information they can list on their website, put a price on, and make available for sale, from the provisions of the Freedom of Information Act. The code of practice should implore public bodies not to abuse this loophole.

32. It is good practice for public bodies to consider if it is appropriate to levy any charges, as referred to in Section 21(2)(b) of the Freedom of Information Act in particular circumstances, and certainly to properly consider any requests for a waiver of any charges. Essentially a public interest test should be applied in relation to the Section 21 exemption even though one is not required by law. If fees are generally charged per document, a waiver on public interest grounds could enable the analysis of a large number of documents which would otherwise be uneconomical. A public body may not wish to levy a charge generally imposed on professional, or commercial, users of information when a request comes from an individual, or an elected representative. Ideally any charging schemes should foresee such circumstances, and proactively provide for them.

Commitment to greater openness

33. The current code of practice contains a forward stating: “The Government is committed to greater openness in the public sector. The Freedom of Information Act will further this aim by helping to transform the culture of the public sector to one of greater openness, enabling members of the public to better understand the decisions of public authorities, and ensuring that services provided by the public sector are seen to be efficiently and properly delivered.” We would like to see those commitments and aims reaffirmed any revised document.

[4] https://www.legislation.gov.uk/ukpga/2000/36/section/22

Status of the code of practice

34. The code of practice is not currently a document we use, or refer to, on a regular basis while advising our users on the operation of the Freedom of Information regime, or in our discussions with public bodies and the Information Commissioner in relation to the operation of our service.

35. The status of the code of practice, its purpose and its relationship with other sources of guidance should be clearly presented. Consideration should be given to if the code of practice is intended as a public facing document, if so then should public bodies be expected to link to it from their Freedom of Information web pages?

36. We suggest that guidance currently issued by the Information Commissioner, which provides clear and detailed guidance for authorities, be systematically reviewed to consider if elements of it should be given more weight via their inclusion, directly, or indirectly, in the code of practice.

37. We appreciate the Information Commissioner is able to update their guidance more easily than the code of practice can be updated but it would be desirable to coordinate the code of practice with official guidance from other sources. Duplication should be avoided, as should requiring users of guidance in this field to check two, or more, locations to find what they are looking for.

38. While the primary purpose of the code of practice is to provide guidance to public bodies subject to the Freedom of Information Act, it could also be positioned as guidance setting out good practice which other bodies carrying out a public function might like to follow.

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?

Publication of compliance statistics

39. We are in favour of the production of compliance statistics, as referenced in paragraph 8.5, for public bodies with more than 100 FTE employees. The equivalent publication for central government through the Cabinet Office has been a very useful resource in understanding the differential effectiveness of FOI processing at different departments.

40. However, we have concerns with both the suggested questions and the publication process.

41. The suggested five statistics cover much less ground than the Cabinet Office central government releases. For instance, the draft code of practice suggests that the number of internal reviews should be published - but not if internal reviews were successful. Similarly, the draft code of practice suggests the number of requests withheld should be published – but this also needs to include the reasons given for information being withheld to help understand practice across public bodies. In general, we believe that the questions currently used in the Cabinet Office data releases should form the basis for the disclosure template.

42. The format and venue of the publication of this information is also important. One could envisage hundreds of PDFs published on different websites, from which it would be hard to extract data for comparison. With this in mind, we recommend that this data is:
    a) published to a consistent schema in a data format (csv, json) rather than pdf.
    b) lodged in a central repository to enable cross-comparison.
    c) published over consistent time ranges - ideally separate quarterly and annual statistics to mirror the Cabinet Office releases.

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?

43. It should be made clear that the proposed guidance on publication of senior executive pay and benefits should not be interpreted as supporting the automatic refusal of specific Freedom of Information requests for information relating to pay or benefits of other, more junior, staff.

44. Information should be published in a standardised, machine readable, open format to enable analysis and comparisons. Consideration should be given to the establishment of a central repository for published information on this subject. The repository could host, present, and enable basic querying of the data, as well as notify public bodies, and the public, of any failures to comply with the provisions of the code.

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?

45. See section on pseudonymous requests in answer to question 1.

46. We are aware that the vexatiousness exemption has been used in cases where public bodies have considered a disproportionate amount of time would be required to review, and redact, material. The exemption for vexatious requests has been interpreted as allowing a request to be rejected on the grounds of disproportionate disruption/burden caused by spending time reviewing and redacting material, even though time spent redacting material is excluded from what can be taken into account when determining if a request exceeds the cost limits. As this is an unusual, and counter-intuitive, extension of the meaning of the word “vexatious” it needs to be clearly explained using appropriate, carefully chosen, language in correspondence explaining a refusal to a requestor.

47. A reasonable level of chasing up a response to a request, for example asking for an update on progress every week or so should not result in request being considered vexatious. What's reasonable may well depend on the detail of the correspondence in a particular case, and if, for example, a justified expected date of response has been provided.

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?

48. As we have stated elsewhere we consider it desirable to present all official guidance relating to this field in a coherent, easy to find, accessible and understandable manner.

49. Again, as stated elsewhere, there are many areas where the code of practice currently only applies to datasets but could be generalised and applied more broadly; for example on considering proactive publication following a request for information, on providing responses in open, accessible formats and on licensing. We understand there are specific legislative and other considerations which only apply to datasets, however the starting point a could be consistent, generalised, code of practice. We would like to see changes to legislation to provide consistency in this area too, not just in the code of practice.

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?

Applicant blindness

50. The Information Commissioner and Information Tribunal have long upheld the principle of Freedom of Information Act being applicant and motive blind[5]. While the

[5]https://ico.org.uk/media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf

Freedom of Information Act contains a requirement that requesters provide their real name it is expected that authorities will treat the request 'applicant blind' and not pay any attention to the identity of the applicant, other than in particular, uncommon, circumstances relating to determining if a request is vexatious, or if requests should be combined for the purposes of calculating if responding will result in costs exceeding the limit set out in law.

51. In practice, it is generally acknowledged that certain kinds of requester (such as a known journalist) may receive a different service from some authorities than an unknown requester. While trialing our WhatDoTheyKnow Pro service (which can temporarily embargo requests – and so hide them from public view), we received multiple enquiries from FOI officers who were unable to find the usual public page associated with a request sent through WhatDoTheyKnow. The implication of this is that at least some FOI officers are investigating other requests from the same user and were not treating the request as applicant-blind.

52. With this in mind, it is a concern that the code of practice currently does not support the 'applicant blind' approach and set out best-practice in how to implement it in practice. The code should be more explicit in reflecting existing guidance and tribunal decisions in this area. There is clearly a tension between the principle of applicant and motive blindness (mentioned in paragraph 111 of the ICO guidance on recognising a Freedom of Information request[6]) and the suggestion in the proposed code that authorities might want to consider the motivation and request history of a requester in order to assess vexatiousness (paragraph 7.5 of the proposed guidance) or use that as a reason to reject a request (paragraph 2.7) or consider whether requesters are acting together when aggregating requests for the cost limit (paragraph 6.5). We would like to see the code of practice make clear that extensive research into the identity and background of requesters should not be part of the standard practice of officers responding to Freedom of Information requests. The ICO notes in their guidance "we would not want to see a situation where authorities routinely carry out checks on requesters".

[6]https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf

53. We want to see Freedom of Information law used in the public interest by those with good reason not to use their real names such as whistleblowers within public bodies. While we understand the code of practice will have to reflect the law we would like to see the code note the Information Commissioner's guidance on what constitutes a "real name" (again in its document on recognising a Freedom of Information request) and promote the fact a request can be made using a maiden name, any name by which you are "widely known and/or is regularly used", or the name of an organisation / a company. We regularly see public bodies ask for a requestor's name when requests are submitted in the name of organisations.

Contractors and outsourced services

54. Section 9 of the proposed code of practice would be stronger if backed by legislation, for example to require contractors to provide requested information to the public body they are contracted by when a Freedom of Information request for it has been made. Memoranda of understanding and contracts can set out working arrangements but the principles should be laid down in law.

55. If there is an intent to extend the scope of Freedom of Information law to more bodies providing public services this needs to be done via legislation; there is a need to recognise the limitations of what can be achieved via the code of practice. Private bodies providing public services in some sectors, for example those providing certain NHS services, are already subject to Freedom of Information law, this principle could be extended but doing so is beyond the scope of the code of practice.

56. The code of practice should take account of the fact public bodies outsource the provision of services to each other; it is not just private sector contractors which may hold information on behalf of a public body.

57. Guidance should make clear that requests for information held by a contractor on behalf of a public body should be made to the public body. Public bodies should take responsibility for obtaining information from their contractors and should not merely refer requesters to contractors. This principle is present in the proposed code of practice (paragraph 9.8) but it could be clearer and phrased from the point of view of a requester.

58. Public bodies could be encouraged to set out, in their publication schemes, what information is held by contractors on their behalf, and make clear how that information can be obtained.

Reducing occurrences of accidental releases of information

59. The guidance does not cover effective redaction and other techniques that authorities should be using when releasing information in order to avoid mass data breaches.

Reuse and licensing

60. Too often public bodies include frightening boilerplate text within responses to Freedom of Information requests which may deter requesters from using, and acting on, information released. Public bodies should only make such warnings when they are genuinely relevant to the specific information being released.

61. Where it is appropriate to do so, rather than seeking to restrictively licence released information, public bodies should release material into the public domain.

Internal reviews

62. The section of the code of practice on internal reviews should be drafted with consideration of the fact an internal review is sometimes requested into the initial handling of a request (eg. if a request was not responded to at all, or not recognised as a Freedom of Information request), and potentially again once a substantive response under the terms of the Freedom of Information Act has been obtained.

Applicability of Freedom of Information law to backup files

63. We note that paragraph 1.11 states back-up files should generally be regarded as not-held for the purposes of the Freedom of Information Act. We do not believe this is in line with current case-law, or guidance and decisions from the Information Commissioner. We suggest reviewing the basis for this element of the proposed code of practice.

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