

Implementation of the Freedom of Information Act in places of deposit for public records

DRAFT procedures for handling requests for information held in deposited public records – an explanatory note

1. SUMMARY

The implementation of the Freedom of Information (FOI) Act 2000 will have a profound impact on places of deposit for public records. Public records are held by places of deposit on behalf of the Lord Chancellor, who expects The National Archives to ensure that suitable arrangements are made by places of deposit for their compliance with the FOI Act where it relates to these records.

The National Archives (TNA), in partnership with other government bodies and places of deposit for public records, has been developing procedures, forms and guidelines to promote and support this aim. This work is being led by staff in TNA's Archive Inspection Services Unit.

2. CONTEXT

Part of TNA's role is to act on behalf of the Lord Chancellor to help ensure that places of deposit for public records are able to operate in compliance with the FOI Act as regards their arrangements for the receipt of public records and their subsequent storage and access. TNA must also work to ensure that government bodies which transfer public records to places of deposit for permanent preservation are doing so in ways which ensure both their own compliance with the Act, and which support the places of deposit in their compliance efforts.

3. AIMS AND OBJECTIVES

Two deliverables from The National Archives FOI implementation project relate directly to the places of deposit for public records:

- transfer, deposit and presentation procedures and forms relating to Part II of the Lord Chancellor's s.46 Code of Practice
- procedures for use by places of deposit in dealing with FOI requests about their deposited public record holdings

These areas will relate closely to the existing provisions set out in s.66 of the FOI Act and to the two Codes of Practice under ss.45 and 46.

Completion of this work will result in one publication incorporating both deliverables – a TNA guide to government bodies and the places of deposit as regards their responsibilities under the FOI Act with respect to deposited public records. The publication will not be a detailed, step-by-step guide to procedures and practices, as every government body and place of deposit will have widely differing circumstances which dictate that the publication has to allow for a degree of flexibility in its implementation. Consequently the publication will set out the legal position and responsibilities surrounding deposited public records and FOI, will specify certain behaviours which government bodies and places of deposit must have in order to carry out these responsibilities, and will offer guidance on how these behaviours might be achieved.

4. METHOD

These are not deliverables which TNA could “do to” our external colleagues, but has rather to be done with their support, guidance and leadership. A representative working group of individuals from outside TNA was drawn together in January 2004 to assist in drafting and reviewing the deliverable products, both at group meetings and by correspondence.

The group includes representatives of places of deposit from local authorities, museums and galleries, health services and specialist areas, from government bodies (or their agents) which most commonly transfer public records into places of deposit e.g. Court Service and National Health Service agencies. The working group has met three times since February 2004 to develop the draft guidelines. The group has also corresponded extensively on specific issues in the guidance. Drafting has been led by TNA staff, and has been informed by ongoing work in other parts of TNA and by contributions drawn from group members’ own experiences.

The draft papers which the working group is producing will be made available to all places of deposit and relevant government officers for their consideration and comment. The approval of the finished publication by the Department for Constitutional Affairs will be sought later this year. The final guidance publication will then be issued to all places of deposit and government departments and their agents. Implementation activities will include relevant TNA staff attending meetings during the latter part of 2004 to promote and help embed this publication and the guidance it will contain.

5. CLARIFICATIONS

It must be stressed that these draft procedures are based on current understanding of how the FOI Act will affect deposited public records and the places of deposit. The purpose of publishing the guidance at this draft stage is to give places of deposit and government bodies an early indication of the sort of procedures which are likely to need to be followed when dealing with requests for information held in deposited public records. While places of

deposit in particular will immediately be able to incorporate the draft guidelines into their own training and preparatory activities, further review may necessitate changes to the guidance before the implementation of the FOI Act on 1 January 2005.

It must also be made clear that these guidelines do not offer advice on making specific access decisions. TNA's guidance primarily offers advice on the procedures which should be followed when handling access requests, and although aspects of the decision-making process are dealt with this is an area which will be fully addressed by other government departments. Specifically, guidance on the application of exemptions to different types of information will be issued later this year by the information Commissioner and by the Department for Constitutional Affairs.

6. OTHER TNA GUIDANCE

The working group has also been engaged in drafting guidelines which creating authorities – those government bodies and their local agents which create public records – should follow in relation to the transfer of public records to places of deposit. The first draft of these guidelines will be released on this web site at the end of June.

These transfer guidelines will address issues such as the responsibility for creating authorities to make appropriate arrangements to review, package and describe those public records which they intend to transfer to places of deposit. Under the FOI Act, places of deposit must be able to respond to enquiries which they receive in relation to information held in deposited public records. If they are to do this, they must know three things:

- exactly what information has been transferred to them by creating authorities
- which access conditions apply to the information
- who to contact at the creating authorities if help is required

It is the responsibility of the creating authorities to satisfy these three requirements. This part of TNA's guidance will set out the ways in which authorities can do this.

7. FURTHER INFORMATION

All enquiries on progress with this guidance project should be sent to steven.jones@nationalarchives.gov.uk

For comments on the content of the draft procedures for handling enquiries: archive-inspection@nationalarchives.gov.uk

PART 2. ENQUIRIES / ACCESS REQUESTS

2.1 Introduction

This part of the guidance explains what the responsibilities of Places of Deposit are when answering FOI requests for information in deposited public records. It is also relevant to requests for information in public records which fall under the Environmental Information Regulations. It suggests some practical ways of complying with the FOI Act when dealing with enquiries.

Please note that this guidance specifically relates to deposited public records in Places of Deposit. Although many of the issues raised will be similar, this document should not be taken as guidance which covers all records or information subject to FOI.

This part of the guidance roughly follows the process of dealing with an enquiry, from start to finish. It is strongly influenced by the s.45 Code of Practice on dealing with requests for information¹, The National Archives' own experience in preparing for dealing with requests, and the experiences and advice of representatives from different types of Places of Deposit. It covers the following stages of an FOI enquiry:

- 2.2 An overview of the enquiry process
- 2.3 Preparation
- 2.4 Receiving the enquiry
- 2.5 Categorising and logging the enquiry
- 2.6 Requesting clarification or further information
- 2.7 Is the information likely to be held by us?
- 2.8 Is the information already reasonably accessible (s.21) or shortly to be published (s.22)?
- 2.9 Cost exemptions and charging fees
- 2.10 Enquiries for information in public records which are not yet open to the public
- 2.11 Refusing a request
- 2.12 Providing the information
- 2.13 Enquiry closed, access decisions recorded.
- 2.14 Complaints/Appeals

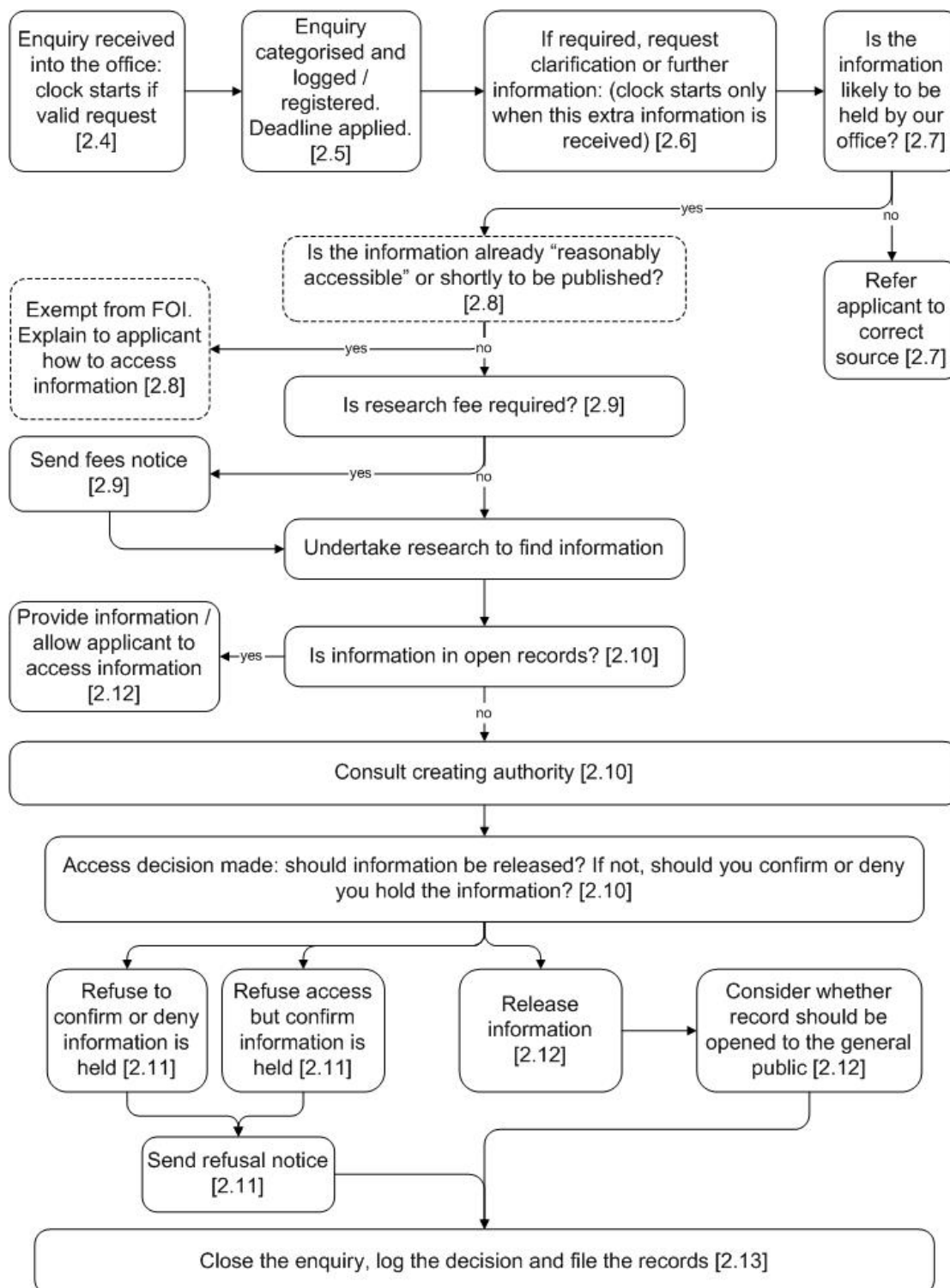
<http://www.dca.gov.uk/foi/codesprac.htm> Bear in mind that the Code of Practice relates to all kinds of records subject to FOI, not just public records. The Code is due to be reviewed, and amended if necessary, before January 2005.

WHAT YOU NEED TO KNOW

- Places of Deposit for public records act on behalf of the Lord Chancellor, who is legally responsible for the application of FOI to public records.
- Any request for information a Place of Deposit holds could be an FOI request – including information in the archives.
- FOI is about access to *information* not necessarily access to complete records.
- If the information is in ‘closed’ public records, there is a requirement to collaborate with the creating authority in making a decision about releasing information.
- The general rule to be followed is to handle a request for information as you would expect it to be handled if it was you that submitted it. All deadlines should be met (FOI – 20 working days, EIR – 20 working days and DP – 40 calendar days). The requestor is to be informed of any issues there might be while handling the request. These procedures are an expansion of that general rule.
- You should keep good records of enquiry handling.

2.2 An overview of the enquiry process

This flowchart gives a very basic overview of the enquiry process from start to finish. The following sections of this guidance, indicated in brackets [], will look at each stage of the process in detail. A dotted line indicates uncertainty pending clarification.



2.3 Preparation

Key points:

- Before FOI requests begin to arrive, you must ensure that procedures are in place to make it as easy as possible for people to make enquiries.

The Freedom of Information Act sets out a duty to provide advice and assistance to enquirers:

s16(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

In preparing for requests to arrive, this means that you must ensure that the whole enquiry process is easy to understand and that members of the public know what their rights are and what the procedure is for making an enquiry. The s45 Code of Practice sets out in detail exactly how your office can meet this requirement. Complying with the Code of Practice means that you are by definition providing advice and assistance. Check how far your office provides advice and assistance to potential enquirers by looking over this checklist taken from the s45 Code.

s.45 Code of Practice		
para.	Do you provide advice and assistance to potential enquirers?	Met?
6	Public authorities should publish their procedures for dealing with requests for information.	
	The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance.	
	A telephone number should also be provided, where possible that of a named individual who can provide assistance.	
	The procedures should be referred to in the authority's publication scheme.	
	These procedures may include what the public authority's usual procedure will be where it does not hold the information requested.	
	It may also alert potential applicants to the fact that the public authority may need ² to consult other public authorities and/or	

² If the request is for information in public records which are not yet open to the public, Places of Deposit are required by the Act to consult the creating authority. To comply with this section of the Code as far as public records are concerned, the Place of Deposit could therefore simply mention this fact alongside all the other information it makes available to potential enquirers.

	third parties in order to reach a decision on whether the requested information can be released, and therefore alert potential applicants that they may wish to be notified before any transfer of request or consultation is made and if so, they should say so in their applications.	
7	Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need to draw these to the attention of potential applicants who appear unaware of them.	

Preparing for FOI

You may wish to start analysing your enquiries now, to help estimate the number of FOI enquiries you are likely to receive from 2005. For example, for a couple of months try categorising the requests as they come in, and marking them down on a chart. How many of them would be FOI enquiries? How many of them ask for information in closed records compared to open records? How many might be covered by the Environmental Information Regulations? This will also help you to practice identifying FOI requests and distinguishing them from DPA or EIR requests. It would also be worthwhile keeping a note of how long enquiries generally take to answer, as this will help you to calculate fees estimates. If your charging regime is challenged, you can show that it is based it on real, quantifiable evidence of how much time enquiries generally take.

Remember that the number of FOI enquiries you receive could increase from 2005 because of the publicity which the Act will receive. You might want to check now whether some questions are asked often enough for it to be worth putting them, and the answers, on your website as FAQs.

At some point you will need to consult with the creating authority about access to information in the public records. You may wish to start drawing up a list of contacts in creating departments who you will contact for this purpose.

ACTION:

- Check that you comply with the duty to provide advice and assistance to potential enquirers.
- Consider whether to do some preparatory work to help estimate the number of FOI enquiries you are likely to receive and the time it will take to answer them.
- Can popular enquiries be answered as FAQs on your website or in your publication scheme?
- Start collating a list of contacts within creating departments in case you need to consult with them.
- Network with colleagues in other Places of Deposit and Archives to discuss problems and solutions.

2.4 Receiving the enquiry

Enquiry received
into the office:
clock starts if
valid request

Key points:

- Freedom of Information requests must be dealt with promptly and no later than 20 working days. The clock starts ticking on the first working day when the enquiry is received into the office.
- The date the enquiry is received should therefore be recorded.

The ticking clock

The deadline for replying to an enquiry depends upon which legislation the access request falls under. This will be explained in the next section of the guidance; the key point here is to ensure that when enquiries arrive (whichever legislation they fall under) that the date that they have been received is recorded. FOI requests must be dealt with within 20 working days, and the clock starts ticking on the first working day that the enquiry is “received” into the organisation.

The clock starts ticking only if the request is a valid FOI request. Further explanation of how to identify a valid FOI request is given in section 2.5 of this guidance. At this stage, you might not know whether the enquiry is an FOI request or not.

What is a “working day”?

The FOI Act defines the “working day” in s.10(6) as being any day other than a Saturday, a Sunday or a public holiday. In other words, the FOI Act says the working day is Monday-Friday. This applies even if your office’s working week is Tuesday-Saturday, or whether your office is only open for a couple of days a week. Whatever your office’s particular situation, you will still have to follow the FOI Act’s definition. So, it follows that if correspondence arrives into the office on a Saturday, it only counts as being “received” on a Monday morning because Saturday isn’t a working day under the Act. Any stocktaking closures, or any other temporary closures to the public are still counted as working days.

The Act does not define what *hours* from Monday-Friday are considered to be working hours; this is something for each individual office to define. At The National Archives we are using 9-5 (the standard working day) as our working hours. Any FOI requests we receive after 5pm on Monday, e.g. by email, would count as being legally “received” at 9am on Tuesday morning. Similarly, Saturday does not count as a working day, and therefore an FOI enquiry which arrives after 5pm on a Friday will count as being legally “received” on the following Monday.

Even if your office is completely closed on Mondays with no staff in the building, if post comes into the office it counts as being “received” on Monday, and the clock starts ticking. Day one of the 20 working days is the day the enquiry is received into the organisation – whether someone is there to open it or not.

If there is no way of telling which day the correspondence was received, then you could assume it all arrived on the earliest possible day, or at least the middle day (in this case, Friday or Monday) just to be on the safe side to ensure that the 20 working days is met as far as possible.

Date stamp the post

Since the clock starts ticking on the first working day when the request is received by the organisation, it is important to obtain evidence of this by ensuring that all post is date stamped (or some other similar way of recording the information) when it comes into the organisation. However, remember that if the date on emails or faxes is a Saturday or Sunday, legally the clock will start ticking on the following Monday. In other words, the date on the email itself is usually the date it was sent rather than the date it was “received” under the FOI Act.

You may wish to consider whether it would be better if all post to your office were received via a centralised point, or whether it should be received by individual staff. At The National Archives, the post is opened by our facilities department who date stamp the correspondence and forward it on to the appropriate department for logging and reply. Would the date stamping be done by a centralised unit in your organisation? If not, will each individual staff member date stamp the post when it is received - or should you appoint one member of staff to be responsible for doing this, either permanently or on a rota system? The actual practicalities of how this is done are not important, as long as it is achieved. The main thing is to get evidence of the working day the enquiry was received by you. Remember that the clock starts from the day it was received into your office, not necessarily the day the correspondence was opened or read.

Covering during absences

You also need to consider what will happen when a colleague is out of the office. What happens if an FOI request lands on their desk and stays there until they get back from holiday? Either post should be dealt with centrally so this situation wouldn't occur, or staff should always look out for post on their absent colleague's desk so that it can be dealt with. Similarly, what if an email

enquiry arrives to an individual's inbox whilst they are away? Do you have procedures to allow staff to check their colleague's email if they are absent?

At The National Archives, staff will be encouraged to authorise a trusted colleague to check on their external emails if they are absent for more than a week (any internal confidential emails will be marked as such in the subject heading and so will not be opened).

You should consider the effect staff absences would have on the FOI process. In a single staffed office, if no-one else can cover for the Archivist, an absence for 3 weeks could be a problem as you will only have one week to deal with the enquiries and to undertake any consultation procedures when you return.

All of this is obviously going to be a serious consideration for offices with part-time Archivists or sole Archivists who have to close the service when they are on leave, or because they only work part time. The key thing to bear in mind is to provide advice and assistance as much as you possibly can. Automatic replies and information on the website will help. Make sure that you publicise the fact that your office is not staffed on certain days, so people are aware of this in advance. Be as helpful as you can, and hopefully problems will be avoided.

It will be important for lone Archivists to reserve time to deal with enquiries when they return from leave. Try to avoid any meetings or other activities for a few days to ensure that you can concentrate on dealing with any enquiries that have come in while you were away. If you have been monitoring your enquiries over a few months, you will be able to make an educated guess of how many enquiries are likely to have arrived during your absence and how long you will need to deal with them on your return. If you are lucky, you may be able to nominate a colleague to deal with simple written enquiries whilst you are away to help ease the burden.

It is particularly important, therefore, for small Places of Deposit to put procedures in place to ensure that the consultation with the creating authority (explained in section 9 of this guidance) is completed as quickly as possible. It could be a benefit that many single-staffed offices (such as Hospital Archivists) are situated within the creating authority, which would in theory make the consultation process quicker.

In larger offices such as The National Archives, where enquiries often need to be passed from person to person or department to department, shorter periods of absence could pose a problem as there are more links in the chain to potentially hold up the process.

All Places of Deposit should instigate procedures to ensure that staff who are about to go on leave are not holding on to any FOI requests, and that if possible, FOI enquiries are not left lying on their desk or in their inbox whilst they are away. Single-staffed offices should aim to discuss this issue within their own organisation to try to find potential solutions to this issue. In

particular, it might be a good idea to work closely with the colleague responsible for handling FOI requests for corporate information.

Phone calls

We have so far looked at written enquiries, not enquiries which have come through by phone. But it is important to be aware of two things in relation to phone calls.

1. An access request falling under the Environmental Information Regulations does NOT need to be received in a written form, and can be received orally. Section 2.5 of this guidance explains how to distinguish between the different types of request.
2. FOI enquires DO need to be in a written form. However, this is not to say that an enquiry received over the phone should be ignored, as we have a duty to provide advice and assistance to potential FOI enquirers.

The s45 Code emphasises that people should be made aware of their rights, as they may not be aware that FOI requests must be written down.

para.	s.45 Code of Practice
7	Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need to draw these to the attention of potential applicants who appear unaware of them.

Staff should be able to explain that if the enquirer wishes their request to be dealt with under FOI legislation, it must be in a written form.

At The National Archives, a script will be issued to staff taking phone calls which explains that the enquirer will need to write in if they wish to make an FOI request, or they will be referred to the relevant website pages which will include an electronic enquiry form. If the enquirer is unable to write in, a form will be available so that staff can take the relevant details over the phone. We do not expect this to be a common occurrence. The s45 of the Code says that “in exceptional circumstances”, we can offer to write down enquiries for the applicant so that they become FOI requests:

para.	s.45 Code of Practice
8	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. Depending on the circumstances, appropriate assistance might include: <ul style="list-style-type: none"> ▪ advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application, or make the application on their behalf; ▪ in exceptional circumstances, offering to take a note of the

	<p>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).</p> <p>This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.</p>
--	--

Each Place of Deposit should consider whether it will offer to write down enquiries themselves or refer the enquirer to another agency such as the Citizens Advice Bureau.

If an enquiry has been written down by staff on behalf of the enquirer, it needs to be checked over by the applicant to verify the request. The FOI clock starts ticking once the enquiry has been “approved” by the enquirer (this counts as being “received”), and not before. This can be done by reading the enquiry back to them and getting oral approval to the enquiry (and making a note of the fact that verification was sought and given). If the enquirer is on site they could sign the request. In exceptional circumstances, such as with a complex enquiry, you may need to send the written enquiry by post or email to the enquirer to approve and the enquirer should sign or make their mark on it.

Another way of submitting a written FOI request could be to have ready printed forms available on site, so that people can fill these in themselves. A similar form could even be adapted for online use.

Enquiries transferred within your own organisation

It is in everyone’s interest to ensure that enquiries are directed to the appropriate department as soon as possible, to avoid a situation whereby an enquiry comes into the organisation and only reaches your department with 5 working days left on the clock. Ask yourself whether everyone in your own organisation is aware of the types of information held by your office and the types of enquiries you can answer. It is worth considering whether you will need to undertake some awareness raising within your own organisation to ensure enquiries received by other departments are passed on to you as soon as possible. Try to think of the departments which are most likely to receive requests about information you hold, and target them first.

If the request is received by you late due to an internal delay, it may be helpful to send an acknowledgement to the enquirer. Consider whether you will meet the deadline. If not, this acknowledgement could be used to secure an extension by agreement with the enquirer. It is open to you to negotiate an extension, but open to the enquirer to refuse and complain to the Information Commissioner if the deadline is not met. If the deadline is not met - for whatever reason - you may wish to consider waiving any fees to help compensate for the failure.

ACTION:

- Do you understand how the FOI Act defines a “working day”?
- Do you know when the FOI clock starts ticking?
- Do you clearly publicise any office closures?
- Do you have a system in place for date-stamping the post?
- Do you have procedures to cover for staff absences?
- Are you able to write down FOI enquiries received over the phone?
- Do you want to create forms for on-site or website use?
- Have you publicised your existence within your own organisation?

2.5 Categorising and logging the enquiry

Enquiry
 categorised and
 logged /
 registered.
 Deadline applied.

Key points:

- You have to know what kind of request it is in order to apply the correct deadline for response. Staff should be able to identify FOI requests.
- Enquiries should be logged in order to keep track of how they are dealt with and to ensure deadlines are met
- You need to decide *how* this is going to happen and *what information* you are going to log/register.

What kind of request is it?

This depends on the type of information being requested.

Request	Format	Legislation	Deadline
Information about the applicant (or someone authorised to act on their behalf)	Must be written	Data Protection Act	40 calendar days
Information about someone else (a "third party")	Must be written	Freedom of Information	20 working days
Information about the environment or human interaction with the environment (land, landscape, soil, water, air, atmosphere, flora and fauna; emissions, pollution and smog; sewers and drainage; cultural sites; the food chain, pesticides; policies, and any plans and agreements affecting any of the above).	Can be oral or written	Environmental Information Regulations	20 working days

Any other written information which may be found in the archives or in your own corporate records	Must be written	Freedom of Information	20 working days
General advice e.g. opening hours, how to get to the office, anything which can be answered immediately from memory e.g. local knowledge, etc.	Any	None	None (but you may have internal targets)

Note that the deadline for DPA is 40 *calendar* days while the deadline for FOI/EIR enquiries is in *working* days.

Also note that requests for FOI need to be written whilst requests falling under the EIRs can be received over the phone or in person.

Aim to reply as soon as you can

The Freedom of Information Act requires that:

s.10(1) ...a public authority must [provide the information] promptly and in any event not later than the twentieth working day following the date of receipt.

The s.45 Code of Practice elaborates on this:

para.	s.45 Code of Practice
17	Public authorities are required to comply with all requests for information promptly and they should not delay responding until the end of the 20 working day period under section 10(1) if the information could reasonably have been provided earlier.

In other words, you shouldn't wait until the last minute if you can send out the information any earlier.

Internal deadlines

Your office may already have a separate deadline for replying to correspondence, which may or may not correspond to the above targets. For example, at The National Archives we have a deadline to respond to (although not necessarily fully answer) all correspondence within 10 working days. If your office's deadline is similar, i.e. less than the 20 days required by FOI, then you may need to clarify what constitutes meeting your internal target. Can you meet your internal target by sending an automatic acknowledgement or a holding reply? Alternatively, you may wish to treat FOI

requests as separate from everything else and therefore apply your internal targets only to non-FOI requests.

What makes it a valid FOI request?

The criteria for deciding whether an enquiry is a valid FOI request are set out in s.8 of the Act. To be an FOI request, the enquiry needs to be in writing, give a contact address (this can be an email), a contact name, and describe the information requested. Enquiries received by email, or any other legible format capable of being used for subsequent reference, count as "written."

If the request is unclear because it does not describe the information requested, it is not a valid FOI request. If the request *is* clear but there is not enough information in the enquiry to supply the information requested, it is an FOI request. However, under s.1(3) of the Act you are not obliged to provide the information requested until you receive the extra information necessary from the enquirer. Both of these points are discussed further in section 2.6 of this guidance.

What if it the request falls under more than one legislation?

It is possible that one enquiry could contain several different requests which fall under different legislation. For example, one enquiry might contain a Data Protection request, an FOI request and a request which does not fall under any legislation. In this case, each piece of *information* should be dealt with by you in whichever way the relevant legislation requires. At The National Archives, requests such as this will be logged onto the tracking system as one request but highlighted as having multi questions.

Central government will provide further advice on the issue of requests for information which is covered by more than one type of legislation.

Why log it?

When the enquiry is received, it should be logged into some kind of tracking system (whether this be paper or electronic). Logging enquiries is not actually required by the Act, but it is an entirely sensible thing to do. It enables enquiries to be tracked and referenced again in future. It will provide essential information in case the applicant complains about the way the request has been handled. Aside from this, the information will also be useful in other ways. It can help produce statistics about what kinds of information people are regularly requesting – thereby giving you helpful information for prioritising your cataloguing work or publications programme. Logging the enquiry will help you to keep control over the requests, to know what deadlines are due. It will also help in the event of having to report on requests to the Information Commissioner or an external auditor.

Who logs it and when?

This raises similar questions as above, relating to who dates stamps the post. The person who date stamps the post could be given responsibility for logging as well, or it could be given to a different person, depending on what suits your office. For example. in The National Archives, our facilities department

will date stamp the post but the enquiry will be logged by the member of staff to whom it is forwarded.

The post should ideally be logged on the same day as it is received, but as long as it is date stamped – and so the date of receipt is recorded - then it might not cause any problems if the post was logged a couple of days later, perhaps once the enquiry has been looked at in more detail. In some cases (e.g. if the office is closed on certain working days) this will be inevitable, as the enquiry will have to be logged/registered day(s) after it was actually received into the office. However, in general terms enquiries should be logged as soon as practically possible.

How should requests be logged?

You need to consider how you will log the requests. Will they be logged in a specially created electronic tracking system? Do you want to use existing software (e.g. a database / spreadsheet) to log the requests? Do you want to purchase a specialist package, or can the FOI logging be integrated into the workflow part of your ERMS? Will you have to rely on a paper system? You may wish to integrate your FOI log into any existing logging systems you currently operate, or you may wish to have FOI requests logged separately from other non-FOI enquiries. Whichever method is not important, as long as it achieves what needs to be done and suits your way of working³.

The main thing to consider about choosing a system is what exactly do you need in order to a) track the progress of current enquiries and b) show how you handled past requests.

What needs to be logged?

Here are some suggestions of the elements which you may need to record on your logging system.

- Each enquiry could be given a unique reference number. The act of logging the information could automatically (if possible) create this number.
- Date enquiry received.
- Name, contact address of enquirer.
- Description of the enquiry.
- Format, whether post, email, fax, a form, or phone⁴ (you may need this information to help you know where to look for a detailed record of the enquiry).
- The type of enquiry, e.g. FOI, DPA, EIR, a mixture of legislation, or none. The system could be set up to automatically produce a deadline date depending upon the type of enquiry.

³ In April 2004 the Department for Constitutional Affairs published a “Generic User Requirements Specification for IT Systems to Manage Freedom of Information and Environmental Information Regulations Enquiries”.
<http://www.dca.gov.uk/foi/map/gusv4contents.htm>

⁴ Of course, an enquiry received only by phone does not count as a valid FOI request, but it may be a valid request under the Environmental Information Regulations.

- Whether it relates to information in the archives or information about your own office or organisation
- Your system may be sophisticated enough to link the logging and registering of enquiries with the electronic record of the enquiry itself and any related correspondence.
- Who has logged it.
- Where it is being held or sent, or who is dealing with it.

You should also bear in mind that a retention schedule may need to be set for the information in the system, because you are unlikely to need to keep each log entry permanently.

What if the request is vexatious or repeated?

There is provision set out in the Act to ensure that offices do not have to deal with requests that are “vexatious” or “repeated”. But what exactly is a vexatious request? There is no precise definition currently available, but if the enquirer continues to ask for the same information time and time again when you have already responded⁵ and done all you can to offer advice and assistance (e.g. if the information being requested is exactly the same), then this would seem likely to fall into the category of a repeated request, or even a vexatious one. If it can be objectively proven that the enquirer is being unreasonable then this may be grounds for being classed as vexatious.

If the enquiry falls into the category, the office is not obliged to answer it, and should reply giving a refusal notice⁶ explaining that the enquiry has been classed as vexatious. Of course, you could still answer it if you want to, it is just that you are not *obliged* to.

The s45 Code also notes that:

para.	s.45 Code of Practice
15	An authority is not expected to provide assistance to applicants whose requests are vexatious within the meaning of section 14 of the Act.

Requests which seem to be part of an organised campaign

The FOI Act says that:

12(1)...a public authority [is not obliged] to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

12(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-

⁵ The Information Commissioner will provide guidance on the definition of a “reasonable time” between two identical requests.

⁶ Guidance on what refusal notices should include can be found below.

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

This means that if all the requests are using the same type of language and asking for the same thing, the requests might seem to fit into the category of appearing to be part of an organised campaign. The Act says that the Secretary of State may bring in regulations⁷ so that you could count the cost of replying to one of these requests as the cost of replying to all, which may mean that the combined total of replying exceeds the cost threshold in the fees regulations.

For example, if ten people form a campaign and all send in requests for the same information, you would be able to charge each person ten times the cost: i.e. if ten people write in requesting the same information and we estimate to search for that information it would cost £60 you could charge each person $10 \times £60 = £600$ ⁸. Two or more people can form a campaign. However, it is difficult to distinguish between a campaign request and a popular request, so any judgements like this should be taken carefully.

The s.45 code says that if the requests do exceed the cost limit in this way then the authority should consider releasing the info in a more "cost effective manner" e.g. on the web:

para.	s.45 Code of Practice
16	Where an authority is not required to comply with a number of related requests because, under section 12(1) and regulations made under section 12(4), the cumulative cost of complying with the requests would exceed the "appropriate limit" (i.e. cost threshold) prescribed in Fees Regulations, the authority should consider whether the information could be disclosed in another, more cost-effective, manner. For example, the authority should consider if the information is such that publication on the authority's website, and a brief notification of the website reference to each applicant, would bring the cost within the appropriate limit.

ACTION:

- Do you know how to distinguish between different requests?
- Do you know what constitutes a valid FOI request?
- Have you defined what you need to log?
- Do you have a system in place for logging enquiries?
- Do you understand the rules regarding vexatious requests?

⁷ At the time of writing regulations have not yet been released.

⁸ If the search would cost $10 \times £70 = £700$, the enquiry may even fall above the cost limit prescribed by Fees Regulations.

2.6 Requesting clarification or further information

If required, request clarification or further information: (clock starts only when this extra information is received)

Key points:

- To be valid the request should explain clearly what information is required. If it does not, it is not a valid FOI request and you can request clarification.
- You may also reasonably require further information from the enquirer in order to answer the request. You are not obliged to answer the enquiry until the extra information is received.

I don't understand what they're asking.

If you cannot understand what the enquirer is asking, then it is not a valid FOI request. You will need to ask for further clarification. It is not an FOI request if you can't even understand what the person is asking for because they have not described the information being requested.

Remember that when clarifying the request, the enquirer does not have to give the reason why they want the information, so you should not ask.. When trying to clarify the request, you should be careful not to ask questions like "why do you want this information?" or "what are you going to do with this information?" It would be better to phrase the questions as "what exactly do you need to know?" or "what precisely do you want to find out?"

The request is not technically a valid FOI request until you can understand what the enquirer is asking. You may wish to log the enquiry on your system anyway, but the 20 working day deadline does not have to be applied until the question is clarified. Remember that there is a requirement to provide advice and assistance to potential FOI applicants, so you should offer as much help as you can.

We need more information to be able to find it.

Another circumstance would be if you do understand the question, but you need more information in order to identify and locate the information. Is there enough information for a search? Do you need more details to be able to find it? For example, if someone asks "I'm looking for any information on Robert Smith who was a Carpenter" then you'd be perfectly within your rights to ask for further information, such as in which century Mr Smith lived or from what part of the country he came.

Technically, such a request is an FOI request. However, section 1(3) of the Act says that if you reasonably need more information to identify and locate the information requested, you don't have to provide the information requested until you get that extra information.

- 1. - (3) Where a public authority-
 - (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
 the authority is not obliged to comply with subsection (1)⁹ unless it is supplied with that further information.

Section 10(6) of the Act says that the 20 working day deadline only begins when you receive the extra information required in order to identify and locate the information requested – and this counts as “the date of receipt”:

- 10. – (6) In this section-
 - "the date of receipt" means-
 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);

At The National Archives, for practical purposes only we will be treating all requests for information as if they were valid FOI requests and starting the clock when the request is received into the office, whether the request is technically valid at that point or not. If we need to clarify the request, the clock will be stopped while we wait for the clarification. It is planned that clarification will be requested on the first day the enquiry is received.

In effect, we are voluntarily starting the clock earlier than we are required under the Act. It is being done this way for practical purposes so that we can streamline and simplify the process as much as possible. This will enable us to link the original enquiry with the follow up request and enable us to keep track of our customer service provision.

The s45 Code of Practice has the following to say on this:

para.	s.45 Code of Practice
9	Where the applicant does not describe the information sought in a way which would enable the public authority to identify or locate it, or the request is ambiguous, the authority should, as far as practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the

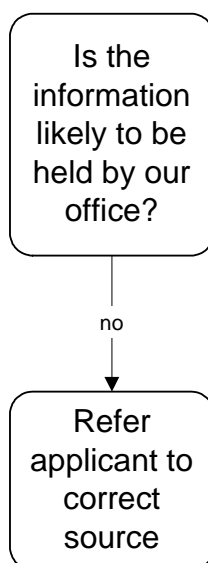
⁹ I.e. be informed that information is held and have the information provided to them.

	impression that he or she is obliged to disclose the nature of his or her interest or that he or she will be treated differently if he or she does. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.
10	<p>Appropriate assistance in this instance might include:</p> <ul style="list-style-type: none"> ▪ providing an outline of the different kinds of information which might meet the terms of the request; ▪ providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority; ▪ providing a general response to the request setting out options for further information which could be provided on request; <p>This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.</p>
11	In seeking to clarify what is sought public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers 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.
12	If, following the provision of such assistance, the applicant still fails 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. The authority should disclose any information relating to the application which has been successfully identified and found for which it does not wish to claim an exemption. It should also explain to the applicant why it cannot take the request any further and provide details of the authority's complaints procedure and the applicant's rights under section 50 of the Act.

ACTION:

- Are you ready to request clarification if necessary?
- Do you understand that you can't ask the reason they want the information?
- Do you want to prepare stock paragraphs or template letters for use when requesting clarification?
- Does your logging system allow you to stop and start the clock and move the FOI deadline?

2.7 Is the information likely to be held by us?



Key points:

- An initial check should be done to determine whether it is likely or not that the office holds the information.
- If not, the enquirer should be referred to the most likely correct source.

Once you have a clear understanding of what the applicant wants, you will also have to consider whether your office is likely to hold the information. This is separate from actually finding and providing the information itself.

Is the information likely to be held by our office?

There is often no way of being 100% certain that the exact information someone requests is held by your office without spending hours searching for it yourself. What you have to do at this stage, therefore, is to undertake an initial probability check, which is likely to involve quick consultation of catalogues, readers' guides, leaflets, and so on. If the information could be held in uncatalogued records, you should consult whatever basic lists are available. It is likely to be a limited search, e.g. 15 minutes work. At this point the staff member does not need to find the information itself, they just need to decide on the likelihood of your office holding it. This judgement may involve an element of risk assessment. If it turns out that the information is not likely to be held, then the enquirer should be directed to the likely correct source, and you should give the enquirer advice and assistance. You should also let the enquirer know where you have looked and how you have searched to show that you have checked all the relevant sources.

You may wish to undertake this check before logging the enquiry into your system; however bear in mind that the enquirer could still complain to the Information Commissioner about how you handled their enquiry so it is probably best to log it anyway.

If the information is likely to be held, you could use this opportunity to send a fees notice to cover searching for and retrieving the information.

Remember that you are not obliged to create new information to answer an enquiry. For example, if someone asks how many times a certain topic was discussed in a certain meeting, you would not be obliged to trawl through the minutes yourself to find out. What you could do instead is allow the enquirer access to the minutes to calculate the answer themselves.

Referring enquirer to the correct source

If the information is not held by your office the enquirer should be referred to the correct source of the information, if you can suggest an alternative. We would not recommend that you actually forward the FOI request onto the organisation (i.e. "transfer" the request), because you have to be absolutely sure that the organisation has the exact information the enquirer wants before doing this. In many cases this is impossible to know in advance.

You may wish to consider setting up a directory of external organisations' contact details for quick staff reference if you receive a lot of requests about information which your office does not hold.

Any response which does not provide the information sought technically counts as a 'refusal' and a stock letter should be used as the basis of the letter. It should include a detailed explanation of the sources checked, whether archives or corporate records, as well as complaint rights and so on.

There are certain types of information which are so sensitive that if asked, you would refuse to confirm or deny that the information is held. You should use the same form of words to reply to *all* enquiries about this type of information *whether you actually do hold it or not*. It is important to be consistent in this. If you only issue refusals to confirm or deny when you hold the information and do not when the information is not held, you would inadvertently reveal that the information was held. The National Archives intends to provide examples of the form of words you might use when refusing to confirm or deny.

The s45 Code says that if you hold some of the information but not others, then just redirect the enquirer for the information which you don't hold. You should also offer as much advice and assistance as you can¹⁰.

para.	s.45 Code of Practice
22	Public authorities should bear in mind that "holding" information includes holding a copy of a record produced or supplied by another person or body (but does not extend to holding a record on behalf of another person or body as provided for in section 3(2)(a) of the Act).
23	The authority receiving the initial request must always process it in

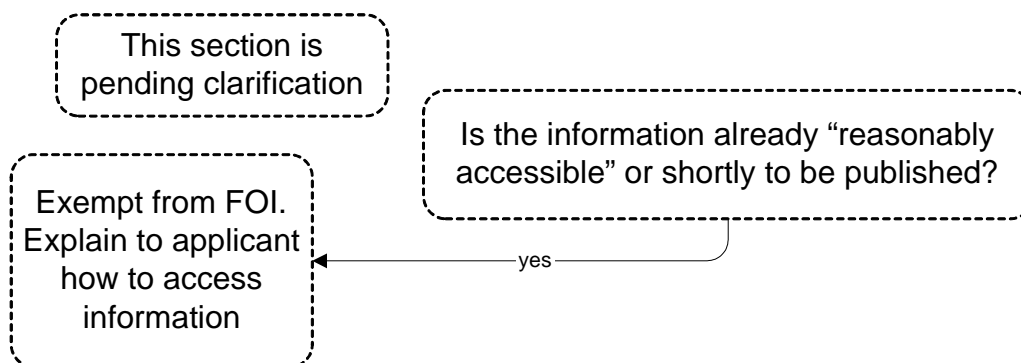
¹⁰ Paragraphs 21, 25-29 of the s45 Code of Practice discuss transferring the request from one public authority to another. We recommend that Places of Deposit refer the enquirer to the most likely source instead of directly transferring the request, so these sections of the Code have not been reproduced here.

	accordance with the Act in respect of such information relating to the request as it holds. The authority should also advise the applicant that it does not hold part of the requested information, or all of it, whichever applies. But before doing this, the authority must be certain as to the extent of the information relating to the request which it holds itself.
24	<p>If the authority to whom the original request was made believes that some or all of the information requested is held by another public authority, the authority should consider what would be the most helpful way of assisting the applicant with his or her request. In most cases this is likely to involve:</p> <ul style="list-style-type: none"> • contacting the applicant and informing him or her that the information requested may be held by another public authority; • suggesting that the applicant re-applies to the authority which the original authority believes to hold the information; • providing him or her with contact details for that authority.
30	Where a public authority is unable either to advise the applicant which public authority holds, or may hold, the requested information or to facilitate the transfer of the request 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 or her to pursue his or her request.

ACTION:

- Set out a list of the information resources which could be searched by staff in order to do this initial “probability check”
- Compile directory of external organisations’ contact details for quick staff reference.
- Create stock paragraphs for use when referring enquirers to other sources. Ensure that they explain what sources you have searched.
- Consider what types of information may be exempt from the duty to confirm or deny the information is held. Prepare to answer all enquiries for this type of information with the same form of words, whether it is held or not.

2.8 Is the information already reasonably accessible (s.21) or shortly to be published (s.22)?



Key points:

- The interpretation of these exemptions has yet to be clarified. Potentially, Places of Deposit might be able to claim the s.21 or s.22 exemption for some of the archives they hold.

GUIDANCE ON THE INTERPRETATION OF THESE SECTIONS
WILL BE PROVIDED IN DUE COURSE

At this stage, you know what the enquiry is about, you have enough information to find what they want, and it is likely or possible that your office holds the information.

The next step is to consider whether the information is already reasonably accessible to the applicant.

The s.21 exemption

The FOI Act has an exemption which says that information which is already “reasonably accessible to the applicant” is exempt from the requirements of FOI. Here is the relevant section of the Act:

21. - (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection

(2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

What this means is that a) information may still be reasonably accessible even if there is a charge for it, b) if you are obliged to provide the information because of other legislation then it counts as "reasonably accessible", and c) you can't call something reasonably accessible purely because the information is available if someone requests it, *unless* there is a corresponding class in the publication scheme.

The s.22 exemption

s.22 of the FOI Act says that:

- s.22-(1) Information is exempt information if –
- a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)
 - b) the information was already held with a view to such publication at the time when the request for information was made, and
 - c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph a)

[GUIDANCE ON THE INTERPRETATION OF THESE SECTIONS WILL BE PROVIDED IN DUE COURSE.]

Unfit records

"Unfit" records are those which are deemed too fragile to be accessed without some serious conservation work. Under Freedom of Information, the fact that the record is "unfit" is not a valid reason for refusing access to the information. It will be important to put in place strategies for dealing with requests for information in fragile records. Here are some suggestions:

- The Archivist may be able to allow the record to be seen but under close supervision and with the use of preservation equipment such as gloves, archival weights, and foam blocks and so on.
- If the Archivist is unsure, they should consult a conservator (where possible) for advice.
- If possible, you may be able to allow the record to be seen in the presence of a conservator
- If the record is so fragile that it cannot be used at all, try to let the reader at least see the state of the record so that they can understand the reason why access is not possible. The enquirer should be shown the actual document as proof that it is unusable.
- Provide the information in a transcription or summary.

- Prioritise the document for conservation.
- Make a copy or a photograph of the information

Remember that FOI relates to information as opposed to the record itself.

Unfortunately, it is highly unlikely that Places of Deposit will be able to include the cost of conservation work in the cost of “providing the information” because this is considered to be a core function of the office.

The main point here is to ensure that you can demonstrate willingness to be as helpful as possible to the reader and to provide the information where you possibly can, as long as the document is not damaged by doing so.

At The National Archives we have changed our catalogues to include the following statement:

“Availability Condition: This document is very fragile and cannot be produced to you in the normal way. Please contact the Counter staff for further information.”

Previously the catalogue used to say: “This document is very fragile and cannot be produced”

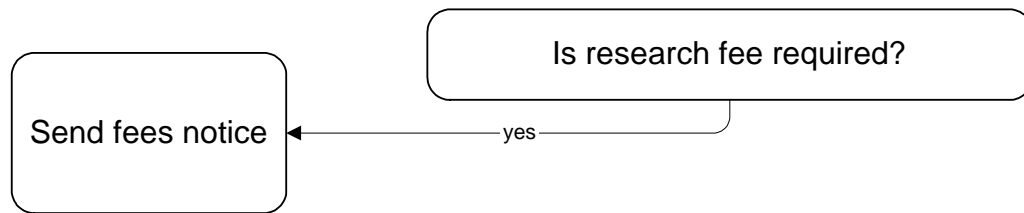
Interpretation of these exemptions

[The National Archives is seeking clarification over the interpretation of s.21 and s.22. We will update this guidance as soon as this has been received. GUIDANCE ON THE INTERPRETATION OF THESE SECTIONS WILL BE PROVIDED IN DUE COURSE.]

Claiming these exemptions

If the records are subject to either of these exemptions, then you don't have to deal with enquiry under FOI rules. You should contact the applicant, (technically a “refusal notice”, although to use this term might be confusing), explaining where and how the applicant can access the information and whether a charge applies. You should also set out the applicant's complaint and appeal rights. See section 2.10 for more information about what needs to be included in refusal notices.

2.9 Cost exemptions and charging fees



Key points:

- Fees must be charged within 20 working days
- Once a fee has been charged, the clock stops ticking until you receive the fee
- If the cost of complying would exceed the cost limit, you are not obliged to comply with FOI

This section will give general guidance on charging fees as specific fees regimes and regulations may change. Please refer to the current fees regulations¹¹ for more detailed guidance. This section may be updated once the fees regime has been confirmed.

Requirements of the Act

The FOI Act sets out the following rules for fees and costs.

s.9 of the Act:

- Once the fees notice has been issued (this must be within the 20 working days), the clock stops ticking until the fee is received. If no fee is received by the end of three months later, the enquiry can be considered closed.
- The fee must be in accordance with regulations under the Act. However, if the request is not an FOI request but is a DPA request, the fee should follow DPA regulations.

s.12 of the Act:

- You are not obliged to comply with providing the information if you estimate that the cost of complying would exceed the cost limit. The duty to confirm or deny whether the information is held may also be subject the cost limit, although this is likely to be very unusual.

s.13 of the Act:

- You can charge for the provision of information where the cost exceeds the relevant limit, or if the provision of information is not required by the law.

¹¹ Fees regulations will be available on the DCA website, at: <http://www.dca.gov.uk/foi/secleg.htm> .

Estimating the cost of enquiries

It is important to ensure that the fees you charge are justifiable and appropriate. In preparation for FOI, it is a good idea to keep track of how long it takes to find information in response to enquiries, how long it takes to retrieve the information, and how much it costs to provide the information. Once you have built up this knowledge over a period of time, you will be able to work out the cost of an average enquiry, and set out a charging regime which is justifiable as it would be based on actual experience.

Enquiries which exceed the cost limit

If you estimate that the total cost of the enquiry will exceeds the maximum cost limit set out by fee regulations then you don't have to comply with the request, but you must still provide advice and assistance. You should advise the applicant to reformulate their request, providing advice and assistance as appropriate. You must still advise the applicant whether or not you are holding the information (unless to do so would itself exceed the limit).

A stock letter should be sent to the applicant explaining that the cost limit is being claimed. It should also suggest how the request could be reduced so as to take it below the cost limit. It should include a stock paragraph setting out the applicant's complaint and appeal rights.

Note that the cost limit exemption does not apply to information which is covered by the Environmental Information Regulations.

para.	s.45 Code of Practice	
13	Where the applicant indicates that he or she is not prepared to pay the fee notified in any fees notice given to the applicant, the authority should consider whether there is any information that may be of interest to the applicant that is available free of charge.	
14	Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12(4), the cost of complying would exceed the "appropriate limit" (i.e. cost threshold), and where the public authority is not prepared to comply on a discretionary basis because of the cost of doing so, the authority should consider providing an indication of what information could be provided within the cost ceiling.	

Fees notice

There is no obligation to charge for access, but if you are going to, you must provide a "fees notice" to the applicant. The clock then stops for up to three months whilst you wait for the applicant to pay the fee.

If enquirers disputes the fee, they can appeal via a three-stage process in the same way as other complaints: 1) public authority's complaints procedure; 2)

request decision from Information Commissioner, and finally, 3) appeal to Information Tribunal.

Fee received

Once the fee has been received from the applicant, the request is resumed and the 20 working days target continues.

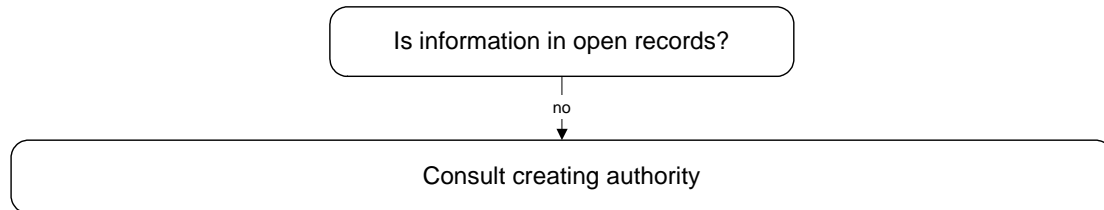
It is possible that, when FOI is up and running, a customer may have already used the service, or heard of the fee already and sent it in with their enquiry. If this is the case, the Place of Deposit should acknowledge receipt of the fee and must say how much work can be done for the amount of money that has been paid. A fees notice might still need to be sent later on if more money is required.

This section may be updated once the fees regime has been confirmed.

ACTION:

- Gather evidence on the cost of handling average enquiries to support your charges.

2.10 Enquiries for information in public records which are not yet open to the public



Key points:

- The Place of Deposit must always consult the creating authority about releasing information in public records which are not yet open.
- The Place of Deposit has been appointed to act on behalf of the Lord Chancellor, who is legally responsible for deciding which exemptions (if any) apply.
- The creating authority is legally responsible for deciding whether the public interest lies in releasing or withholding information.

If the information being requested is in public records which are not yet open to the public, things get a bit more complicated.

The basics

Archives should be automatically open to the public on request unless FOI exemptions apply to the information they contain. Public records already open or open at transfer should be assumed to continue to be open.

The Place of Deposit must always consult the creating authority when making a decision on access to information in public records which are not yet open. The Environmental Information Regulations require an equivalent consultation process.

Legal responsibilities

The process of considering whether to release information in records which are not yet open involves several different decisions.

This table summarises the legal responsibilities of each public authority for making decisions, and who they must consult.

Places of Deposit should ensure that they are familiar with the different responsibilities.

Summary	Decision	Who makes this decision?	Who is consulted?
Initial question	1. Could exemptions ¹² be applied to the requested information? <i>Should</i> they be applied ¹³ ?	The Place of Deposit, acting on behalf of the Lord Chancellor.	The creating authority must always be consulted.
If public interest test required (i.e. qualified not absolute exemption applies)	If public interest test is required: 2. Should the information be released in the public interest?	The creating authority.	If proposing to refuse access, the creating authority must consult the Lord Chancellor ¹⁴ .
Duty to confirm or deny ¹⁵	3. a) Is there an exemption from the duty to confirm or deny the information is held?	The Place of Deposit, acting on behalf of the Lord Chancellor.	The creating authority must be consulted.
	If public interest test is required: 3. b) Does the public interest in confirming/denying override the public interest in refusing to do so?	The creating authority.	If proposing to refuse to confirm or deny information is held, the creating authority must consult the Lord Chancellor ¹⁶ .
Final question	4. If the information is available to the applicant, should it be available to everyone?	In making Decisions 1-3 above, the Place of Deposit and creating authority should also decide whether access to one is also access to all	. See left

The flow chart on page 33 puts these decisions into context.

¹² More than one exemption could apply to the information.

¹³ It is not mandatory to apply exemptions just because they could be applied.

¹⁴ The initial point of contact for the creating authority when consulting the Lord Chancellor should be the Departmental Record Officer, who will be able to advise further on the procedure.

¹⁵ This is only relevant if access to the information is being refused.

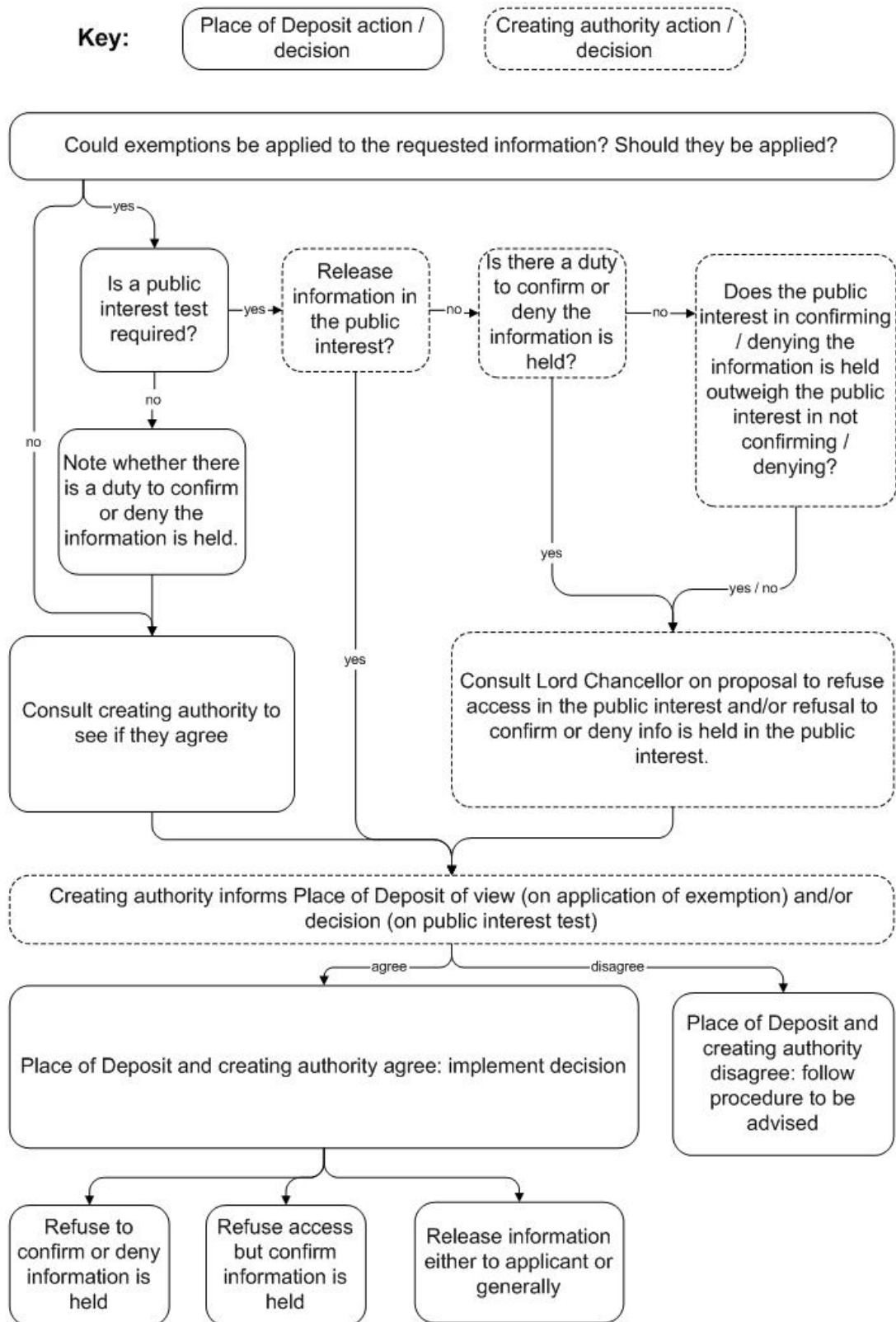
¹⁶ See footnote 14.

“Records authority” and “responsible authority”

Under the FOI Act, the Lord Chancellor is the “records authority” for public records in Places of Deposit and the record creating authority is the “responsible authority”. However, under the terms of Place of Deposit appointment, Places of Deposit are authorised to act on his behalf. When an organisation maintains its own Place of Deposit, it holds its public records on behalf of the Lord Chancellor and acts on his behalf.

This covers the background and the legal responsibilities. What we will look at next is how this consultation process will actually work in practice.

Enquiries for information in public records which are not yet open to the public



To cut down on the time the decision-making process takes, you may decide that all requests for information in closed records will automatically be passed to the Head Archivist (or a nominated person) so that the process can begin as soon as possible. Remember, however, that the s. 45 Code recommends that complaints should be handled by someone other than the person who made the original decision.

Could exemptions be applied to the information? Should they be applied? Forming an initial view.

Could exemptions be applied to the requested information? Should they be applied?

Identifying exemptions

From 2005, the authority which creates the public record and transfers it to the Place of Deposit will be required by the s46 Code of Practice to identify and list the exemptions which they believe apply at the time of transfer. However, Places of Deposit contain many archives which have already been transferred and which were closed under the Public Records Act, either because the standard 30 year closure period had not expired or because they were considered to require a longer closure period.

Records which were closed under the Public Records Act may contain exempt information, or they may not. Because you can't be sure without analysing each record in detail, records which were closed under the Public Records Act should not be made automatically open to the public. This does not mean that the records are necessarily "closed". If someone requests information contained in them, you will have to make a decision as to whether the information should be released. It may be that the information does not need to be kept closed. Alternatively, you may find that exemptions do apply to the information.

When a request for information in a 'closed' record comes into a Place of Deposit, the Place of Deposit must form a view as to:

- a) whether exemptions could be applied to the information being requested
- b) the reason why they could be applied to the information being requested
- c) whether the exemption(s) should be applied or waived in this case.

Detailed guidance on the interpretation and application of specific exemptions to specific types of records is beyond the scope of this guidance, but it will be provided by the Department of Constitutional Affairs¹⁷ and the Information Commissioner¹⁸. in a Handbook to be issued by the Department for Constitutional Affairs.

¹⁷ <http://www.dca.gov.uk/foi/understand.htm>

¹⁸ <http://www.informationcommissioner.gov.uk>

Information, not records

Remember that FOI relates to information, not records. One record might contain some bits of information which fall under various different exemptions and some bits of information which fall under no exemptions. So even though the whole record might be not open to the public on request, an enquirer could still legitimately be given certain information from it.

In the previous system under the Public Records Act, records (not information) were either closed or open. They were closed under the Public Records Act either for 30 years as a matter of course, or longer by a Lord Chancellor's Instrument. Any request for information in closed records (apart from people wanting their own data: Data Protection Act requests) would have been simply refused, referred to the record creating authority to decide whether to grant "privileged access", or in some cases, an accelerated opening could have been applied for in order to release the record. Although perhaps not as straightforward, the new system under Freedom of Information is fairer as it allows decisions to be made on the nature of the information being requested rather than by which record the information happens to be contained in.

Forming an initial view

Before consulting the creating authority, the Place of Deposit should form a view as to which exemptions (if any) could be applied to the actual information being requested. Remember that more than one exemption could apply to the same information. You may be able to form a view based on the nature of the information being requested, or you may have to examine the record in some detail to be sure. It may help to ask yourself the following questions:

- Why was this record closed originally?
- Does the information being requested directly relate to the reason why it was closed? Perhaps the information being requested is very basic and harmless but just happens to be held within a record which was closed for another reason.
- Imagine if the information being requested was extracted from the record and printed onto a sheet of paper. Is it innocuous? Would it still be exempt? (Bear in mind that the inclusion of the record's title, dates and context may act to make the information sensitive).

Be sure also to refer to any guidance on exemptions produced by the Department for Constitutional Affairs and the Information Commissioner to inform your view.

There are two possible outcomes of this evaluation:

1. The Place of Deposit forms a view that no exemptions can apply to the information and therefore the information should be released.
2. The Place of Deposit forms a view that an exemption or exemptions apply.

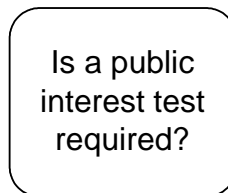
If an exemption could be applied, the Place of Deposit should also form an initial view on:

1. The reason why they could be applied to the information being requested.
2. whether the exemption(s) should be applied or waived in this case.

In some cases, an exemption might apply to the information but the Place of Deposit may decide to waive it; either for the specific enquirer or even for general access. In other words, once the exemption has been identified, you need to ask: do we wish to claim the exemption? Most of the time, the answer will most likely be yes. But the situation may occur when you decided that even though the exemption is there, you have chosen to waive it. An example might be if an exemption were waived to allow a family member access to deceased patient records which would not be opened to the general public.

The next question is to ask what type of exemption relates to the information.

Two types of exemption



There are two types of exemption: absolute and qualified. The only difference is that qualified exemptions require a public interest test to be made. Places of Deposit are not responsible for making the public interest test decision for deposited public records; this is the responsibility of the creating authority.

We expect that "absolute" exemptions will be much more common in Places of Deposit, as the types of information that are subject to qualified exemptions are less likely to be found in the classes of public records held locally.

Whatever the outcome of the Place of Deposit's evaluation, when making decisions about access to information in public records which are not yet open, the creating authority must always be consulted. This is the case even if the creating authority identified exemptions at the time the record was transferred to the Place of Deposit, and even if the Place of Deposit believes that no exemptions apply.

The creating authority is responsible for making public interest test decisions. If there is no public interest test decision, the creating authority must still be consulted, but the Place of Deposit is still responsible for the identification of exemptions.

Consulting the creating authority

Consult creating authority to see if they agree

Why?

S.66(2) of the FOI Act says that the “records authority” (the Place of Deposit acting on behalf of the Lord Chancellor) must consult the record creating body (the “responsible authority”) before making a decision on whether an exemption applies or whether to confirm or deny that the information is held. The reason for consultation is to get the creating authority’s views and expertise about the records.

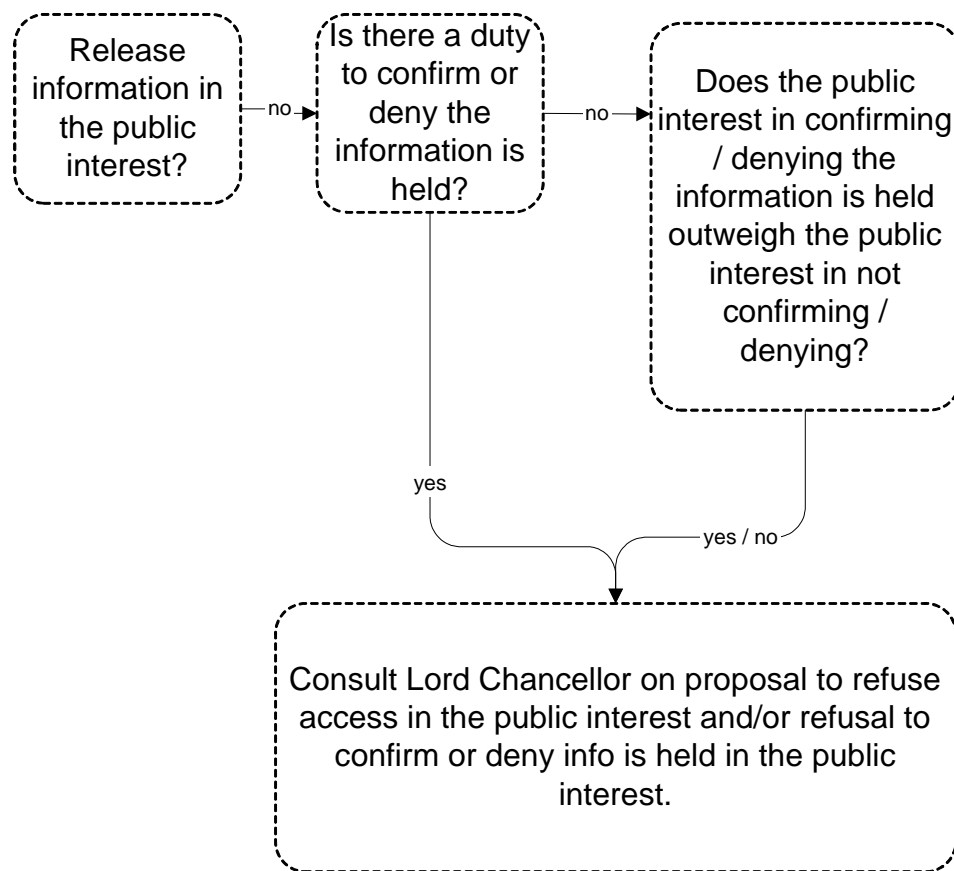
Remember that the Place of Deposit is delegated to act on behalf of the Lord Chancellor, who is legally responsible for deciding what exemptions apply. So the identification of exemptions rests with the Place of Deposit, after they have consulted the creating authority. Public interest tests are the responsibility of the creating authority. If the creating authority proposes to refuse access to the information in the public interest, it must consult with the Lord Chancellor¹⁹.

The key points to remember are:

- The Place of Deposit must always consult the creating authority when making a decision on access to closed records.
- The Place of Deposit always decides if exemptions apply to the information, after consulting the creating authority.
- The creating authority always decides whether to release exempt information in the public interest.

¹⁹ In the first instance the creating authority should contact the Departmental Record Officer for advice on how to take this forward.

More on public interest tests



This creating authority is responsible for two decisions: A) does the public interest in providing the information outweigh the public interest in keeping it closed? B) if it should be kept closed, does the public interest in confirming or denying the information is held outweigh the public interest in refusing to do so?²⁰

Who should be consulted?

The Place of Deposit should ideally have a list of contacts within the creating authorities (or if they no longer exist, their successors) so it knows who to contact as quickly as possible. It would make sense to begin making such contacts in advance of FOI, and perhaps checking them annually to ensure that they are up to date.

We realise, however, that often it is difficult to get a named contact within the creating organisation. If the organisation is defunct, the Place of Deposit should contact the relevant Government Department for advice on who to consult. For example if an NHS organisation is defunct and has no obvious

²⁰ The Information Commissioner has released guidance on public interest test decisions. This is available at <http://www.informationcommissioner.gov.uk>, in the section "FOI – Legal Obligations for Public Authorities"

successor, the Place of Deposit could ask Department of Health for advice on who should be consult.

We hope to provide more guidance on who to contact in due course.

How should the consultation take place?

The consultation should ideally be done in writing (email, letter or fax) so that a record of the consultation is available. If it is done by phone a note should be taken of the phone call if the decision is later challenged.

When contacting creating authorities, it would be a good idea to include the following elements:

- Details of the enquiry.
- A description of the information requested, a copy of the record if relevant or feasible, or provision to view the original record.
- A reminder of the two parties' (i.e. the Place of Deposit and the creating authority) responsibilities under the Act.
- An explanation of the view of the Place of Deposit as to whether a) if exemptions could be applied, b) why they could be applied to the information being requested and c) whether exemptions should be applied or waived in this case. If the Place of Deposit considers that no exemptions apply, this should also be explained.
- A request for the creating authority's view. Do they agree or disagree?
- If a public interest test is required, confirm that the creating authority is responsible for the public interest test decision. You may wish to mention that if they propose to refuse access in the public interest, they must first consult the Lord Chancellor²¹.
- Any particular constraints on the time available to deal with the enquiry, e.g. how many days are left on the clock. Note that the Act says that the time for making public interest test decisions can extend beyond 20 days (in fact there is no limit imposed), although the s.45 Code says 20 working days should always be the aim. Ask that the creating authority let you know if you the 20 working days is not going to be met²². *However*, if it seems possible that you may have to refuse to confirm or deny that the information is held because it is so sensitive, note that the creating department must reply within 20 working days²³.

²¹ Initially the creating authority should contact their Departmental Record Officer for advice on how to take this forward.

²² Applicants must always be contacted within the 20 working days. Therefore if the public interest test decision-making process is going to extend beyond 20 working days, they should be given an initial "holding" response.

²³ As explained in the previous footnote, the enquirer must always be contacted within 20 working days, even if a public interest test decision is being made; if not with the decision, at least with some kind of initial response. If there is any prospect that it will be necessary to refuse to confirm or deny the information is held, the decision must be made within 20 working days because an initial response to the effect that the matter was under consideration would reveal that the information was held..

Keeping a record of the consultation.

It is very important that a record is kept of the consultation process. This can be in the form of an email, a fax, a letter, or a written note of a telephone call; it doesn't matter, as long as the information is recorded and can be found again in future. It may be needed as evidence if the decision is challenged. The Place of Deposit should be able to prove that it acted in accordance with the Act to consult with the creating authority.

Extension of 20 working day deadline for public interest tests

As explained above, the Act allows for the 20 working day deadline to be extended for public interest test decisions. The s.45 Code elaborates on this:

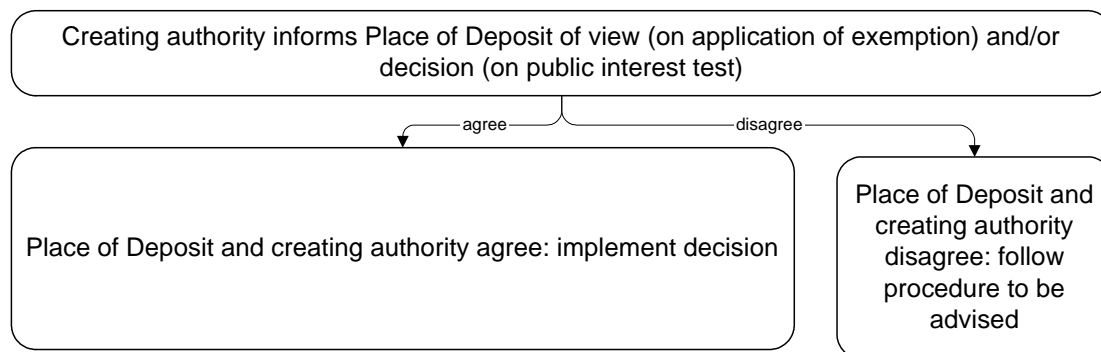
para.	s.45 Code of Practice
18	Public authorities should aim to make <i>Tall</i> decisions within 20 working days, including in cases where a public authority needs to consider where the public interest lies in respect of an application for exempt information. However, it is recognised there will be some instances where it will not be possible to deal with such an application within 20 working days. Although there is no statutory time limit on the length of time the authority may take to reach a decision where the public interest must be considered, it must, under section 17(2), give an estimate of the date by which it expects to reach such a decision. In these instances, authorities are expected to give estimates which are realistic and reasonable in the circumstances of the particular case, taking account, for example, of the need to consult third parties where this is necessary. Public authorities are expected to comply with their estimates unless there are good reasons not to. If the public authority exceeds its estimate, it should apologise to the applicant and explain the reason(s) for the delay. If a public authority finds, while considering the public interest, that the estimate given is proving unrealistic, it should keep the applicant informed. Public authorities should keep a record of instances where estimates are exceeded, and where this happens more than occasionally, take steps to identify the problem and rectify it.

However, remember that if you are going to refuse to confirm or deny that the information is held, the 20 working day deadline should be met so that you don't inadvertently give away that the information is held. This reasoning for this is explained at footnote 17.

What if almost identical enquiries are regularly made?

If an almost identical enquiry has arisen beforehand, as part of the consultation it would make sense to remind the creating authority of the previous decision. It would also be helpful to keep a note of the type of information provided from particular classes of records so that if a similar enquiry comes up in future you can compare it to previous decisions (your tracking system may be useful in this regard). Besides saving time and effort in future, this would also provide for consistency in approach.

Reply from the creating authority



The creating authority should provide an explanation of what exemptions it believes apply (if any) and why. If the Place of Deposit has already identified the exemptions and justifications, it should indicate whether it agrees or disagrees with the Place of Deposit's view. The creating authority must provide a view on exemptions and justification data and must indicate whether the justification itself can also be released. Even if a public interest test has been made by the creating authority, which the creating authority is legally responsible for, the Place of Deposit will be responsible for writing back to the enquirer. The Place of Deposit therefore needs to receive enough information from the creating authority to be able to give an appropriate response.

If the creating authority has decided to refuse access to the information in the public interest, they should confirm with the Place of Deposit that they have consulted the Lord Chancellor.

What if the creating authority does not reply?

The Place of Deposit is responsible for meeting the statutory deadline and should follow up after a certain amount of time has passed (e.g. on day 15). We will provide further guidance on this in due course.

What if the Place of Deposit and creating authority do not agree?

For public interest test decisions, the creating authority is legally responsible and the Place of Deposit should comply with the creating authority's decision.

For all other decisions, Places of Deposit are acting on behalf of the Lord Chancellor, who is legally responsible. We recommend that the view of the creating authority be given great weight, as the authority may be more aware of specific statute bars, other relevant legislation, or the operational impact of releasing information. In the final analysis however the Place of Deposit should be convinced of the justification and arguments for the access decision. We hope to provide further guidance in due course on what should happen if the creating authority and the Place of Deposit can not agree. In the interim Places of Deposit should contact The National Archives and the creating authority should contact their Departmental Record Officer.

At The National Archives, the Advisory Council will advise on any disagreements between The National Archives and government departments. The Advisory Council is not legally responsible for the decisions, but is being used in this way as an independent source of guidance for difficult decisions. However, the exemption decision will still be made by the National Archives.

A Memorandum of Understanding between The National Archives and public record creating bodies (the 'responsible authority') has been agreed, which sets out how The National Archives (TNA) will consult creating authorities. Although not technically applicable to Places of Deposit, the same general principles will apply to Places of Deposit, and it is worth quoting a section here:

Consultation process

5. The consultation will allow the responsible authority to assess the implications of disclosure of the information and assist TNA in determining what exemptions may be relevant and whether the duty to confirm or deny applies or if the information is exempt. TNA will attach great weight to the views of the responsible authority (see also paragraph 7).... Any advice to TNA to neither confirm nor deny holding information needs to be given before 20 working days from the date on which the request was received by TNA.

7. Where consultation in accordance with paragraph 5 takes place, TNA will endeavour to reach agreement with the responsible authority in relation to identifying exempt information. If no agreement can be reached TNA and the responsible authority agree jointly to seek the views of the Advisory Council on National Records and Archives before reaching a final decision. TNA will attach great weight to the Council's views. As legal holder of the records concerned, TNA is finally responsible for exempt information being identified in response to a request.

Places of Deposit which are part of the creating authority

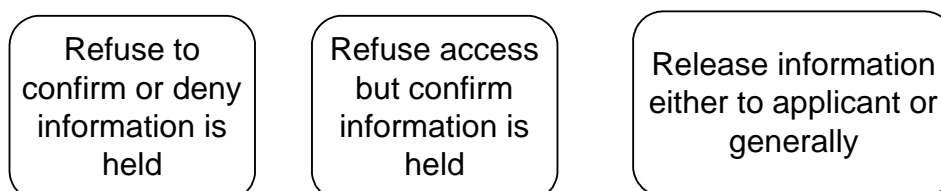
In situations where the Place of Deposit is part of the creating authority (i.e. it holds public records created by its own organisation) the consultation process will be slightly different. In this case, the organisation is both the "responsible authority" and it is also acting on behalf of the Lord Chancellor, who is the "record holding authority." In effect, the authority will be consulting itself.

It is up to each authority as to how it handles the consultation process internally. Archivists should agree a policy within their organisation as to whether they should consult with another member of staff such as an FOI Officer, a Lawyer, a records manager, or whether responsibility for decision making will be completely delegated to one person, the Archivist.

Remember that if the organisation is proposing to refuse access to information in deposited public records as part of a public interest test, it must consult the Lord Chancellor²⁴.

It will still be important to keep a full record of the decision making process in case the decision needs to be audited.

Decision is made



Once a response has been received from the creating authority, a decision can be made on whether the information should be released or not. Below is a summary of the options available.

1. **Refuse to confirm or deny information is held.** . If this is the case, a careful form of words should be used²⁵
2. **Refuse access but confirm information is held.** If refusing access to information, you should send a “refusal notice”. The next section of this guidance explains what refusal notices should contain.
3. **Release the information.** If no exemptions apply to the entire record, there is no justification for keeping it closed. It should be opened, and the access information (e.g. on your catalogue) should be changed so that it shows the records as open. However, it may be that some of the information from the record is being released but not others. If this is the case, it may be necessary to provide the information in such a way as to protect nearby exempt information, e.g. by redaction²⁶, or providing a summary or transcript. You should then ask yourself, **if the information is available to the applicant, should it be available to everyone?**

Recording the decision

Once the enquiry has been dealt with, a record should be kept of the decisions made. The s.45 Code says this is especially important when refusing access.

²⁴ In the first instance the creating authority should contact the Departmental Record Officer.

²⁵ Note that you should always use the same form of words to reply to *all* enquiries about this type of information *whether you actually do hold it or not*. It is important to be consistent in this. If you only issue refusals to confirm or deny when you hold the information and do not when the information is not held, you would inadvertently reveal that the information was held. Further guidance on the form of words to use when refusing to confirm or deny will be provided.

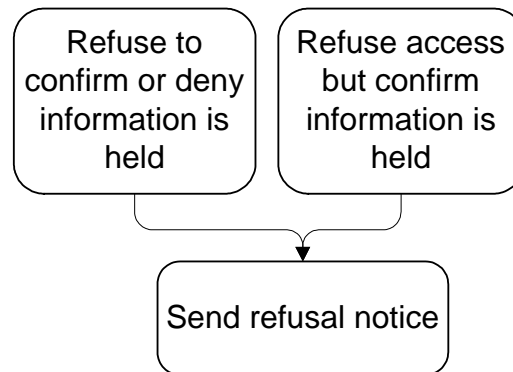
²⁶ The National Archives intends to produce a toolkit on redaction.

para.	s.45 Code of Practice
51	<p>For monitoring purposes public authorities should keep a record of all applications where either all or part of the requested information is withheld. In addition to a record of the numbers of applications involved where information is withheld, senior managers in each public authority need information on each case to determine whether cases are being properly considered, and whether the reasons for refusals are sound. This could be done by requiring all staff who refuse a request for information to forward the details to a central point in the organisation for collation. Details of information on complaints about applications which have been refused [...] could be collected at the same central point.</p>

ACTION:

- Are you clear about your legal responsibilities?
- Do you have contacts in creating authorities with whom you will need to consult?
- Are you familiar with the exemptions?
- Do you have a stock letter to use as a holding reply?
- Do you have a stock letter to send to creating authorities for consultation purposes?
- Consider what types of information may be exempt from the duty to confirm or deny the information is held. Prepare to answer all enquiries for this type of information with the same form of words, whether it is held or not.

2.11 Refusing a request



Key points:

- When refusing access to information, you must give a written “refusal notice”
- The refusal notice must contain certain information.

When refusing a request, you must inform the applicant in writing. This is technically known as a “Refusal Notice”. Section 17 of the FOI Act explains what refusal notices should contain. The Place of Deposit should always write the refusal notice, even if the decision was a public interest test made by the creating authority.

Refusal notices

If an exemption applies, the refusal notice must contain the following information²⁷, unless the information is such that you must refuse to confirm or deny it is held.:

- A statement that the information is exempt
- Exactly which exemption(s) are being applied
- An explanation (if it is not otherwise apparent) of why the exemption applies

In all cases, the refusal notice should also contain²⁸:

- details of your organisation’s complaints handling procedures
- details of the applicant’s right to apply to the Information Commissioner for a decision as to whether the request has been dealt with in accordance with the Act

Apart from this, you can also include any advice and assistance you see fit.

Refusal after public interest test

If a public interest decision has been made by the creating authority, the refusal notice should state the reason why either a) the public interest in

²⁷ Freedom of Information Act, s.17(1)

²⁸ Freedom of Information Act, s.17(7)

refusing to confirm or deny the information is held outweighs the public interest in disclosing whether or not the information is held, or b) that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.²⁹ The creating authority should provide this information to the Place of Deposit when they reply. *However*, if such a statement would mean that the exempt information itself is revealed, the Place of Deposit is not obliged to make the statement.³⁰

The s45 Code of Practice emphasises that when requests are refused, there must be an explanation why, unless it is impossible to do so because the information is so sensitive:

para.	s.45 Code of Practice
50	Where a request for information is refused in reliance on an exemption, the Act requires that the authority notifies the applicant which exemption has been claimed, and if it would otherwise not be apparent, why that exemption applies. Public authorities should not (subject to the proviso in section 17(4) i.e. if the statement would involve the disclosure of information which would itself be exempt information) merely paraphrase the wording of the exemption. The Act also requires authorities, when withholding information (other than under an "absolute" exemption), to state the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. Public authorities should specify the public interest factors (for and against disclosure) which they have taken into account before reaching the decision (again, subject to the proviso in section 17(4)).

Refusal because cost limit exceeded or vexatious

If the reason for refusal is that the cost limit would be exceeded or the request is vexatious, the refusal notice should explain this³¹. If refusing because the request exceeds the cost limit, it would be a good idea to explain the basis of your calculation. If the vexatious enquirer has already been given a refusal notice to this effect there is no obligation to do it again.³²

There are several reasons why a request for information may be refused. The table below explains various reasons why you might be refusing a request and what action should be taken as a result.

²⁹ Freedom of Information Act, s.17(3)

³⁰ Freedom of Information Act, s.17(4)

³¹ Freedom of Information Act, s.17(5)

³² Freedom of Information Act, s.17(6)

	Reason why refusing request	Action	Notes
1.	The information is not held by the organisation	Advise the applicant of the appropriate source.	This is not actually counted as a “refusal” but as a “negative response.” However, note that in the Environmental Information Regulations, it does count as a refusal.
2.	Vexatious or repeated requests (unless a reasonable interval has elapsed)	Issue a “refusal notice” stating that relying on the exemption s14(1) (if vexatious) or s14(2) (if repeated). If you’ve already issued a refusal notice in relation to a previous request and it would be unreasonable to serve another notice in relation to the current request, no response is required, but the decision should be documented ³³	You are not required to provide advice and assistance in relation to vexatious requests.
3.	The cost of locating and retrieving the information exceeds the limit	Issue refusal notice stating the fact that the cost of locating and retrieving the information would exceed the limit ³⁴ Explain the basis of the calculation. You must provide this notice within 20 working days ³⁵ .	You should provide “advice and assistance” to the applicant in re-scoping the request.
4.	The aggregated costs of two or more similar requests exceed the limit.	Issue refusal notice stating that the cost of locating the information would exceed the limit ³⁶ . You must provide this notice within 20 working days ³⁷ .	This applies where two or more requests are made by one person, or by different people who appear to be acting together (i.e. an organised campaign).
5.	The information is already available through the	Reply to applicant explaining how to access the information.	

³³ FOI Act s17(6)

³⁴ FOI Act s12(1)

³⁵ FOI Act s17(5)

³⁶ FOI Act s12(4)

³⁷ FOI Act s17(5)

	Reason why refusing request	Action	Notes
	publication scheme.		
6.	The information is in open access archives	FURTHER GUIDANCE ON THE INTERPRETATION OF THIS SECTION WILL BE PROVIDED IN DUE COURSE [The information may be exempt from the requirements of FOI. Reply to the applicant giving advice and assistance on how to access the information.]	
7.	The information is exempt from the requirement to confirm or deny whether the information is held.	Issue refusal notice saying authority does not have to confirm or deny by virtue of an exemption, specify the relevant exemption, and state why exemption applies ³⁸ . You are not required to say why the exemption applies, if to do so would mean revealing the exempt information ³⁹ . Careful wording will be needed if refusing to confirm or deny information is held so as not to reveal it is, in fact, held	Use stock paragraphs each time a request for this type of information is made, whether you hold the information or not.
8.	The information is exempt from the requirement to disclose information.	Issue refusal notice saying authority does not have to disclose the information by virtue of an exemption, specify the relevant exemption, and state why the exemption applies ⁴⁰ . You are not required to say why the exemption applies, if to do so would mean revealing the exempt information ⁴¹ . Where the exemption is subject to a public interest test, state in the refusal notice if the decision has not yet been made and give an estimate of date by which you expect the decision to have been made ⁴² .	Unless the exemption actually prohibits disclosure (e.g. a statute bar), the authority could still exercise its discretion and choose to disclose the information, having first consulted the creating authority.
9.	The exemption has been	After making the decision, issue a refusal notice. Two possible situations might apply:	This refusal notice may be issued outside the 20 day

³⁸ FOI ACT s17(1)

³⁹ FOI Act s17(4)

⁴⁰ FOI Act s17(1)

⁴¹ FOI Act s17(4)

⁴² FOI Act s17(2)

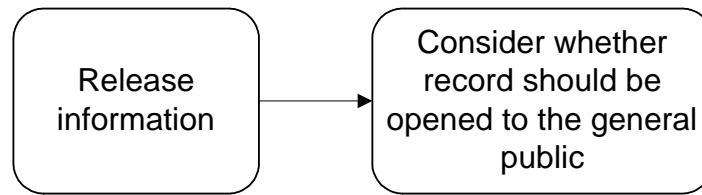
	Reason why refusing request	Action	Notes
	subject to a public interest test and the decision has been taken not to disclose.	<p>A) It would not be in the public interest to disclose the information⁴³. Give reasons for this decision in the refusal notice⁴⁴ or in a separate 'public interest' refusal notice within a reasonable time⁴⁵. Bear in mind whether giving the reasons would reveal the exempt information.</p> <p>B) It would not be in the public interest to disclose fact that the information is held⁴⁶. Give reasons for this decision in the refusal notice⁴⁷ or in a separate 'public interest' refusal notice within a reasonable time⁴⁸. Bear in mind whether giving the reasons would reveal the exempt information.</p> <p>The creating authority should supply the reason.</p>	limit - but the s.45 Code says you should aim to make all decisions within 20 working days.

ACTION:

- Do you know what should be in a refusal notice?
- Do you have a complaints procedure?
- Do you have a stock letter or stock paragraphs ready to use?

⁴³ FOI Act s17(3)
⁴⁴ FOI Act s17(1)
⁴⁵ FOI Act s17(3)
⁴⁶ FOI Act s17(3)
⁴⁷ FOI Act s17(1)
⁴⁸ FOI Act s17(3)

2.12 Providing the information



Key points:

- Try to accommodate applicants preferences for how they wish to access the information
- If a record contains both closed and open information, make sure the closed information is protected
- If a record is opened to one person, consider whether it should be opened to all.

Communicating the information

The FOI Act states that, within reason, public authorities should try to accommodate applicants wishes as to how they wish to access the information. Examples given are a) a copy of the information in permanent form or in another form acceptable to the applicant, b) an opportunity to inspect the record containing the information, or c) a digest or summary of the information. However, it also says that you can consider the cost implications when deciding whether a particular request is reasonable.

S.11(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely-

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference.

(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4) Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

Protecting information which is not yet open

If information is being released from a record which also contains information which remains closed, it will be necessary to take steps to protect the closed information. This can be achieved by:

- Transcribing the relevant sections
- Providing a photocopy of the open information, blanking out anything which is not to be released
- Allowing the enquirer to see the original document, but binding/taping up the “closed” pages and supervising very closely.

Redaction

If the information is held on paper, the pages affected should be photocopied, the text to be withheld either by deleting with a thick black felt pen or by cutting it out. The redacted version should then be photocopied again and the photocopy sent to the applicant. Check first that the sensitive text is not visible against light.

To remove any possibility of doubt as to what was actually released, in case the applicant complains to the Information Commissioner and the case has to be reviewed, it would be a good idea to make two copies and keep one with the case papers of the enquiry. Alternatively, if there is likely to be general public interest in the information, keep a public access copy of the part-record and amend the catalogue accordingly.

The National Archives will provide further guidance on redaction.

Open to one, open to all?

In some cases it may be that the record was previously closed, but after examination it was discovered that there were no exemptions applying. Consider whether the record should be made open to the public generally. The creating authority should be consulted about this; see section 2.10 for further guidance on consulting the record creators. This is especially important if the original enquiry related to one small section of the record, as different issues may need to be considered.

ACTION:

- Look into the various options available for providing access, and consider whether they offer a reasonable variety of methods. For example, if the applicant wished to have an electronic copy of the information, could this be provided?

2.13 Enquiry closed, access decisions recorded.

Close the enquiry, log the decision and file the records

Key points:

- It is important to record what happened in case there is a complaint.

Record the outcome

Once the enquiry is completed, make sure that a record is made of the enquiry, and that all the relevant sources of data are amended accordingly. This may include your enquiry logging/tracking system and the archival catalogue itself (which may contain access data).

para.	s.45 Code of Practice
51	For monitoring purposes public authorities should keep a record of all applications where either all or part of the requested information is withheld. In addition to a record of the numbers of applications involved where information is withheld, senior managers in each public authority need information on each case to determine whether cases are being properly considered, and whether the reasons for refusals are sound. This could be done by requiring all staff who refuse a request for information to forward the details to a central point in the organisation for collation. Details of information on complaints about applications which have been refused ... could be collected at the same central point.

The National Archives will provide guidance on how long records of FOI enquiries should be retained, in due course.

ACTION:

- When an enquiry is complete, where are you going to file the information?
- Do you have the facility to link notes of access decisions to the catalogue entry and vice-versa?

2.14 Complaints/Appeals

Key points:

- You should have a complaints procedure.
- Your complaints procedure should be well publicised
- The applicant's rights of complaint should be included in refusal notices and other FOI-related correspondence.
- If the complaint cannot be resolved, the applicant should be provided with contact details for the Information Commissioner.
- The creating department should be involved in any review of a decision to refuse access

If an applicant wishes to complain, they should follow a three step procedure.

1. The public authority's internal complaints procedure
2. Information Commissioner
3. Information Tribunal

If the complaint is against a refusal to provide the information, repeat the consultation process set out in 2.10.

The main points made by the s.45 Code of Practice (paragraphs 52-63) on this issue are:

Complaints procedure in place

- Each public authority should have a complaints procedure.
- It should be a "fair and impartial means of dealing with handling problems and reviewing decisions... It should be possible to reverse or amend decisions previously taken." They should provide a prompt response.
- If a public authority has not introduced a complaints procedure, applicants can complain to the Information Commissioner.
- "Where the complaint concerns a request for information under the general right of access, the review should be handled by a person who was not a party to the original decision, where this is practicable. . If this is not possible (for example in a very small public authority), the circumstances should be explained to the applicant."⁴⁹

Publicise complaints procedure

- The applicant's rights of complaint should be included in refusal notices and other FOI-related correspondence. They should explain how to make a complaint and inform the applicant of the right to complain to the Information Commissioner under section 50 if s/he is not satisfied.

Count dissatisfaction as a complaint

⁴⁹ s.45 Code of Practice, paragraph 57.

- Any written reply expressing dissatisfaction with the authority's response to a valid FOI request should be treated as a complaint.

Inform complainants of right to contact the Information Commissioner is dissatisfied

- If it cannot be resolved, the public authority should explain how applicants can contact the Information Commissioner, who may investigate the matter at his discretion.

Targets set for dealing with complaints

- Complaints should always be acknowledged and complainants should be informed of the authority's target date for determining the complaint. "Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint."⁵⁰ Target times should be reasonable, defensible, and subject to regular review. "Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets."⁵¹

Keep records and review procedures

- Records should be kept of all complaints and their outcome. Complaints should be monitored and procedures for dealing with requests reviewed and amended if necessary.

Outcome of complaint

- "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 and the applicant should be informed how soon this will be."⁵² Note that Places of Deposit should always consult with the creating authority in the same way as they would for the original enquiry.
- "Where the outcome of a complaint is that the procedures within an authority have not been properly followed by the authority's staff, the authority should apologise to the applicant. The authority should also take appropriate steps to prevent similar errors occurring in future."⁵³
- "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 or her right to apply to the Commissioner, and be given details of how to make an application, for a decision on whether the request for information

⁵⁰ S.45 Code of Practice, paragraph 58.

⁵¹ S.45 Code of Practice, paragraph 59.

⁵² S.45 Code of Practice, paragraph 61

⁵³ S.45 Code of Practice, paragraph 62

has been dealt with in accordance with the requirements of Part I of the Act.”⁵⁴

ACTION:

- Do you have a complaints procedure?
- Is it well publicised?
- Is it included in refusal notices and other FOI-related correspondence?
- Does it comply with the requirements of the s.45 Code?
- Does it make provision for consulting the creating department if the complaint is against a refusal?

⁵⁴ S.45 Code of Practice, paragraph 63