

**Ministry of Defence Access to Information
Guidance Note**

Version 6

April 2009

FOI Guidance Note Complaints & Appeals

This Guidance Note describes the MOD processes for the handling of appeals under the FOI Act and the EIRs. The Data Protection Act 1998 processes are documented separately. The FOI Act and the EIRs allow requestors to complain if they consider that MOD is not complying with its Publication Scheme or that a valid request has not been properly handled, or they are otherwise dissatisfied with the outcome of their request. (In general the EIR processes are the same as for the Act – differences will be highlighted in this document. References to the Act, in this document, also apply to EIRs unless otherwise stated).

Abbreviations and Glossary of Terms

Abbreviation/Term	Definition
AIT	Access (to) Information Toolkit
Complainant	A requestor becomes a complainant when s/he requests an appeal after the MOD independent internal review
Appellant	A complainant becomes an appellant when appealing to an Information Tribunal
Branch	For the purposes of this document also covers Ship, Unit, RAF Station etc
CIO CI	Chief Information Officer of MOD (formerly Directorate General Information) Corporate Information
CIO CI Access	The branch in CIO that is the MOD's lead on Open Government matters in general and implementation of the FOI/EIR.
CIO-CI-Access Rev	The team who undertake the initial staffing of the independent internal reviews on behalf of CIO-Hd Corp Information
CIO-Hd Corp Info	Chief Information Officer - Head of Corporate Information is the 1-star civil servant with overall responsibility for FOI and information handling matters in the MOD
DPA98	Data Protection Act 1998
EIR	Environmental Information Regulations 2004
FOI Act	Freedom of Information Act 2000
ICO	The Information Commissioner's Office is a UK independent supervisory authority reporting directly to the UK Parliament. The Office oversees and enforces compliance with FOI /EIR and DPA
MOJ	Ministry of Justice (formerly the Department for Constitutional Affairs)
OGDs	Other Government Departments
RFI	Request for Information
Requestor	Person who makes an initial request for information (RFI)
SME	Subject matter expert
SofS	Secretary of State (for Defence - unless otherwise stated)
Exemption	FOI provision for non-disclosure
Exception	EIR provision for non-disclosure

Background

1. This document describes the MOD processes for the handling of complaints under the Freedom of Information (FOI) Act 2000 and the Environmental Information Regulations 2004 (EIR). The Data Protection Act 1998 (DPA98) processes are documented separately. The FOI Act and the EIR allows requestors to complain if they consider that the Department has not complied with its publication scheme or that a valid request has not been properly handled, or they are otherwise dissatisfied with the outcome of their request (In general, the EIR processes are the same as for the Act – differences will be highlighted in this document. References to the Act, in this document, will also apply to EIR unless stated).
2. The Information Commissioner's office oversees and enforces the FOI Act. Poor performance generates a great deal of negative publicity for a Public Authority and can be damaging to its corporate reputation. It is therefore essential that complaints and appeals processes are applied correctly in accordance with this guidance.

Brief Overview of the Main Appeals Procedure

3. Any requestor who considers that their request for information (RFI) has not been properly handled, or who is otherwise dissatisfied with the outcome of the consideration of their RFI, should, in the first instance, try to resolve it informally in discussion with the official who dealt with it. This period of informal resolution is encouraged in an attempt to clarify outstanding points or resolve any misunderstandings at an early stage rather than proceeding direct to a formal review. If the applicant remains dissatisfied, s/he can complain to MOD's internal reviewer – Chief Information Officer (CIO) Head of Corporate Information – and request an independent internal review and then, if dissatisfied with the outcome of this appeal, to the Information Commissioner (IC). The IC will review both the handling and substance of the RFI response and the outcome of the internal review and will examine whether the Act has been applied properly in refusing to release information. If it is decided that an exemption has not been properly applied or the public interest test not weighed properly, the IC can require release of the information through an Enforcement Notice. There is a further level of appeal to an Information Tribunal. This involves either the appellant or the MOD (with MOJ assistance) appealing against the decision of the IC. Points of law arising from Tribunal decisions can be appealed in the High Court.

Initial Stage

Requests for Information

4. In most cases the distinction between the initial request and the MOD independent internal review stages should be clear. Apart from offering advice, CIO CI Access would not expect to be involved with cases at the initial request stage. The more obvious exceptions to this are for cases that have to be referred to the MOJ Clearing House (see paragraphs 6 and 7 below) and cases where CIO Information Access are the lead branch for responding to initial requests, for example, requests for information on MOD FOI processes. However, CIO CI Access carries out the MOD independent internal reviews and will be involved for all higher levels of appeal.

Request Handling

5. It is important to state in the RFI response that the requestor should, in the first instance, contact the official who replied to the request if they are dissatisfied with the response in order to try and clarify any points, and clear up misunderstandings rather than going direct to a formal independent internal review. Section 16 of the FOI Act requires Public Authorities to provide all reasonable advice and assistance to requestors and Branches should bear in mind this legal obligation in all their FOI/EIR correspondence.

6. The following actions must be carried out at the initial request stage:
 - a. The request must be logged and tracked on the AIT. Lead branches are required to keep copies of the following:

Ministry of Defence Access to Information

Guidance Note

Version 6

April 2009

- The original request
- The information considered to be within the scope of the request (where there is a large volume of documents it may be helpful to produce a schedule of the documents in the form of a table).
- If information was not held, a record of all those parts of the department which were contacted in the search.
- Any acknowledgement of the original request.
- Any letters of clarification, e-mails or records of telephone calls with the requestor.
- Any notifications of additional time to examine the public interest.
- If information was withheld or redacted, an annotated copy of the information in scope showing which exemption has been applied against each individual redaction (in schedule format is large volume of documents).
- Documents setting out the public interest test if qualified exemptions were used to withhold information.
- Where Section 12 is applied (exceeds the cost limit for compliance) details of how estimate of cost was calculated.
- Any communications with, opinions of, or advice from third parties on release (including the MOJ Clearing House or OGDs if they advised).
- Evidence of 1* approval to use qualified exemptions.
- The final response sent (signed and dated) along with a copy of any information disclosed to the requestor.

If there is a request for an independent internal review, CIO Information Access will ask for this information.

b. Keep the requestor informed throughout the initial request stage, especially if a response is delayed for any reason. The IC will investigate our handling procedures as well as our responses, so even if our decision was correct we can still be censured if our handling was poor.

c. The following text must be included at the end of the response to the applicant:

If you are not satisfied with this response or you wish to complain about any aspect of the handling of your request, then you should contact me in the first instance. If informal resolution is not possible and you are still dissatisfied then you may apply for an independent internal review by contacting the Head of Corporate Information, 6th Floor, MOD Main Building, Whitehall, SW1A 2HB (e-mail CIO-XD@mod.uk). Please note that any request for an internal review must be made within 40 working days of the date on which the attempt to reach informal resolution has come to an end.

If you remain dissatisfied following an internal review, you may take your complaint to the Information Commissioner under the provisions of Section 50 of the Freedom of Information Act. Please note that the Information Commissioner will not investigate your case until the MOD internal review process has been completed. Further details of the role and powers of the Information Commissioner can be found on the Commissioner's website, <http://www.ico.gov.uk>.

d. Any follow-up correspondence from the requestor should be treated in one of the following ways:

- A new request– book into the AIT system and staff separately.

Ministry of Defence Access to Information

Guidance Note

Version 6

April 2009

- A request for clarification of the MOD response by the applicant – clarify the response that was sent (i.e. informal resolution).
- A formal complaint by the requestor– any expression of dissatisfaction with the way the RFI was handled should be considered as a formal complaint. The requestor should be advised that the matter has been referred to the CIO-Head of Corporate Information who will conduct an independent internal review of the case. All requests for internal reviews received by branches must be redirected to the CIO-Hd Corp Info.

Clearing House Involvement

7. The central Clearing House, located within the MOJ, helps ensure consistency of approach across central Government in relation to the application of FOI, DPA and EIR.

8. The Clearing House is to be notified of certain types of cases at both the RFI and Internal review stages, in accordance with their own guidance. The notification process is described in a separate document produced by the MOJ.

MoD Independent Internal Reviews

9. An independent internal review is the first appeal stage if the Department refuses to provide requested information or fails to comply with the Act at the initial request stage. If a requestor has complained to the IC *before* seeking an internal review, the Department will contact the requestor to inform them that a review will now take place. **The CIO Head of Corporate Information is responsible for all liaison with the ICO on behalf of MOD and if a Branch or focal point receives any direct communication from the IC it must be forwarded to the CIO Information Access review team for action.** On rare occasions the MOD will pass the complaint directly to the IC but any decision to do this will be taken by the review team.

10. The internal review involves a full reconsideration of the handling of the case, as well as the final decision. It provides an opportunity for the MOD to put its own house in order prior to intervention by the Information Commissioner. CIO Hd Corp Info may conclude that more information should be disclosed, but we proceed with this course only when we have reached agreement with the lead branch, and the 1 star official who signed off the original response, should it be necessary. CIO CI Access Rev will play devil's advocate by anticipating the position that will be taken by the ICO if they are called upon to consider the complaint – that is, testing whether information has been released wherever possible and that if information has been withheld that the arguments for withholding it will stand up to scrutiny.

11. The MOD internal review process is as follows:

a. On receipt of a request for an internal review, the CIO CI Access Review Team will acknowledge the letter and inform the complainant of the target date Hd Corp Info will aim to respond. The Department sets the internal target time for responding to the applicant (in accordance with the Code of Practice) and this is currently 40 working days. However, many reviews will be completed in a shorter period. CIO CI Access will be responsible for keeping the complainant informed if the intended deadline cannot be met.

b. CIO CI Access Rev will request a full history of the case from the lead branch that responded to the original request – see above for list of what they will request to see. In order to complete the review within the target time, the relevant documents must arrive in CIO Information Access within 3 working days.

c. The internal review will consist of an analysis of the evidence; consideration of the appropriateness of the exemption(s) cited; review of the arguments for withholding/disclosing information in the particular circumstances of the case; and consideration of whether the public interest has been properly considered, consulting the business area that handled the initial request where necessary. Dialogue with the lead branch concerned will include issues raised and the

**Ministry of Defence Access to Information
Guidance Note**

Version 6

April 2009

proposed way forward, taking into account both our obligations and any particular sensitivities associated with the case.

d. CIO CI Access Rev will seek advice and assistance from appropriate MOD internal where required.

e. Where the decision on the initial request was taken by someone in a position where a review cannot realistically be undertaken (for example, if CIO Hd Corp Info, responded to the applicant at the initial request stage), Hd Corp Info may consider waiving the MOD independent internal review. However, in most cases it is expected that an internal review will be possible. In the rare cases where an internal review cannot be held, the applicant will be informed and advised of his or her right of appeal to the ICO.

f. Before submitting to the CIO Hd Corp Info the proposed draft response to the complainant will be cleared with the lead branch concerned. In the event of disagreement CIO Hd Corp Info will contact the relevant 1-Star official to attempt to resolve the dispute. If there is still disagreement, a decision will be made either to refer the matter up the chain of command or to uphold the decision to withhold information (effectively passing the decision to the Commissioner).

g. In certain cases, it may be necessary to inform Ministers or senior officials that a response to a request for an MOD Independent Internal Review is being proposed, for example, for controversial or high profile issues - in these cases, the advice to CIO-Hd Corp Info will encompass a submission to the relevant Minister or senior official. Press Briefings will also be prepared by the CIO Information Access when necessary in conjunction with the Lead Branch/SME.

h. Where information has been withheld previously under Sections 23 or 24, CIO Information Access will refer the case again to NSLG.

12. There are two possible outcomes from the internal review:

- (1) The original decision is upheld,
- or
- (2) The original decision is overturned (in full or in part).

If the original decision is upheld

- Where the outcome of a review is that an initial decision to withhold information is upheld, or is otherwise in the MOD's favour, CIO Hd Corp Info will inform the applicant by letter and advise him or her of the right to take their complaint to the Information Commissioner under the provisions of section 50 of the FOI Act

If the original decision is overturned (in full or in part)

- Where the outcome of a complaint is that an initial decision to withhold information is overturned (in full or in part), CIO Hd Corp Info will inform the applicant by letter and, either impart the information (or part of the information) in the letter or an attachment. The letter will also include the right to complain to the IC.
- Where the outcome of a complaint is that the MOD procedures have not been properly followed by the Department's staff, the response to the applicant will contain an apology. CIO CI Access Rev will take appropriate steps to prevent similar errors occurring in the future (including revising these processes, if necessary). Other appropriate corrective action may include preparing a note for CIO Hd of Corp Info to send to the 1 star who approved the previous response pointing out any failures to comply with the Act so that remedial action can be taken.

13. The outcome of the review will be taken into account as part of monitoring of complaints generally. A full record of the review will be kept by the CIO CI Access Review Team for use in the event of an appeal to the Information Commissioner.

Appeals to the Information Commissioner

The CIO Head of Corporate Information is responsible for all liaison with the ICO on behalf of MOD. All correspondence from the Office of the Commissioner to MOD should therefore be forwarded to the CIO-Head of Corporate Information for reply.

The IC will notify MOD of any complaint received.

If further information is required a member of CIO Access Rev will contact the lead branch as and when necessary.

The Information Commissioner will usually require sight of any information that has been withheld in order to reach a decision. In most cases this will be facilitated by the CIO Information review team, with the assistance of the SMEs in cases where a site visit is required. However, there will be some information that the IC is not permitted to see and in these circumstances a written statement from 'an appropriate person' should satisfy the needs of the ICO. Certificates can be issued under section 23 and 24, though we have not issued any to date. Certificates have the effect of ensuring that these exemptions apply. Care must be taken in all communications with the IC to ensure that no exempt information is inadvertently allowed into the public domain, it is for this reason, and to ensure consistency, that all correspondence with the IC is via CIO Access Rev.

Should the case progress to Tribunal (see below) the lead branch may be required to provide a 1* witness for the hearing.

In some cases the Commissioner will reach an informal decision with the involvement of the complainant and the MOD. In all other cases he will issue a formal decision notice. Any rulings made by the Commissioner will need to be carefully considered by the CIO-Head of Corporate Information on behalf of MOD.

Further information can be found on the Information Commissioner's website at <http://www.ico.gov.uk/>

Appeals to the Information Tribunal

When the Information Commissioner issues a Decision Notice under section 50 of the FOI Act MOD may wish to appeal to the Information Tribunal (IT). The complainant may also appeal to the IT if they are not satisfied with the IC decision. When a Decision Notice is appealed to the Tribunal, one of the parties to the original complaint (that is, the complainant or the public authority) will not automatically be a party to the appeal – the parties will be the person bringing the appeal, and the Commissioner. Where the public authority is not a party to the appeal, the Tribunal will very often require information from the public authority in order to determine a case. It will usually be in MOD's interest to join with the IC in defending any appeal against a decision made in our favour. The IT also has the power to receive evidence from people who are not parties.

Any decision to appeal must be taken quickly as a notice must be sent to the Information Tribunal (IT) within 28 days of receiving the notice from the Information Commissioner's Office. If the Department wishes to submit an appeal outside of this time limit, it can be done, but we must provide firm reasons for the delay in submission. Although IC Decision Notices are generally sent to either PUS or CIO Hd of Corporate Information, should one go astray and arrive anywhere else in the Department it is important that it be sent to CIO HD of Corporate Information immediately.

The IT cannot deal with complaints about a public authority or any other party. The IT will only hear appeals about decisions made by the Information Commissioner.

The IT practice notes can be found on the IT website at http://www.informationtribunal.gov.uk/Documents/formsguidance/InformationTribunalPracticeNotes_191208.pdf

**Ministry of Defence Access to Information
Guidance Note**

Version 6

April 2009

The Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/14) as amended by the Information Tribunal (Enforcement Appeals) Rules 2005 (SI 2005/450) can be found on the OPSI website at <http://www.opsi.gov.uk>