

Memorandum of Understanding between the Information Commissioner and the Keeper of Public Records

Introduction

1. This Memorandum of Understanding (MoU) establishes a framework for cooperation and information sharing between the Information Commissioner ("**the Commissioner**") and the Keeper of Public Records, acting also in his capacity as Chief Executive of The National Archives, collectively referred to as "**the parties**" throughout this document. In particular, it sets out the broad principles of collaboration and the legal framework governing the sharing of relevant information and intelligence between the parties. The aim of this MoU is to enable closer working between the parties (including the exchange of appropriate information), so as to assist them in discharging their statutory, regulatory or supervisory functions.
2. This MoU is a statement of intent that does not give rise to legally binding obligations on the part of either the Commissioner or TNA. The parties have determined that they do not exchange sufficient quantities of personal data to warrant entering into a separate data sharing agreement, but this will be kept under review. It does not – and cannot – affect the various regulatory or supervisory relationships existing under statute between the parties.

Overall purpose

3. The purpose of this MoU is to:
 - Facilitate contact and discussion on matters of common interest, particularly by sharing knowledge, information, expertise and best practice.
 - Ensure appropriate consultation in areas of policy and guidance development of mutual interest.
 - Provide a framework for co-ordination of audit and assessment work.

The role and function of the Information Commissioner

4. The Commissioner is a corporation sole appointed by Her Majesty the Queen under the Data Protection Act 2018 to act as the UK's independent regulator to uphold information rights in the public interest, promote openness by public bodies and data privacy for individuals.
5. The Commissioner is empowered to take a range of regulatory action for breaches of the following legislation:
 - Freedom of Information Act 2000 (FOIA);
 - Environmental Information Regulations 2004 (EIR);
 - Re-use of Public Sector Information Regulations 2015;
 - Environmental Protection Public Sector Information Regulations 2009 (INSPIRE Regulations);
 - Data Protection Act 2018 (DPA);
 - General Data Protection Regulation (UK GDPR);
 - Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR);
 - Investigatory Powers Act 2016;
 - Enterprise Act 2002;
 - Security of Network and Information Systems Directive (NIS Directive); and
 - Electronic Identification, Authentication and Trust Services Regulation (eIDAS).
6. The ICO is responsible also for promoting good practice with this legislation. In particular, the ICO promotes observance of the Codes of Practice under sections 45 and 46 of the FOIA¹ and may, with the consent of an authority, assess whether good practice is being followed.²

¹ FOIA s 47(1)

² FOIA s 47(3)

- 7.** The Commissioner is required to consult the Chief Executive of TNA in their capacity as Keeper of Public Records about the promotion of observance of the records management Code of Practice³ by bodies subject to the Public Records Act 1958 (PRA). The Commissioner is also required to consult the Chief Executive of TNA before issuing a practice recommendation to one of those bodies.⁴
- 8.** The Commissioner's regulatory and enforcement powers include:
- Issuing decision notices detailing the outcome of an investigation under FOIA or EIR;
 - Issuing information notices requiring public authorities, individuals, controllers or processors to provide information in relation to an investigation;
 - Conducting assessments of compliance with the DPA, UK GDPR, PECR, eIDAS, the NIS Directive, FOIA and EIR;
 - Issuing enforcement notices, warnings, reprimands, practice recommendations and other orders requiring specific actions by an individual or organisation to resolve breaches (including potential breaches) of data protection legislation and other information rights obligations;
 - Certifying contempt of court should an authority fail to comply with an information notice, decision notice or enforcement notice under FOIA or EIR;
 - Administering fines by way of penalty notices in the circumstances set out in section 155 of the DPA;
 - Administering fixed penalties for failing to meet specific obligations (such as failing to pay the relevant fee to the Commissioner); and,
 - Prosecuting criminal offences before the Courts.
- 9.** Regulation 31 of PECR, as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, also provides the Commissioner with the power to serve enforcement notices and issue monetary penalty notices as above

³ This is the Code of Practice issued under FOIA s 46. A separate Code under s. 45 sets out good practice in request handling

⁴ These consultation requirements are at FOIA s 47(5)(a) and s 48(3)

to organisations who breach PECR. This includes, but is not limited to, breaches in the form of unsolicited marketing which falls within the ambit of PECR, including automated telephone calls made without consent, live telephone calls which have not been screened against the Telephone Preference Service, and unsolicited electronic messages (Regulations 19, 21 and 22 of PECR respectively).

Overview of TNA's role and responsibilities⁵

- 10.** The National Archives is a UK non-ministerial Government Department. The Keeper of Public Records is the Chief Executive of The National Archives ["TNA"] Under Royal Warrant, he is sole Historical Manuscripts Commissioner. Under Letters Patent, he holds the office of Queen's Printer of Acts of Parliament and under statute the Office of the Queen's Printer for Scotland. By administrative action, he is also appointed as the Government Printer for Northern Ireland and Controller of Her Majesty's Stationery Office.
- 11.** TNA is the official archive and publisher of the UK government and for England and Wales and in that capacity is responsible for safeguarding and preserving public records⁶ in the care of the Keeper of Public Records and for doing what is necessary or expedient for maintaining the utility of the Public Record Office.⁷ This includes providing public access and related services to records that are available for public access in accordance with the FOI Act. As such, it is one of the largest (a) respondents to requests made under FOIA s.1 and (b) Records Authorities under FOIA s.15.
- 12.** TNA oversees the preservation of public records in 'places of deposit', i.e. other archives services appointed under the PRA to hold public records.⁸ This includes promoting good practice in preservation and access services to ensure they are comparable to those of TNA, and providing advice on a range of archives issues.

⁵ This overview focuses on The National Archives' roles and responsibilities as they bear on the MoU. It will be amended if statutory responsibilities are changed by legislation not yet enacted and/or commenced.

⁶ Public records are the records of UK Government Departments and associated bodies, of the courts, the armed services and the NHS.

⁷ Public Records Act 1958 s 2(4)

⁸ PRA s 4

- 13.** TNA provides guidance, co-ordination and supervision to Government Departments and other bodies subject to the PRA on the management of their records⁹ and hosts an online Information Management Self-Assessment tool.
- 14.** TNA is responsible, through the Keeper as the Queen's Printer of Acts of Parliament under Letters Patent, for the management and licensing of Crown copyright and Crown database right. In addition, through the Queen's Printer of Acts of Parliament, TNA has responsibility for the publication of UK legislation and the Gazette. The Keeper's responsibilities to publish legislation in Scotland and manage copyright in works created by the Scottish Government are managed in their role as the Queen's Printer for Scotland. In Northern Ireland, they are responsible for publishing legislation of the Northern Ireland Assembly and Executive.
- 15.** The present (April 2021) legal framework for information re-use comprises the Re-use of Public Sector Information Regulations 2015 ["RPSI"], which set out re-use rights public sector bodies must permit in the re-use of their public task information.¹⁰ TNA remains UK Government policy lead for RPSI and the Appeal Right and has published detailed guidance. It also maintains the UK Government Licensing Framework and particularly the Open Government Licence.
- 16.** TNA has the archive sector leadership responsibility in England and provides a policy, information and advice role for Government, engages with archives services and their parent bodies to respond to Government policy and encourages new thinking and initiatives across the sector to enhance and strengthen provision. In line with the Historical Manuscripts Commission warrant, it is a partner in the UK Archives Accreditation Partnership.

Purpose of information sharing

- 17.** The purpose of the MoU is to enable the parties to share relevant information, which enhances their ability to exercise their respective functions.
- 18.** This MoU should not be interpreted as imposing a requirement on either party to disclose information in circumstances where doing so

⁹ PRA s 3(2)

¹⁰ Re-use Regulations, Regulations 8-15

would breach their statutory responsibilities. In particular, each party must ensure that any disclosure of personal data pursuant to these arrangements fully complies with both the UK GDPR and the DPA 2018. The MoU sets out the potential legal basis for information sharing, but it is for each party to determine for themselves that any proposed disclosure is compliant with the law.

Principles of cooperation and sharing

- 19.** The parties recognise that they have complementary expertise and overlapping interests. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at their discretion, the parties will endeavour to co-operate and work together insofar as their respective roles permit. They will share knowledge, expertise, best practice and intelligence in relation to matters of mutual interest and, if there is an overlap or a mutual interest in a policy area, they will consult as appropriate.
- 20.** The parties are committed to the principle of good communication with each other, especially when one organisation's work may have some bearing on the responsibilities of the other organisation. The organisations will seek to alert each other as soon as practicable to relevant developments and issues within their area of responsibility, subject to complying with any relevant legal requirements applying to the disclosure of information.
- 21.** The parties will comply with the general laws they are subject to, including, but not limited to, local data protection laws; the maintenance of any prescribed documentation and policies; and they will comply with any governance requirements, in particular relating to security and retention, and process personal data in accordance with the statutory rights of individuals.

Promotion of good practice

- 22.** The parties both provide online guidance to help public authorities understand and meet their statutory obligations. Both organisations agree to provide links to relevant guidance produced by the other organisation, and to encourage public authorities to use guidance produced by the other organisation, where appropriate.

- 23.** The parties also provide guidance to data controllers and processors subject to the UK GDPR and the Data Protection Act 2018, centring in TNA's case on the definition of archiving purposes.
- 24.** The parties agree that when producing guidance that is relevant to the responsibilities of the other organisation they will consult the other organisation.
- 25.** The parties agree that when they receive a request for policy advice that raises issues relevant to the responsibilities of the other organisation they will consult the other organisation.
- 26.** When improvements in practice are required to conform to the Codes of Practice under sections 45 and 46 of the FOIA, the ICO may issue a Practice Recommendation to the public authority. When the required improvements relate to records management, archive services or the re-use of public sector information, the ICO will consult TNA. The final decision as to whether a Practice Recommendation should be issued and on its contents will be taken by the ICO.
- 27.** When the ICO considers a more appropriate course of action would be for the public authority to sign an Undertaking in relation to the good practice referred to in paragraph 26, the ICO will consult TNA. The final decision as to whether an Undertaking should be sought and on its contents will be taken by the ICO.
- 28.** The parties' engagement in international networks and organisations promoting good practice in the management of records and archives and public access to them may prompt joint working within or between such networks. These may include, but not necessarily only include, the International Committee of Information Commissioners and the International Council on Archives.

Assessment of good practice

- 29.** TNA and the ICO carry out a number of assessment and audit programmes, which assess compliance with relevant statutory obligations, policies, standards and guidance and also highlight good practice. TNA and the ICO will co-ordinate this work as far as possible in order to avoid duplication, present a joined-up approach to Government Departments and other public authorities and share good practice.

- 30.** The principal means of monitoring conformity with the records management Code of Practice will be self-assessment by public authorities, using tools provided by TNA. TNA will provide support for self-assessment if the particular circumstances of the case make this appropriate, subject to the necessary resources being available.
- 31.** TNA will share its assessment of the current levels of conformity with the records management Code of Practice. The ICO may refer to these assessments in the Information Commissioner's annual report to Parliament.
- 32.** The Commissioner may request TNA to undertake an assessment of a public authority's practice with regard to records management. As a general rule, a request for assessment will relate to areas of particular concern within that public authority. TNA will consider all such requests. The scope and type of assessment, the level of commitment involved and the timing will be mutually agreed in relation to each request.
- 33.** If, having conducted an assessment at the Commissioner's request, TNA considers that a Practice Recommendation or an Undertaking is required, the report to the ICO will include a recommendation to this effect with suggestions as to content.
- 34.** If the ICO proposes to issue an Information Notice to a public authority in order to obtain more information concerning its current practice than the public authority has provided, and the information is connected to either records management or to the re-use of public sector information, the ICO will consult TNA.
- 35.** If an assessment of the practice of archives services in relation to the Code of Practice under section 45 of the FOIA appears to the ICO to raise general issues concerning archives policy and professional practice, the ICO will consult TNA. The final decision on the appropriate course of action will be taken by the ICO.

Legal basis for sharing information

- 36.** This MoU is without prejudice to any legal or administrative arrangements in place for co-operation of either organisation with other parties in the exercise of their duties. These include, but are not limited to, the Department for Digital, Culture Media and Sport (which sponsors both Parties), the Scottish Information

Commissioner, the First Tier Tribunal (Information Rights) and the Cabinet Office.

Information shared by TNA with the Commissioner

- 37.** The Commissioner's statutory function relates to the legislation set out at paragraph 4, and this MoU governs information shared by TNA to assist the Commissioner to meet those responsibilities. To the extent that any such shared information is to comprise personal data, as defined under the UK GDPR and DPA 2018, TNA is a Data Controller so must ensure that it has the legal basis to share it and that doing so would otherwise be compliant with the data protection principles.
- 38.** Section 131 of the Data Protection Act 2018 may provide a legal basis for TNA to share information with the Commissioner. Under this particular provision, TNA is not prohibited or restricted from disclosing information to the Commissioner by any other enactment or rule of law provided it is "*information necessary for the discharge of the Commissioner's functions*".

Information shared by the Commissioner with TNA

- 39.** The Commissioner, during the course of her activities, will receive information from a range of sources, including personal data. She will process all personal data in accordance with the principles of the UK GDPR, the DPA 2018 and all other applicable legislation. The Commissioner may identify that information she holds, which may include personal data, ought to be shared with TNA as it would assist them in performing their functions and responsibilities.
- 40.** Section 132(1) of the DPA 2018 states that the Commissioner can only share confidential information with others if there is lawful authority to do so. In this context, the information will be considered confidential if has been obtained, or provided to, the Commissioner in the course of, or the purposes of, discharging her functions, relates to an identifiable individual or business, and is not otherwise available to the public from other sources. This therefore includes, but is not limited to, personal data. Section 132(2) of the DPA 2018 sets out the circumstances in which the Commissioner will have the lawful authority to share that information with TNA. In particular, it will be lawful in circumstances where:

- The sharing was necessary for the purpose of the Commissioner discharging her functions (section 132(2)(c));
- The sharing was made for the purposes of criminal or civil proceedings, however arising (section 132(2)(e)); or
- The sharing was necessary in the public interest, taking into account the rights, freedoms and legitimate interests of any person (section 132(2)(f)).

- 41.** The Commissioner will therefore be permitted to share information with TNA in circumstances where it has determined that it is reasonably necessary to do so in furtherance of one of those grounds outlined above. In doing so, the Commissioner will identify the function of TNA with which that information may assist, and assess whether that function could reasonably be achieved without access to the particular information in question. In particular, where the information proposed for sharing with TNA amounts to personal data the Commissioner will consider whether it is necessary to provide it in an identifiable form in order for TNA to perform its functions, or whether disclosing it in an anonymised form would suffice.
- 42.** If information to be disclosed by the Commissioner was received by her in the course of discharging her functions as a designated enforcer under the Enterprise Act 2002, any disclosure shall be made in accordance with the restrictions set out in Part 9 of that Act.
- 43.** Where information is to be disclosed by either party for law enforcement purposes under section 35 (4) or (5) of the DPA 2018 then they will only do so in accordance with an appropriate policy document as outlined by section 42 of the DPA.
- 44.** Where a request for information is received by either party under data protection laws or FOIA, the recipient of the request will seek the views of the other party as described in the FOIA section 45 Code of Practice, where the information being sought under the request includes information obtained from, or shared by, the other party. However, the decision to disclose or withhold the information (and therefore any liability arising out of that decision) remains with the party in receipt of the request as Data Controller in respect of that data.

Method of exchange

- 45.** Appropriate security measures shall be agreed to protect information transfers in accordance with the sensitivity of the information and any classification that is applied by the sender.

Confidentiality and data breach reporting

- 46.** Where confidential material is shared between the parties it will be marked with the appropriate security classification.
- 47.** Where one party has received information from the other, it will consult with the other party before passing the information to a third party or using the information in an enforcement proceeding or court case.
- 48.** Where confidential material obtained from, or shared by, the originating party is wrongfully disclosed by the party holding the information, this party will bring this to the attention of the originating party without delay. This is in addition to obligations to report a personal data breach under the UK GDPR and/or DPA where personal data is contained in the information disclosed.

Duration and review of the MoU

- 49.** The parties will monitor the operation of this MoU and will review it every two years. The MoU will be published on the parties' websites.
- 50.** The Commissioner and the Chief Executive of TNA will meet at least once a year, and more frequently if required, to discuss matters of mutual interest and the operation of this MoU. These meetings may be deputised to Executive or Senior level when necessary and will also be underpinned by regular liaison between their officials including meetings, as and when required.
- 51.** Any minor changes to this memorandum identified between reviews may be agreed in writing between the parties.
- 52.** Any issues arising in relation to this memorandum will be notified to the point of contact for each organisation.

Key contacts

- 53.** The parties have both identified a key person who is responsible for managing this MoU.
- 54.** Those individuals will maintain an open dialogue between each other in order to ensure that the MoU remains effective and fit for purpose. They will also seek to identify any difficulties in the working relationship, and proactively seek to minimise the same.

Signatories

**Information Commissioner,
Information Commissioner's
Office**

**Chief Executive and Keeper,
The National Archives**

Elizabeth Denham

Jeff James

29 April 2021

Note: This document has been signed and signatures redacted for publication.