

FOI and Transparency regulatory manual 2023



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Introduction

Who is this manual for?

This manual is an internal working document aimed at all levels of staff within the Freedom of Information and Transparency Directorate (FOI and Transparency Directorate).

What is the purpose of this manual?

This manual sets the framework for how the FOI and Transparency Directorate will take regulatory action in line with the Commissioner’s statutory powers. It outlines how we will implement in practice our published Regulatory Action Policy (RAP) and utilise our statutory powers.

It is important that we use the regulatory powers under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) fairly, consistently and in line with the Commissioner’s RAP.

The RAP sets out how the Commissioner intends to make the best use of his powers and outlines the circumstances when he will take regulatory action and the outcomes that any action aims to achieve. This makes it clear that any regulatory action must be proportionate, lawful, fair and rational.

What is the status of this manual?

This is the ICO’s FOI and Transparency regulatory manual. It contains practical guidance covering much of our regulatory powers under FOIA and the EIR.

The manual is designed to be pragmatic. It identifies the methodology and process which the FOI and Transparency Directorate has developed to utilise the Commissioner’s statutory powers. These processes are designed to be flexible and departure from the manual may in some cases be necessary on a discretionary basis and where justified on the facts of a particular case.

What is this manual not?

This manual is not intended to be a full and complete breakdown of all elements of the FOI and Transparency directorates regulatory work. It does not form part of the ICO’s RAP, or other policy position – and instead should be considered as helpful guidance, on a practical level, for staff working in the FOI and Transparency Directorate.

How should I use this manual?

This manual should be used as a point of reference, or practical tool when considering and taking regulatory action. It includes key considerations for how you should decide which of our regulatory options may be appropriate.

What is the scope of this manual?

The scope of this manual covers the ICO's approach to:

- Issuing Decision Notices;
- Issuing Information Notices;
- Making Practice Recommendations;
- Issuing Enforcement Notices; and
- Certifying cases of Contempt to the High Court

The issuing of Decision Notices is the most routine form of regulatory action undertaken by FOI casework to order disclosure of requested information. We have established processes for the regular practice of issuing Decision Notices, and Information Notices on individual cases, which are included in the [FOIA/EIR service guide](#), [case handling process map](#) and [DN - sign off procedure](#). However, this document deals with action relating to non-compliance with Decision Notices and Information Notices along with wider concerns with the performance of public authorities.

Exclusions

This manual does not include the ICO's approach to the criminal offence at section 77 FOIA. The ICO's Criminal Investigation Team are responsible for consideration of, and prosecution for, an offence under section 77 FOIA in accordance with the [ICO Prosecution Policy](#). The ICO's Investigations directorate has a separate [manual](#).

The provision at section 55 and Schedule 3 of FOIA to ask the court for a warrant, which is most likely to be used in connection with section 77 FOIA, is also not included in this manual.

The Commissioner's power to lay a report before Parliament, which may be used if there is evidence of a systemic problem relating to a particular issue or organisation or sector, is also not included in this manual.

Regulatory context

What are the ICO's regulatory responsibilities and powers under FOIA?

Section 47 FOIA lists our general responsibilities which include:

- promoting good practice by public authorities and to perform our obligations so as to encourage public authorities to follow FOIA requirements and the associated codes of practice;

- sharing information with the public about how FOIA works, what good practice looks like and what the ICO's role is in relation to FOIA;
- giving advice to the public and public authorities about FOIA; and
- assessing whether a public authority (with their consent) is following good practice.

The Section 45 Code of Practice gives recommendations for public authorities about their handling of requests. Its coverage includes:

- timeliness;
- the situations in which advice and assistance should be given to those making requests;
- the complaints procedures that should be in place;
- and various considerations that may affect relationships with other public bodies or third parties.

The Section 46 Code of Practice covers good records management practice and the obligations of public authorities under Public Records legislation.

If we believe a public authority is not acting appropriately regarding their duties under FOIA associated codes of practice, then we can (under section 48 FOIA) make formal recommendations explaining what they need to do to meet their obligations. Where such a recommendation relates to the section 46 Code of Practice about good record keeping and compliance with the relevant Public Records Act, we will consult with The National Archives.

Anyone can ask us to decide whether a public authority dealt with their particular request for information in line with FOIA. If we decide that they did not, we can issue a Decision Notice (in compliance with section 50 FOIA) which tells the public authority what they must do to comply with FOIA.

If we are not sure whether a public authority is complying with FOIA or we need further information, then we can issue an information notice (section 51 FOIA). This requires the public authority to provide information to us which helps us to decide.

If we decide that a public authority is not complying with FOIA, then we can issue an enforcement notice (section 52 FOIA). This can make the public authority comply with any of the requirements of Part I of FOIA). If a public authority does not comply with a notice we issue, then we can certify to the court to make it aware of this (section 54 FOIA). This could result in the public authority being held in contempt of court.

Under section 77 FOIA we may decide to take a public authority (or any person who is employed by, an officer of or subject to the direction of the public

authority) to court for an offence of altering records with intent to prevent disclosure (except for offences committed in Scotland, which we would refer to the Procurator Fiscal).

What are the ICO's regulatory responsibilities and powers under the EIR?

Our responsibilities and powers under FOIA (see above) also apply to the EIR.

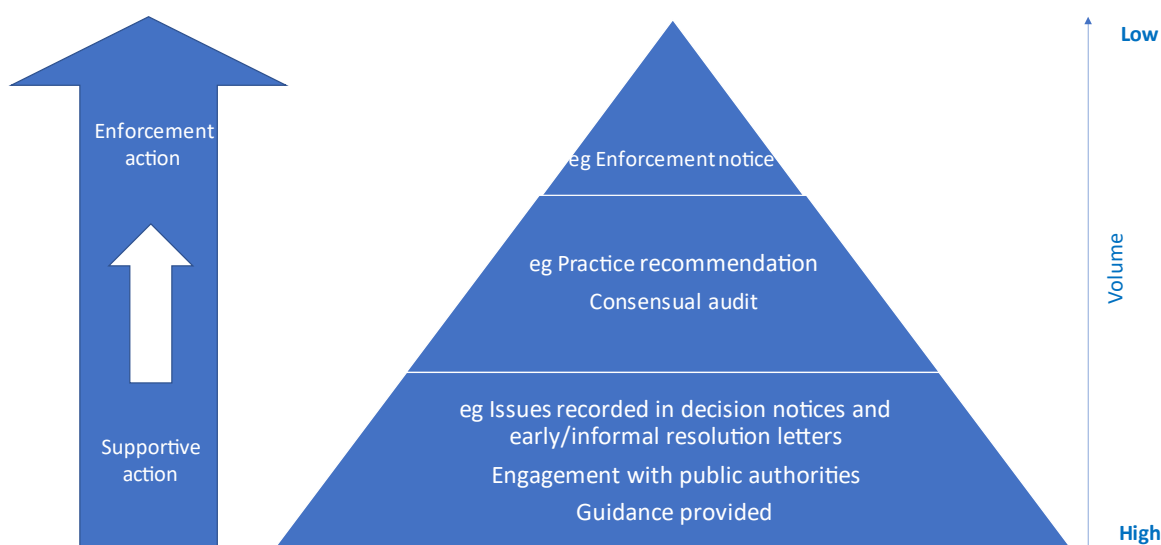
These include the power to issue a practice recommendation in relation to the Code of Practice under regulation 16 of the EIR.

The regulation 16 Code of Practice provides guidance on how to deal with requests for environmental information and states what level of procedural service would be good practice for public authorities to achieve.

What is monitoring and what are we using it for?

Monitoring is the collation of quantitative and qualitative evidence as to a public authority's compliance with FOIA and the EIR and any trends or patterns of behaviour within sectors or other groups of public authorities. Our aim is not simply to create relatively static lists of the 'most complained about' authorities, but to take a holistic view of the evidence we can see about the quality of compliance with information rights law across the regulated community.

We use monitoring to identify where we can increase our level of support to public authorities through our approach to upstream regulation and where we should use our statutory powers due to consistently poor performance and failure to comply with the law. The diagram below shows a likely hierarchy of some of our outcomes.



Not all monitoring will result in regulatory action. As described in the 'Making decisions' section below, we will review the results of the evidence from monitoring to decide on an appropriate course of action.

Who carries out this work?

The regulatory responsibilities and powers under FOIA and the EIR are predominantly undertaken by staff within the FOI and Transparency Directorate. These include:

- Director of FOI and Transparency: responsible for strategic leadership and direction of the team.
- Head of Casework: responsible for oversight of the casework function and FOI policy.
- Group and Team Managers: responsible for all casework teams and ensuring the quality and timeliness of casework.
- Principal Advisers and Upstream Regulation Manager (and related teams): responsible for a range of support functions from policy and Tribunal reviews, to monitoring activity and upstream regulation.
- Caseworkers: responsible for delivering timely, high quality casework within organisational KPIs.

These staff work with others across the organisation to support the use of these powers. For example, the ICO's Legal Services (FOI Appeals) take action in respect of contempt of court proceedings for failure to comply with a notice we issue.

See Appendix 1 for more details as to specific roles and responsibilities of staff within the FOI and Transparency Directorate in relation to taking regulatory action in line with this manual.

Who are the high-level decision makers?

As a Corporation Sole, the Information Commissioner's functions are vested personally in the Commissioner. However, the Commissioner is able to delegate his functions to officers and staff. The [Scheme of Delegations](#) formally details the Commissioner's main delegations.

Carrying out our work

Monitoring performance

We take an evidence-based approach to monitoring performance using what we see from casework, other internal evidence, and, where available, external information.

Evidence from casework

We must capture concerns about the way that public authorities have dealt with information requests in a way that allows us to identify trends or patterns of

behaviour. This will provide evidence that will allow us to consider regulatory action on the basis of a public authorities overall performance. These concerns will be apparent to case officers as they process casework.

All case officers should record concerns identified through day-to-day casework as they arise. This allows for specific issues, for example timeliness and inappropriate use of exemptions, to be recorded in a consistent manner and enables the managers to track emerging issues to inform strategic considerations.

If a caseworker has a strong concern about an individual case, they should consider what action could be taken and discuss with their manager immediately.

Examples of this include, but are not limited to, the following:

- The PA has a significant backlog of requests.
- The PA cannot process requests for some reason.
- The PA is obviously failing to engage on a case.
- The PA is clearly failing to comply with provisions of the Codes of Practice.
- The PA has approached the case officer to raise awareness of issues with their performance.

Other evidence

The ICO sees a small percentage of the information requests made to public authorities via casework. We need to continue to find ways to factor in how public authorities deal with the cases that don't get raised with us, within our resource constraints. We consider overall performance statistics from central government and will continue to explore what other information is available in relation to other public authorities and sectors (such as data in Annual Reports, responses to previous requests that are available online etc) to make decisions on whether regulatory action is appropriate.

We develop on-line assessment tools for different aspects of compliance and will look at how well these are being used by public authorities where possible. We will also consider a public authority's approach to their FOI and EIR obligations generally by looking at their proactive disclosure and publication schemes.

We will also use the responses to ICO decision and information notices as evidence of a public authorities overall approach to the legislation.

Using intelligence

The ICO's Intelligence Department produces a number of analytical intelligence products, both proactively and reactively. We will give consideration to these and our overall approach will be guided by the ICO's wider regulatory priorities, working with the Prioritisation Department where relevant.

The intelligence products may recommend specific themes or sectors of interest and inform regulatory decisions. In turn, information collected by the Directorate will be structured in a way to allow analysis by the Intelligence Department alongside wider ICO datasets.

Considering our approach

Formal regulatory action decisions will ultimately be made in line with our delegated authorities.

To support our new more strategic approach, however, a senior oversight group looks holistically at the evidence we are seeing across the public sector about compliance with information rights law. This group meets regularly and includes the managers, Principal Advisers, the Upstream Regulation Manager, the Head of Casework and the Director of FOI and Transparency. Other attendees are invited as necessary, including from the organisation more widely. The group is chaired by the Upstream Regulation Manager who, being a step removed from casework, can bring independent challenge. Discussion is led by the managers and Principal Advisers, who will propose regulatory action based on the latest intelligence from their sectors and the broader evidence available. This informs our thinking on what action may be needed.

The purpose of the meetings is to ensure consistency and to adopt a proportionate and impactful approach, in line with capacity and our resources, whereby use of our range of regulatory powers becomes business as usual. It also helps us identify where individual public authorities, or sectors more generally, may benefit from support from our upstream regulation team to support improvements in performance.

It also discusses our plans for taking regulatory action and whether this is being progressed quickly enough and in a consistent way across sectors based on the evidence we are seeing.

Although the focus is on FOI and EIR casework, we also need to routinely consider enforcement activity in the context of the wider performance of a public authority in relation to Data Protection and other legislation we regulate. This includes ensuring that any regulatory action taken in relation to data protection and any other casework does not adversely affect access to information rights as public authority's resource any remedial activity they are taking in other areas.

Alongside the operation of this manual therefore, the managers take responsibility for co-ordinating with Public Advice and Data Protection Complaints (PADPC), Regulatory Assurance and other colleagues to horizon scan upcoming regulatory activity and identify overlaps.

Taking regulatory action

The action we may take can be characterised into three levels:

- Level 1:
 - Record an individual/potentially systemic issue in the 'other matters' section of a Decision Notice, Information Notice or early/informal resolution letter.
 - Informal engagement with a public authority to understand how it is performing in practice.

These actions may also include providing guidance or seeking informal remedial action such as an action plan to be developed.
- Level 2:
 - Issue a Practice Recommendation to deal with a repeated or potentially significant issue;
 - Issue an Information Notice to formally require the provision of information about a public authorities compliance with Part 1 of FOIA or the Codes of Practice; and/or
 - offer a consensual audit.
- Level 3:
 - Issue an Enforcement Notice to deal with a repeated and/or significant or systemic issue.
 - Certify failure to comply with a statutory notice to the High Court.

FOI case officers may take all levels of action, subject to input from Regulatory Assurance and Legal (for example, Regulatory Assurance may conduct an audit and Legal may certify failure to comply with a statutory notice to the High Court).

Managers will be responsible for:

- Liaising with colleagues outside of FOI to consider enforcement activity in the context of the wider performance of a public authority.
- Providing support with drafting Practice Recommendations and Enforcement Notices.
- Reviewing Practice Recommendations and Enforcement Notices.
- Managing communication of action taken.
- Following up and evaluating action taken.

These tasks may be delegated to case officers as the manager sees fit.

Practice recommendations will be signed off by a level F. Enforcement notices will be signed off by either the Director of FOI and Transparency or the Head of FOI complaints. Legal will input into Enforcement notices where novel issues are involved.

Aggravating and mitigating factors will be taken into account as described in the RAP. Although all factors in the RAP are available for consideration, we envisage the following to be particularly relevant when we consider use of our regulatory powers under the FOIA and EIR:

Aggravating factors

- the attitude and conduct of the person or organisation concerned suggests an intentional, wilful or negligent approach to compliance;
- the breach or potential breach is particularly serious;
- the person or organisation significantly or repeatedly failed to follow the good practice set out in the codes of practice we are required to promote;
- the person or organisation did not follow relevant advice, warnings, consultation feedback, conditions or guidance from us;
- the person or organisation failed to comply with an information notice, a decision notice or an enforcement notice;

Mitigating factors

- if the person or organisation notified us of the issue early and has been open with us;
- any early action the organisation took to ensure future compliance with a relevant code of practice;
- whether the person or organisation co-operated fully with us during any investigation.

Other factors we may consider

- the cost of measures to mitigate any risk, issue, or harm;
- the gravity and duration of a breach or potential breach;
- the cause of the breach, such as internal process failings;
- the nature of the information requested;
- whether the organisation has a disproportionate or unnecessary clearance process for requests;
- whether the person or organisation is representative of a sector or group, raising the possibility of similar issues arising again across that group or sector if they do not address them;

- the public interest in taking regulatory action (for example, to provide an effective deterrent against future breaches or clarify or test an issue in dispute); and

Steps when action decided

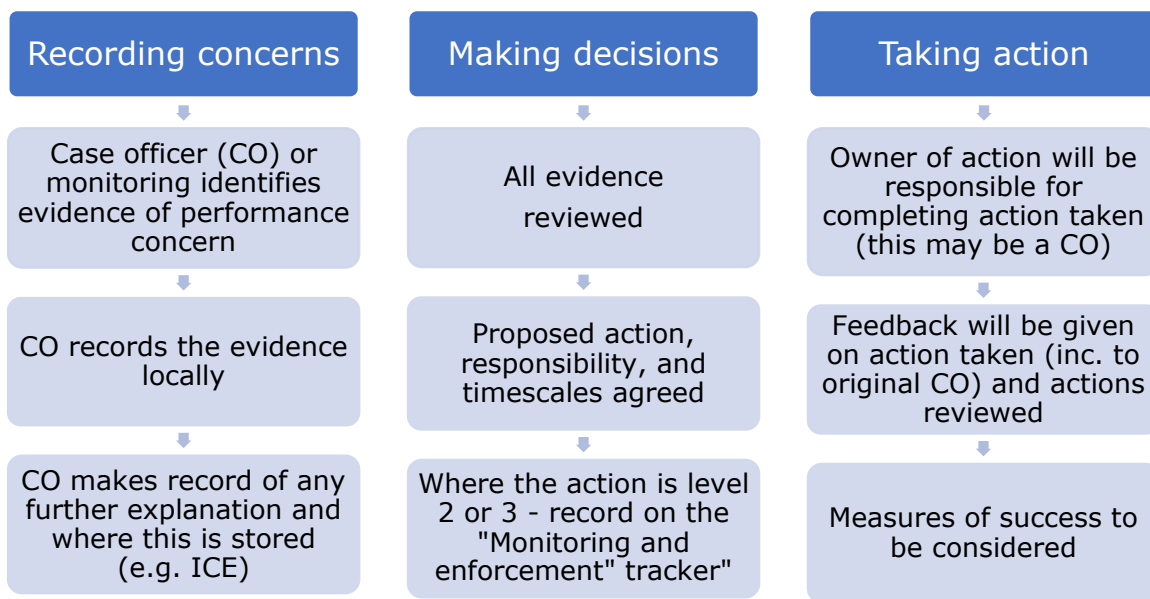
The proposed action, and responsibility and timescales for that action, will be agreed, recorded and followed up at subsequent meetings.

Where the decision is for a level 1 action, this will be recorded locally.

Where the decision is for a level 2 or 3 action, this will be recorded on the 'Monitoring and enforcement' tracker. This is a spreadsheet to record progress of regulatory action from it being under consideration to completed.

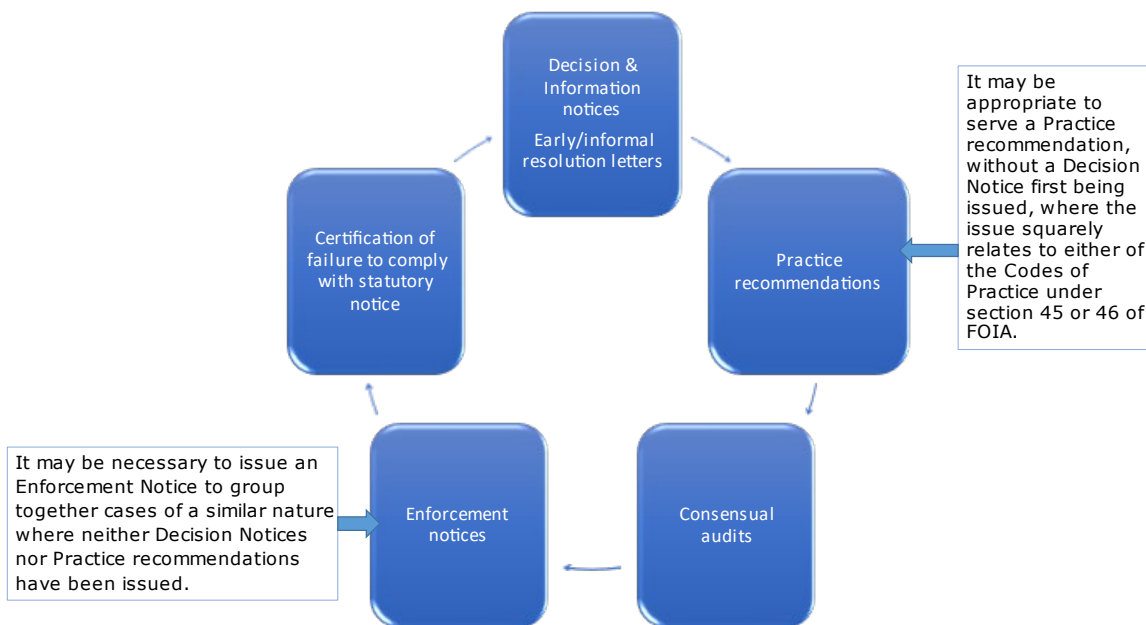
Overview diagram

The following diagram is an overview of the above framework for taking regulatory action.



Regulatory outcomes

The diagram below is illustrative of how we envisage to cycle through our range of regulatory powers. However, not every power will be used in this order for the same issue.



Triggers for action

The following are examples of when we may use our regulatory powers. The lists are not exhaustive.

Decision Notices

Decision Notices are issued where a valid complaint has been made under section 50 of FOIA.

Information Notices

Guidance as to when we will issue Information Notices as a matter of usual practice is included in the [service guide](#). There may be other situations where we issue an Information Notice, for example:

- We need specified information to undertake an investigation of a matter that falls outside of a section 50 complaint, such as an investigation into the use of private communication channels for official business or to check an authority's compliance with Part 1 of FOIA or the Codes of Practice.

Practice recommendations

Practice recommendations are used to bring about systemic improvements in relation to the codes of practice.

- The public authority has failed to comply with the [code of practice issued under section 45 of the FOIA](#).
Examples of when we could issue a practice recommendation under the section 45 code of practice include:

- The public authority consistently responds to information requests, or requests for an internal review, late.
 - The public authority has a backlog of information requests relative to the volume of information requests it receives, and it is projected that will take a significant period for them to recover that backlog.
 - The public authority failed to correctly interpret the request or locate all of the information falling within the scope of the request.
 - The public authority failed to provide an adequate refusal notice.
 - The public authority failed to thoroughly reconsider a request at internal review.
 - The public authority failed to consult or refer a request to a public authority more able to respond.
 - The public authority failed to provide advice and assistance.
 - The public authority failed to consult with a third party such as a commercial entity.
 - The public authority consistently misapplies the cost limit.
 - The public authority consistently misapplies the vexatious provision.
 - The public authority fails to maintain an adequate publication scheme.
 - The public authority does not publish compliance statistics in accordance with section 8.5.
 - The public authority does not publish a postal address and email address (or appropriate online alternative) to which applicants can send requests for information or for assistance.
 - We want to highlight areas of good practice.
- The public authority has failed to comply with the [code of practice issued under section 46 of the FOIA](#).
Examples of when we could issue a practice recommendation under the section 46 code of practice include:
- The public authority does not have in place organisational arrangements that support records management.
 - The public authority does not know what records it holds or where its records are held.
 - The public authority does not ensure that it operates effective arrangements to determine which records should be selected for permanent preservation.
- Where such a recommendation relates to records which are public records for the purposes of the relevant Public Records Act, we will consult with The National Archives.
- The public authority has failed to comply with the [code of practice issued under regulation 16 of the EIR](#).
Examples of when we could issue a practice recommendation under the regulation 16 code of practice include:
-

- The public authority consistently responds to information requests, or requests for an internal review, late.
- The public authority has a backlog of information requests relative to the volume of information requests it receives, and it is projected that will take a significant period for them to recover that backlog.
- The public authority does not have adequate training in place regarding requests for environmental information.
- The public authority does not meet their obligation to progressively make environmental information available to the public.
- The public authority failed to provide advice and assistance.
- The public authority fails to ensure that any charges it make are reasonable and made in accordance with a charging schedule.
- The public authority fails to follow the guidance in the regulation 16 code of practice relating to:
 - transferring requests,
 - consultation with third parties,
 - public sector contracts,
 - accepting information in confidence,
 - consultation with devolved administrations,
 - the refusal of requests, or
 - the review and complaints procedures.

Audit recommendations

An audit assesses whether a public authority is complying with the legislation and the extent to which it is following good practice. Where weaknesses are identified, audit recommendations give practical advice on how to improve. We can only conduct an audit in relation to FOIA or the EIR with the consent of the public authority.

Examples of factors our Regulatory Assurance team take into account when deciding whether to invite a public authority to consent to an audit may include:

- The number of complaints received about the public authority.
- Lack of engagement by the public authority.
- The public authority not adhering to deadlines.
- The public authority not adhering to appeal processes.
- The public authority not having an adequate publication scheme.
- The public authority not adhering to the s45 and s46 codes of practice.
- Media reports or other external insight suggesting that the public authority is failing to comply with the legislation.
- Previous audits undertaken.
- Other ICO work with the public authority.

Regulatory Assurance use this [Audit Referral Form](#).

Enforcement notices

Enforcement notices are used where there are repeated and/or significant or systemic issues in compliance with any of the requirements of Part 1 of FOIA.

- The public authority consistently responds to information requests, or requests for an internal review, late.
- The public authority has a backlog of information requests relative to the volume of information requests it receives, and it is projected that it will take a significant period for them to recover that backlog.
- The public authority has outstanding requests that are significantly over the time limit for compliance.
- The public authority consistently uses inappropriate means to delay or refuse an information request.
- The public authority fails or is unwilling to provide the ICO with a cogent and measurable action plan as to how it will improve its compliance with section 10 FOIA/regulation 5 EIR.
- The public authority fails to comply with its own action plan.
- The public authority fails to comply with a Practice Recommendation.
- The public authority consistently fails to provide advice and assistance to requestors, when it is reasonable for them to do so.
- The public authority consistency misapplies exemptions.
- The public authority consistently fails to comply with other obligations placed upon it by Part 1 of the FOIA. Such matters may include the failing to provide information in an appropriate form and format, a failure to release appropriate datasets for re-use and the charging of inappropriate fees.

Certification for failure to comply with statutory notices

We may certify in writing to the High court where a public authority has failed, without good reason or explanation, to comply with a statutory notice issued by the ICO under sections 50, 51 or 52 of the FOIA.

Follow-up (and feedback)

We will assign responsibility for following up regulatory action where needed to an appropriate manager who will ensure that the action is taken by the public authority according to the agreed timescale.

We will give feedback to the Directorate, including the case officers involved, in logging the issues and concerns as to the action taken.

Managing communication

We will take action to publish and publicise our work in these areas in line with the ICO's [Communicating our Regulatory and Enforcement Activity Policy](#)

ico.org.uk) We will consider the guiding principles and factors in favour of, and preventing or deterring, publishing or publicising.

We will always seek to communicate with a focus, direction and confidence that provides maximum impact and effect and in a way that aligns with both our RAP and our [Publication Scheme](#).

Evaluation

The ways of working in this manual were piloted from July 2022 for 12 months. We reviewed the effectiveness of the approach set out, seeking both internal and external feedback, and updated the manual in June 2023 to include the learnings and to reflect how we work in practice.

We will review regulatory action taken in line with 'Assessing the outcomes of our regulatory actions' section of the RAP to consider the scope and effectiveness of our chosen regulatory activities in achieving our desired outcomes. We will identify clear objectives when we take regulatory action so that we can review the impact of our actions against these objectives.

The way we assess the use of our regulatory powers will vary depending on the reasons for the activities and the action taken. The evaluation options include:

- Following up with the public authority to assess ongoing compliance and improvements on a granular basis. Where necessary, we may use other regulatory tools if our initial action does not achieve the desired outcome.
- Working with our Economic Analysis team to develop and make use of tools to quantify the impact of our work.
- Seeking internal and external feedback to improve the quality of our outputs.
- Use of wider intelligence.

The review and evaluation process will include lessons learned exercises to identify areas to continuously improve our ways of working and to develop further consistency in the use of our regulatory powers.

Appendix 1

Roles and responsibilities

The following diagram shows the responsibilities we envisage for each of the roles within the FOI and Transparency Directorate.

Case Officers

- Record concerns identified through day-to-day casework.
- Where there are strong concerns about an individual case, consider what action could be taken and discuss with their manager immediately.
- Undertake regulatory action where requested by the senior oversight group.

Group & Team Managers

- Review local evidence ahead of the regular meeting.
- Propose regulatory action at the regular meeting.
- Make decisions as part of the senior oversight group.
- Undertake regulatory action where requested by the senior oversight group (including the detail on page 12)

Upstream Regulation

- Identify trends from the local evidence.
- Review non casework evidence/intelligence and identify trends.
- Propose regulatory action at the regular meeting.
- Make decisions as part of the senior oversight group.
- Maintain oversight of regulatory action undertaken.
- Own 'Monitoring & enforcement tracker' and progress public authorities through the 3 stages.
- Chair the regular meetings.

Head of/Director

- Make decisions as part of the senior oversight group.
- Review Practice Recommendations.
- Sign Enforcement Notices.