

Summary of the responses to the Regulatory Action Policy Consultation.

The consultation sought views on how we plan to discharge our regulatory powers as the range and strength of those powers escalates. The guidance sets out our risk-based approach to taking regulatory action against organisations or individuals that have breached the Data Protection Act, the Freedom of Information Act, the Privacy and Electronic Communications Regulations, the Network and Information Systems Regulations, and related legislation.

Our consultation was launched on 4 May 2018 and ended on 28 June 2018. In total we received 80 responses. Of these, 64 responded by answering the questions in our online survey. The remainder approached the ICO directly with a response via email. Any percentages quoted in this document relate to the 64 responses received via our online survey.

The consultation attracted high interest from industry, civil society and commentators. 68% of responses were received from a member of the public who had used our service. 66% of responses were from a representative from an organisation. The consultation drew the largest response from the charity and voluntary sector (17%). Other respondents included representatives from the Finance, Insurance and Credit (12%) and Online Technology and Telecoms (12%) sectors.

We have carefully considered the issues and concerns raised, and have used these to inform the final version of our guidance and our future communications on the RAP. The main messages from the consultation responses are summarised below.

Key Themes

Clarity and Presentation

Question 1:

Is the ICO's approach to regulatory action made clear in our Policy?



84% of respondents agreed that the ICO's approach to regulatory action is clear.

Overall, respondents felt the RAP presents clearly how and when the Commissioner will exercise her powers.

Of the 16% in disagreement some suggested the RAP could be written in plainer English and could benefit from the use of tables and infographics.

Others noted further clarity could be provided in the following areas:

- How the ICO will promote compliance
- How the ICO will interact with other regulators
- How fines will be calculated for SME's
- How organisations can appeal against a decision from the Commissioner

We have shared the RAP with our plain English experts for review, and we intend on producing targeted communications for different audiences in the future.

We are committed to promoting compliance through the promotion of good practice and will continue to take account of any factors which aggravate or mitigate the contravention when deciding if enforcement action is appropriate.

We will encourage a positive attitude towards compliance and promote a culture of accountability. We will deliver new regulatory tools to support the innovative use of data in accordance with the principles of information rights legislation.

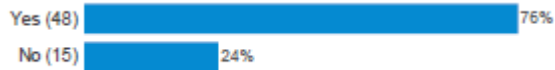
Before issuing a monetary penalty we will always take into account the financial impact of a monetary penalty on a data controller. It's impossible for the ICO to produce regulatory guidance that will be relevant to all small businesses. However, the ICO recognises that SMEs will not have the technical expertise that many larger businesses have at their disposal. In line with our legislative duties to promote good practice we will continue to produce practical and concise guidance to help SME's comply with the law, this will include targeted resources on the use of our regulatory powers under the new regime.

Respondents also commented on the absence of guidance for data controller on the court appeal process. Guidance on how to appeal against a decision made by the Commissioner is published by Her Majesty's Court and Tribunal Service at [Justice.gov.uk](https://www.justice.gov.uk).

We aim to be an effective, open and transparent regulator. The ICO's Communicating Regulatory Action Policy is currently being refreshed to reflect the new RAP, we believe this will address concerns about when we will disclose, publish and publicise any regulatory action we take.

Question 2:

Do you think the policy is comprehensive?



76% of respondents felt the RAP was comprehensive. We received a wide variety of feedback on this point, we have identified a number of key themes raised and summarised below.

DPA focus

Several respondents felt the guidance was too focussed on Data protection and clarity on what powers and rights of appeal under other information rights legislation.

The Commissioner is required to produce guidance on how she proposes to exercise her functions in connect with information notices, assessment notices, enforcement notices, and penalty notices.

We have taken the technical points on board and updated the guidance to make it clearer what powers apply to each legislation. We have also removed reference to assessment notices and the right of appeal under the NIS directive as these do not apply.

Some respondents felt further guidance was required on section 77 of the FOIA. We will continue to will pursue prosecution in accordance with the principles laid out in our prosecuting statement which we will update to reflect our increased powers and changes in the RAP. Further information on section 77 can also be found in the Retention and Destruction of Requested Information guidance.

There are no fundamental changes to our regulatory approach. The RAP is intended to provide direction and focus for those we regulate, on our approach to regulation with regard to the legislation we oversee. The ICO has a duty to promote observance with FOIA, EIR and the associated codes of practice. We will deploy a suite of tools, which whilst not part of the formal regulatory framework, have historically sought to improve FOI compliance amongst public authorities.

Data Processors

Some organisations commented that further guidance was needed on the role of the Data Protection Officers in the regulatory process and how the ICO will interact with them.

We agree that the role of the DPO is important but the action we take in this context is against Data Controllers/Processors more generically. Whilst DPO's are there to help assist and advise it is ultimately those in the board room, or those that make or take decisions on behalf of organisations that are accountable for their actions.

General - Audience

We have received comments around consumer rights and compensation, and that the policy does not make reference to the mechanisms available for individuals.

We consider it important to build public trust and confidence. The RAP is intends on providing guidance on how the Commissioner will use her powers. The Commissioner does not have the power to award compensation. Our Your Data Matters campaign drives forward public awareness of information rights and provides advice to members of the public on their right to raise a concern and hold organisations to account.

Guidance on penalty setting

Commentators expressed concern over the lack of guidance on how we will apply penalties and how the regulatory action policy might apply to those in the supply chain.

Each individual case will be judged on its own merits. The GDPR and DPA makes data controllers and processors jointly and severally liable for the actions that they take and any action that we decide to take will reflect that.

The Commissioner will use her powers fairly and proportionately and consider the financial situation of the organisation when doing so.

We will also commit to updating our guidance on issuing monetary penalties to provide further clarity in this area.

General – reputation

Respondents broadly supported the ICOs commitment to adopting a proportionate and targeted approach to enforcement, specifically our intention to reward and incentivise compliance.

Some respondents raised concerns that the guidance does not cover when we will share good practice as a result of issues raised with us.

We will consider sharing lessons learned from either our complaints work, our investigations or audits or any other activity that we think can help improve information rights understanding. The specifics are not directly included in the Regulatory Action Policy but we will publish information or case stories where they can help improve practice. Information on when we will publish the outcome of our regulatory action can be found in [our Communicating Regulatory Action Policy](#).

Next Steps

Once the final RAP is approved it will be submitted to the Secretary of State for Culture and Media and Sport and laid before Parliament for approval.