

Investigations Policy for Alleged Criminal Breaches of s170, s173 Data Protection Act 2018, s132 Data Protection Act 2018, and s77 Freedom of Information Act 2000 by ICO Staff

1. Scope

- 1.1 This policy is applicable to all staff employed by the ICO, the Senior Management Team and the Information Commissioner.

2. Background

- 2.1 The ICO's role in upholding the privacy rights of individuals, together with promoting openness and transparency, can bring us into conflict with both those who we regulate and with complainants. This relationship can lead to allegations of criminal breaches of s170 & s173 of the DPA, s132 of the DPA and s77 of the FOIA being made against the Information Commissioner, the Senior Management Team, Leadership Group or other ICO staff.
- 2.2 The ICO has a core responsibility for investigating allegations of S170, s173 of the DPA, s132 of the DPA and s77 of the FOIA, and as a Crown Prosecutor we are responsible for instigating criminal proceedings for these offences. Therefore, it is imperative that we have robust policies and procedures in place to ensure that any investigations conducted by the ICO regarding the ICO are thorough, expeditious and that decisions arising are made without fear of favour.

3. Considerations

- 3.1 Section 77 FOIA sets an extremely high-bar. It is the only criminal offence within the FOIA and each element must be proven to the criminal standard, i.e. beyond reasonable doubt. This burden of proof also applies to breaches of s170, s173 and s132. There is an added element in terms of investigations under s77 FOIA in that investigators have to ensure that a timely and efficient investigation is conducted as there is a 6-month limitation on proceedings.
- 3.2 A prosecution for an offence under the DPA or FOIA can only be brought by the Commissioner or by or with the consent of the Director of Public Prosecutions. There are separate procedures for offences committed and prosecuted in Scotland. Matters pertaining to the FOIA in Scotland will be dealt with by Scottish Information Commissioner. Whilst the ICO Legal Team is able to provide advice to ICO investigators, any prosecution considerations would be a matter for the CPS.

- 3.3 It may not be seen to be appropriate for the Commissioner to investigate an offence committed by himself or a current member of her staff as he may not be seen to be acting independently or objectively. Similarly it would not be appropriate for the Commissioner to prosecute an offence committed by himself or a current member of his staff.
- 3.4 However, the Crown Prosecution Service advises that organisations should have the necessary arrangements in place to conduct the initial or primary investigation to first establish whether a criminal offence has been committed. Therefore, the arrangements at the ICO will require for the ICO Criminal Investigations Team (CrIT) to carry out an investigation into the allegation. On completion, and where there is prima facie evidence of a criminal offence, and in the interests of transparency the completed case file will be referred to the Crown Prosecution Service for advice, and where necessary and appropriate, prosecution.
- 3.5 There may be occasion where an immediate referral to the Police may be appropriate for a criminal investigation. This will be determined by the Director of Investigations in consultation with the Commissioner/Deputy Commissioner.
- 3.6 The Senior ICO Investigating Officer will be the Group Manager CrIT, who will in turn report to the Head of Investigations. For low risk complaints the responsibility for investigating may be devolved to a Team Manager within the CrIT. The Head of Investigations may determine that in certain cases it is appropriate that they assume the role of SIO. In allegations involving members of the CrIT the initial investigation will be led by the Group Manager Privacy and Digital marketing Investigation Team (PDMIT).
- 3.7 In the event that the Senior ICO Investigating Officer determines that there should be no further action, the complainant should be informed of the outcome of the investigation and advised of the right to review scheme. In these circumstances and when all complaint procedures have been exhausted the complainant will be informed that if they wish to pursue the matter further they should make a complaint direct to the Police.
- 3.8 If as a consequence of the internal investigation there are any perceived breaches of the ICO Disciplinary Policy and Procedure, or Managing Poor Performance Procedure, the matter will be referred to ICO Human Resources and addressed in accordance

with the relevant policy. In the event of a parallel criminal and disciplinary investigation, the criminal investigation will take precedence. Any material gathered during the course of an internal criminal investigation may be used in any subsequent disciplinary investigation or proceedings.

4. Process

- 4.1 Whilst allegations of this nature are rare they can be received by anyone in the ICO. On receipt of an allegation and at the earliest opportunity, the Head of Investigations and the Group Manager CrIT are to be advised of the complaint. In the absence of the Head of Investigations or if the allegation is against the Head of Investigations, then the matter is to be brought to the attention of the Director of Investigations.
- 4.2 If the complaint is received by the caseworker to whom it relates, the matter must be brought to the immediate attention of the individual's line manager. No further work is to be carried out on the relevant file until authorised by the caseworker's line management. The referral form should be fully completed with as much detail and information as possible. This form should be forwarded to the Group manager CrIT no later than 48 hours after receipt of the complaint.
- 4.3 If the Head of Investigations or Group Manager CrIT ascertains that an investigation is warranted, the Group manager CrIT will set the investigation parameters and the Director of Investigation will determine the level of oversight that will be required. The Group Manager CrIT will be responsible for liaising as appropriate with IT and IG to secure and preserve any initial evidence.
- 4.4 The Group Manager CrIT will be responsible for appointing an Officer in Charge (OIC) with the requisite skills and experience. On instruction from the Director of Investigations/Group Manager CrIT the receiving unit is to create a skeleton Investigation on Crimson and SharePoint folder and all available information/material is to be made available to the appointed CrIT OIC.
- 4.5 There should be no undue delay in enacting this process, particularly where the reporting officer is unsure as to whether this should be dealt with as a criminal allegation or is uncertain as to what will be required evidentially.
- 4.6 This is particularly important in relation to complaints relating to s77 FOIA, and may lead to allegations made against Senior ICO

staff not being prioritised correctly, and management oversight not being applied at the appropriate level. If in any doubt advice should be sought from the Director of Investigations/Group Manager CrIT at the earliest opportunity.

- 4.7 The Head of Investigations will ensure that the Information Commissioner and/or Senior Management Team are updated as appropriate. Where an allegation is made against the Information Commissioner, the matter will be referred by the Head of Investigations to the non-executive Director who sits as the Chair of the Audit Committee. Should an allegation be made against a member of the Senior Management Team, the matter must be referred to the Deputy Commissioner or Information Commissioner.
- 4.8 In the event that an initial internal investigation by the ICO is deemed to be inappropriate, the matter must be referred to the Police for further investigation. This will be determined by the ICO Senior Management Team.
- 4.9 The investigation team will liaise as appropriate with the staff member's line management. Consideration regarding any potential suspension of the staff member will be referred to the ICO Human Resources department. The circumstances of each case will be considered on its own merits; suspension of a staff member would not be a matter of course. All actions regarding any proposed suspension will be in accordance with current practice, procedure and policy.
- 4.10 Should there be a requirement for a formal criminal interview with the staff member, that interview would be under caution in accordance with current practice, procedure and the Police and Criminal Evidence Act. This would include formal disclosure in anticipation of any interview.
- 4.11 Staff members are advised to seek legal advice and where appropriate the advice of their respective trades union. In any criminal interview the staff member subject of the complaint would be entitled to seek legal representation, however this may not always be free. The ICO recognise that staff may be subject of an allegation whilst acting in a professional capacity or in good faith. In appropriate circumstances the ICO will provide a suitable level of support including the provision of legal services. This will be subject to the discretion of the ICO and/or any relevant Government policy at that time. Staff members are also

reminded of the colleague assistance telephone helpline as outlined in the ICO staff benefits handbook which includes a legal advice helpline. If a staff member is not entitled to free legal advice and legal support had not been provided by the ICO, and they do not have the means to pay, the staff member may request to have a friend present whilst the interview takes place.

- 4.12 Due to the timescales and the potential for reputational damage investigations of this nature will be prioritised by the CrIT. The findings of the investigation are to be presented to the Head of Investigations at the earliest opportunity.
- 4.13 Access to the Crimson case will be restricted and the SIO is to ensure that a management policy book is maintained for all investigations of this nature, in which they are to record all key decisions including staffing, briefings and policy.
- 4.14 If it is determined from the initial investigation that a criminal offence may have been committed, the Head of Investigations must be advised at the earliest opportunity. The completed case file will be submitted through the ICO Legal Team to the Crown Prosecution Service for advice, and where necessary and appropriate, prosecution. The timeliness of investigations is particularly important in respect of s77 FOAI offences where there is a six-month limitation on proceedings.
- 4.15 If the allegation is deemed to be inappropriate for the ICO to conduct the investigation, the matter will be referred to the local police force where the alleged offence has taken place. In those circumstances the ICO responsibility for the matter will cease when the Police have assumed responsibility for the investigation. The complainant is to be updated accordingly.

END

Appendix 1: Process Map

