

## Freedom of information regulatory action policy

### Why a policy?

The Information Commissioner's Office (ICO) is committed to upholding the right of access to official information held by public authorities. We do this by overseeing two key pieces of legislation that allow members of the public to request official information held by public bodies. These are:

- the [Freedom of Information Act 2000](#) (FOIA); and
- the [Environmental Information Regulations 2004](#) (EIR).

The legislation is supported by three codes of practice:

- The [section 45 code of practice](#), which provides guidance on the practice that it would be desirable for public authorities to follow in discharging their functions under FOIA.
- The [regulation 16 code of practice](#), which provides guidance on the practice it would be desirable for public authorities to follow in discharging their functions under EIR.
- The [section 46 code of practice](#), which provides guidance on the practice it would be desirable for public authorities to follow in connection with the keeping, management and destruction of their records. It applies not only to public authorities but also to other bodies that are subject to the Public Records Act 1958 or the Public Records Act (Northern Ireland) 1923.

FOIA, EIR and their associated codes of practice oblige organisations to meet particular standards when responding to requests for information. These include:

- replying within a specified timescale (usually 20 working days);
- providing the information requested or explaining why it cannot be supplied;
- publishing official information by way of a publication scheme (FOIA), or by proactive disclosure (EIR);
- providing a complaints procedure for applicants who are dissatisfied with the way their request has been handled (commonly referred to as an internal review); and
- responding to internal reviews within a specified timescale.

The ICO has a duty to promote observance with FOIA, EIR and the associated codes of practice. This policy will assist the ICO in discharging this obligation (section 47 (1)).

Many authorities are already meeting the standards expected of them, but for those that are not this policy will provide the framework within which the

ICO will take action. Specifically, where authorities repeatedly or seriously fail to meet the requirements of the legislation, or conform to the associated codes of practice, the ICO will take regulatory action.

The intention of this policy is to provide more detail on the ICO's approach to regulatory action, setting out the nature of our various powers and when and how we plan to use them. The Commissioner intends that this policy should send clear and consistent signals to those authorities falling within the scope of FOIA or EIR, to the public whom the law empowers, and to the staff who act on its behalf.

Information rights practitioners should read this document in conjunction with our [Data protection regulatory action policy](#).

### **What is regulatory action?**

In this context regulatory action describes the powers available to the ICO to promote and secure compliance with FOIA, EIR and the associated codes of practice. They include non-criminal enforcement and voluntary assessments.

### **Our aim**

Our aim is to promote the following good practice and to ensure that public authorities meet the requirements of the legislation, particularly in relation to timeliness.

Where we have evidence to suggest that an authority is regularly or seriously failing to meet the requirements of the legislation we will take purposeful regulatory action. We will do this to:

- promote open government;
- bring about a culture of maximum disclosure;
- set examples;
- help clarify issues; and
- ensure that obligations are not deliberately or persistently ignored.

We believe that targeted, proportionate and effective regulatory action will help to improve standards across the public sector.

### **Guiding principles**

Regulatory action taken by the ICO will be consistent with the five principles of good regulation established by the Better Regulation Task Force. These are:

Transparency

We will be open about our approach to regulatory action and open about the action we take and the outcomes we achieve.

Accountability	We will include information on the use of our regulatory action powers in our annual report to Parliament. We will make sure that those who are subject to regulatory action are aware of their rights of appeal.
Proportionality	We will put in place systems to ensure that regulatory action we take is in proportion to the harm or potential harm done. We will not resort to formal action where we are satisfied that the risk can be addressed by negotiation or other less formal means.
Consistency	We will apply our decision making criteria consistently in the exercise of our regulatory action powers.
Targeting	We will target regulatory action on those areas where it is the most appropriate tool to achieve our goals. Our own targets will be based on outcomes rather than how often we use our regulatory action powers.

### **Forms of regulatory action**

There are a number of tools available to the ICO for regulatory action. Where a choice exists, the most effective will be chosen for each situation, bearing also in mind the deterrent or educative effect on other organisations. The tools are not necessarily mutually exclusive and may be used in combination when justified by the circumstances. The main options are:

Assessment	An assessment may be conducted with the consent of a public authority. It is designed to determine whether an authority is following good practice – and specifically, to assess its conformity to the codes of practice. In relation to conformity to the section 46 code of practice, assessments will be carried out in
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conjunction with the Keeper of Public Records or in the case of Northern Ireland, Deputy Keeper of the Records of Northern Ireland (section 47 (3)).

#### Enforcement notice

A formal notice requiring an authority to take the action specified in the notice in order to bring about compliance with part 1 of FOIA or parts 2 and 3 of EIR. Such notices will usually address systemic or repeated breaches. Failure to comply with a notice may result in the ICO certifying that fact to the court for the matter to be dealt with as contempt of court (section 52).

#### Information notice

A notice requiring an authority to supply the ICO with the information specified in the notice. In the context of regulatory action they may be used to obtain information for the purpose of assessing whether the authority has complied, or is complying with the requirements of part 1 of FOIA or parts 2 and 3 of EIR. An information notice may also be used to assist the ICO in determining whether the practice of a public authority conforms to the section 45 and 46, or the regulation 16 codes of practice. Failure to comply with a notice may result in the ICO certifying that fact to the court for the matter to be dealt with as contempt of court (section 51).

#### Decision notice

A decision notice details the outcome of the ICO's investigation into an individual case. In the context of regulatory action, the ICO may use decision notices to publically highlight particular issues

with an authority's handling of a specific request (section 50).

#### Practice recommendation

A non-enforceable recommendation which can be issued in response to non-conformity with the codes of practice. A practice recommendation will specify the steps which, in the ICO's opinion, are necessary to ensure conformity with the codes.

#### Negotiation

Not a formal regulatory power but a form of regulatory action that will be used widely to in order to bring about compliance with FOIA, EIR and conformity with the associated codes of practice. Negotiated resolution can be backed by a formal undertaking, given to an organisation by the ICO.

#### Monitoring

As with negotiation, this is not a formal regulatory power but a method that will be used to inform the ICO's view of an authority's overall performance. It is most likely to be used to monitor timeliness and may be a precursor to further action if an authority is unable to demonstrate an improvement within a specified timescale.

#### Undertakings

The culmination of negotiated resolution, an undertaking commits an authority to a particular course of action in order to improve its compliance.

#### Report to Parliament

A failure to take account of a practice recommendation, or the need for an enforcement notice to be issued may be included in the ICO's annual report to Parliament.

## Prosecution

In the context of regulating FOIA and EIR, our powers of prosecution relate to the offences described in section 77 of FOIA and regulation 19 of EIR. Section 77 and regulation 19 both concern the offence of deliberately altering, defacing, blocking, erasing, destroying or concealing a record which is subject to a request, with the intention of preventing the disclosure of information to which the applicant would otherwise be entitled.

## Contempt of Court

In the event that an authority should fail to comply with the steps specified by the Commissioner in a Decision Notice, Information Notice or an Enforcement Notice, the Commissioner may certify as such to the Court. The Court may inquire into the matter, and may deal with the authority as if it had committed a contempt of Court. This provision also applies should an authority purport to have complied with an Information Notice by knowingly or recklessly making a statement which is false.

## **Initiation of regulatory action**

We will adopt a selective approach to initiating and pursuing regulatory action. Our approach will be driven by concerns about significant or repeated failures to meet the requirements of FOIA, EIR or their associated codes of practice. The type of intervention will be appropriate to the failure and proportionate.

The criteria set out below will guide decisions about our priorities at all stages – fact-finding, initiation of action and follow-through. We will always be clear about the outcome(s) we are aiming to achieve.

The initial drivers will usually be:

- concerns raised with us in the complaints that we receive;
- concerns raised with us by an authority direct;
- issues that come to our attention via the media, the web and social media such as information rights blogs;

- concerns raised by Parliament, the Ministry of Justice or liaison groups;
- concerns raised by the First Tier Tribunal (Information Rights); and
- concerns that become apparent through our other activities, for example wider information handling issues that come to our attention via our data protection audit programme.

We may initiate regulatory action ourselves, as well as in response to matters raised with us by others.

We will collate information on complaints made to us in order to identify sectors or specific organisations for more focused activity. Past performance may be taken into account where authorities continue to fail to meet their obligations and responsibilities. We will build up intelligence based on the number and nature of complaints received about particular authorities. However, not all complaints received about breaches of the legislation will be referred for regulatory action.

Action will only be initiated by the Commissioner where:

- our criteria are satisfied; and
- intervention is a proportionate response; or
- there is likely to be a wider educative or deterrent affect.

Whilst every endeavour will be made to work with public authorities, we will take formal action where it is considered appropriate.

### **Assessment of good practice**

Unlike the Data Protection Act 1998 (section 41A), the ICO does not have powers of compulsory audit when assessing compliance with FOIA, EIR or the associated code of practice. However, section 47 (3) of FOIA provides a mechanism by which the ICO may, with the consent of the authority, carry out an assessment to determine whether it is following good practice.

In most cases, such an assessment will be carried out by asking the authority to supply details of its information handling policies, processes and procedures. Where appropriate we may visit the authority to conduct a consensual onsite assessment.

In cases where repeated or significant delays in dealing with requests, reviews, or both is suspected the ICO will monitor the authority's progress by asking it to provide regular statistical updates on its performance.

Where an assessment is being conducted in relation to the section 46 code of practice on records management, it will be carried out in conjunction with the Keeper of Public Records (or in the case of Northern Ireland, Deputy Keeper of the Records of Northern Ireland).

Although there is no power of compulsory audit for FOIA and EIR, public authorities are expected to co-operate with the ICO's enquiries. In the unlikely event that an authority refuses to do so, the ICO will issue an information notice (section 51) in order to obtain the information it requires.

### **Practice recommendations**

Where the ICO considers that the practice of a public authority does not conform to the codes of practice it may issue a practice recommendation. A practice recommendation will specify the steps the ICO considers should be taken to bring about conformity.

Although a practice recommendation is not directly enforceable, the failure to implement the recommendations made within it may lead to a failure to comply with FOIA or EIR. Examples of where a practice recommendation may be issued include a failure to:

- provide an internal review procedure;
- complete internal reviews within the appropriate timescales;
- transfer or redirect requests appropriately;
- consult with relevant third parties; and
- ensure that authorities make their FOIA obligations clear when entering into contracts with third parties which may contain terms relating to the disclosure of information.

Where a practice recommendation is being considered in relation to the section 46 code of practice on records management, consultation with the Keeper of Public Records (or in the case of Northern Ireland, the Deputy Keeper of Public Records ) is required. The ICO's Memorandum of Understanding with the National Archives, which details the arrangement in this regard, can be found [here](#). Examples of where a practice recommendation may be issued in relation to the section 46 code of practice include the failure to:

- have in place organisational arrangements that support record management;
- have in place a record management policy;
- retain the records needed for business, regulatory, legal and accountability purposes;
- have in place systems that enable records to be stored and retrieved as necessary;
- know what records are held, where they are and to ensure that they remain useable;
- ensure that records are secured securely and that access to them is controlled;
- define how long records should be kept for, and to dispose of them when no longer needed;
- ensure that records shared with other bodies or held on their behalf are managed in accordance with the code; and



- monitor compliance with the code.

Once a practice recommendation has been issued, the ICO will monitor the implementation of any agreed action plan and the adoption of the recommendations made. After an appropriate interval, the ICO may review an authority's progress against the recommendations and publish its findings.

### **Enforcement notices**

Where the ICO is satisfied that a public authority has failed to comply with any of the requirements of part I of FOIA or parts 2 and 3 of the EIR it may serve that authority with an enforcement notice.

In most cases, enforcement notices will be used to address serious or repeated breaches of the legislation. An enforcement notice will specify the parts of the FOIA or EIR with which the authority has failed to comply; explain the reasons for reaching that conclusion, and detail the steps the authority must take and the timescale for doing so. An authority may appeal an enforcement notice to the First Tier Tribunal (Information Rights).

Examples of where an enforcement notice may be appropriate include:

- repeated or significant failures to meet the time for compliance;
- repeated or significant failures to refuse requests in accordance with the requirements of the legislation – for example a repeated failure to specify exemptions / exceptions or to explain why they apply;
- a failure to operate an internal review procedure in accordance with the requirements of regulation 11 (EIR only);
- a failure to adopt an approved publication scheme (FOIA only); and
- a failure to publish information in accordance with an approved publication scheme (FOIA only).

When considering whether an enforcement notice is appropriate the ICO will consider:

- the severity and / or repetition of the breach;
- whether there is evidence that obligations are being deliberately or persistently ignored;
- whether there would be an educative or deterrent affect;
- whether it would help clarify or test an issue; and
- whether an example needs to be created or a precedent set.

In limited circumstances, it may also be appropriate to use an enforcement notice to group together similar complaints about the same public authority.

The ICO, by written notice to the authority on which it was served, may cancel an enforcement notice.

## **Decision making**

We will ensure that any regulatory action we take is proportionate to the problems it seeks to address. Both good regulatory practice and the efficient use of our limited resources require us to be selective. In determining whether to take action, the form of any action, and how far to pursue it, we will apply the following criteria:

- Is the breach / non-conformity so serious that action needs to be taken?
- Is the breach / non-conformity repeated to the extent that it is detrimental to the public's ability to exercise their right of access?
- Is action justified by the need to clarify an important point of law or principle?
- Is action justified by the likelihood that non-compliance / non-conformity will reoccur, or have an ongoing effect if action is not taken?
- Are the organisation and its practices representative of a particular sector or activity to the extent that the case for action is supported by the need to set an example?
- Does a failure by the organisation to follow relevant guidance or accepted business practice support the case for action?
- Does the attitude and conduct of the organisation both in relation to the case in question and more generally in relation to compliance issues suggest a deliberate, wilful or cavalier approach?
- How far do we have a responsibility to organisations that comply with the legislation / conform to the codes of practice to take action against those that do not?
- Is the level of public interest in the

case so great as to support the case for action?

- Given the extent to which pursuing the case will make demands on our resources, can this be justified in the light of other calls for regulatory action?
- What is the risk to the credibility of FOIA, EIR or to our reputation and influence of taking or not taking action?

We will engage with public authorities and provide an opportunity for them to make representations to us before we take regulatory action that affects them, unless matters of urgency or other circumstances make it inappropriate to do so.

Attached to this policy are some illustrative examples of where we will or will not be likely to take regulatory action.

### **Delivery**

The Director of Operations will have primary responsibility for delivery in accordance with this policy. He will do this mainly through his Complaints Resolution and Enforcement departments.

This policy should be read in conjunction with the [information rights strategy](#) (December 2011).

### **Transparency**

In line with the ICO's commitment to transparency we will be open about the regulatory action we take. We will make information available on the ICO website and in the annual report to Parliament about the number of cases we pursue, their nature and their outcomes. We will normally publish enforcement notices; undertakings and practice recommendations.

Where regulatory action reveals problems that are common to a particular sector or activity and it is apparent that there is a need for general advice on the issue in question we will make such advice available.

### **Regulatory action examples**

The following are some examples of the types of conduct which will lead the ICO to consider using its regulatory powers. The examples are intended to be illustrative rather than exhaustive or binding. In practice all the relevant circumstances of a case will be taken into account.

### **Likely (especially after warning)**

- Repeated or serious failure to respond to requests within the appropriate timescales, particularly if a period of monitoring fails to encourage an improvement.
- Repeated or serious failure to complete internal reviews within the appropriate timescales, particularly if a period of monitoring fails to encourage an improvement.
- Failure to adopt an approved publication scheme.
- Failure to publish in accordance with an approved publication scheme
- Failure to have a records management policy in place or to operate in accordance with that policy.
- An obvious disregard for the access provisions FOIA and EIR seek to promote.
- An obvious lack of understanding about the requirements of FOIA and EIR, particularly when the ICO's attempts to provide advice and support have been ignored.
- A repeated failure to produce refusal notices which comply with the requirements of the legislation.

### **Unlikely**

- Minor, non-repetitive breaches of the Act.
- Minor, non-repetitive non-conformity with the codes of practice.
- Non-compliance or non-conformity within a small authority (for example a parish council or school) which was unaware of its obligations, and which has since taken steps to address this.
- Non-compliance or non-conformity which is over 12 months old, unless the breach is continuing or repetitive.