

## **ICO PROSECUTION POLICY STATEMENT**

### **Introduction**

1. The Information Commissioner, as part of his powers to take enforcement action under the Data Protection Act 1998 and Freedom of Information Act 2000, has the discretion to investigate and prosecute, if appropriate, criminal offences under this legislation. The Information Commissioner's discretion in deciding whether to bring a prosecution may be delegated by the Commissioner to designated lawyer(s) employed by her.
2. The purpose of this policy is to provide general guidelines that will be considered when decisions are made in relation to prosecution or alternatives to prosecution, to ensure that such decisions are made in a fair and consistent way.
3. This document is not exhaustive and each case will be considered individually on its merits. In addition to this policy the prosecuting lawyer will have regard, where appropriate, to the following:
  - The CPS Code for Crown Prosecutors
  - The ACPO Manual of Guidance on Data Protection
  - The ICO's Data Protection Regulatory Action Policy
  - The ICO's Freedom of Information Regulatory Action Policy
  - The ICO's Policy on Conviction and Caution Data
  - The CPS Guidelines for Prosecutors on assessing the public interest in cases affecting the media, where applicable

### **Prosecution**

4. The prosecuting lawyer will provide guidance to investigators throughout the investigation and prosecution stage, to advise on the strength of the evidence and to identify potential deficiencies at an early stage. The prosecuting lawyer will do so in a fair, independent and objective way.
5. The prosecutor will review and advise on each case which is being considered for prosecution in order to assess whether the evidence in the case is sufficient to pass the evidential test in the Code for Crown

Prosecutors. If there is insufficient evidence, consideration will be given to whether further evidence can reasonably be obtained. Where this is not practicable, no further action will be taken in respect of the criminal investigation and the proposed defendant will be advised of this course of action.

6. Where however there is evidence which does not amount to a criminal offence but is evidence of non-compliance with the legislation, for example a breach of the data protection principles, further enforcement action, such as obtaining an undertaking, may be taken if considered appropriate.
7. Where in the opinion of the prosecution lawyer there is sufficient evidence we will proceed to consider whether a prosecution would be in the public interest, having regard to the public interest test in the Code for Crown Prosecutors. No prosecution will proceed unless there is sufficient evidence and a prosecution would be in the public interest. The prosecuting lawyer may also give consideration to the appropriateness of an alternative disposal such as offering a caution (paragraph 13). Prosecution must also be in line with our regulatory principles as set out in our Data Protection Regulatory Action Policy
8. Where a decision is made to prosecute we will usually notify defendants in writing of our intention to do so and may offer them an opportunity to make representations to us if appropriate. This will be the usual course in cases where we would be unlikely to interview, such as non-notification cases. However, we will proceed to a prosecution without asking for representations in cases where, for example, they have already had the opportunity to make representations in a PACE interview or have refused to be interviewed.

### **Proceeds of Crime Act 2002 (POCA)**

9. In cases concerning the unlawful trade of personal data, particularly those which involve substantial amounts of money, the ICO will seek to apply provisions under POCA, where appropriate. The ICO recognises that where the circumstances of a case would allow confiscation to be applied for under POCA, this would be an effective deterrent, which can be used to discourage offending committed to enrich the offender.
10. In cases where the POCA provisions are utilised we will apply them proportionately, fairly and within the spirit of the Act. POCA confiscation will be considered in all cases which fall within the scope of the Act, where offences committed have involved significant sums of money including where a series of many smaller transactions amount to a substantial sum due to the period of time of trading concerned.

11. However, whether to commence POCA proceedings is within the Commissioner's discretion and may not be appropriate or viable in some circumstances, for example where there is a victim pursuing a civil action or where the defendant is now bankrupt, or where the enforcement of an order may not be feasible.
12. The ICO is not in a position to carry out its own financial investigations for the purposes of POCA, as it does not employ accredited financial investigators but will work closely with other agencies, such as the Regional Asset Recovery Teams.

### **Cautioning**

13. A caution may be offered where the accused has made a clear and reliable admission of the offence and is prepared to accept a caution, providing it is in the public interest to use this means of disposal. If the accused has not made admissions, raises a defence or declines the offer of a caution then the matter will proceed to prosecution. The implications and significance of accepting a caution will be clearly explained to the accused at the time a caution is offered and the accused will be allowed time to obtain independent legal advice, if required.
14. A caution will only be offered where there is a realistic prospect of conviction. Where the evidence would be insufficient to proceed to prosecution a caution will not be offered and no further action will be taken. When an Investigating Officer is of the view that a case is suitable for a caution to be offered, this recommendation will be made and advice should be sought from the prosecution lawyer.
15. The following factors, which are non-exhaustive, may indicate that a caution is appropriate as a disposal:
  - offending is low-level in terms of seriousness
  - there are no particular aggravating factors
  - it is a first time offence, particularly if there is a likelihood of a caution being effective at securing future compliance
  - the accused has or is willing to provide assistance to an investigation/prosecution
  - where there has been a long delay between the date of offence and date of decision making, without good reason

Consideration will also be given to any mitigating factors, relating to either the circumstances of the individual case or the circumstances of the accused, which may weigh in favour of a caution rather than a prosecution.

16. The following factors, which are non-exhaustive, weigh in favour of a prosecution rather than a caution:

- The accused is breaching the law for financial gain
- has abused a position of trust
- has engaged in a systematic approach to obtaining or attempting to obtain personal data
- there are multiple individual complainants
- the accused has a relevant previous conviction(s) or caution(s) for a similar offence or has breached an undertaking.
- has ignored prior warnings or advice regarding compliance
- there are grounds for believing the offending will be repeated or continued

Consideration will be given to any aggravating factors in the circumstances of the individual case which may make a prosecution in the public interest. We will generally prosecute cases of non-notification where the data controller has failed to have regard to correspondence that they are required to do so.

## **Defendants**

17. Where a prosecution is being considered against a body corporate, consideration will also be given to whether a prosecution is warranted against any individuals in a position of responsibility, such as a director or manager, where the offence was committed with their consent, connivance or attributable to their neglect. Consideration will be given, where appropriate, to the role and responsibilities of the individual, the management chain and the size and structure of the company.

18. We will consider whether prosecuting both the body corporate and an individual is necessary, for example we may only proceed against one of the potential defendants in circumstances where it may be regarded as prosecuting the same person twice, e.g. where a sole director is also the principle owner of the company.

19. In a standard partnership, as each partner is jointly and severally liable for the acts of the partnership, all partners will normally be prosecuted if practicable, unless there is reason to do otherwise, for example where the division of responsibilities within the partnership is known, in which case discretion may be used to proceed against the partner(s) most responsible.

## **Victims**

20. Where there is an identifiable victim, the views of the victim about the offence and the proposed method of disposal, as well as details regarding any harm or loss will be established where possible. Any such views are a factor to be taken into consideration but are not in any way conclusive as any decision is within the discretion of the Commissioner. The use of Victim Impact statements will be considered for any sentencing hearing, however it is considered unlikely that any commercial complainant will be called upon to provide a victim impact statement.

## **Scotland**

21. Where an offence occurs in Scotland and it is considered suitable for prosecution, the case will be referred to the Procurator Fiscal, who will decide whether to bring a prosecution. If so, the Procurator will conduct the prosecution with assistance from the Information Commissioners Office where required. In Scotland any decisions in relation to the proceedings are for the Procurator, although the views of the Information Commissioner may be taken into account.

## **Costs**

22. We will normally seek to recover the costs of our investigation and prosecution at the conclusion of all successful prosecutions.

March 2013