ICO policy

Communicating regulatory activity

1 Introduction

We aim to be an effective, open and transparent regulator. Proportionately publishing, and where appropriate, actively publicising our regulatory activity and outcomes, helps us to achieve our strategic aims in upholding information rights in the public interest, and in promoting openness by public bodies and data privacy for individuals.

When we publish and publicise our regulatory activity, we want to raise awareness of our work to promote good practice and deter those who may be contemplating non-compliance with information rights legislation.

When we are asked about our regulatory activity, we want to be as open as possible. We will only withhold information: where we can identify a genuine likely prejudice to our regulatory activities; to cover those who voluntarily seek our assistance or advice or, where sharing information would otherwise be prohibited.

As a responsible regulator, we must be confident of the legality of and public interest in the information we publish about our regulatory activities and about those we regulate. This policy is intended to help all ICO departments take a lawful and consistent approach when deciding whether to place information about those we regulate into the public domain.

The policy applies to the potential publication or disclosure of information across the full range of our 'formal' and 'informal' regulatory activity. It also covers the potential for disclosures to be made at various stages of our regulatory processes, including before an outcome is reached.

The policy talks about three types of communication:

Disclosure - reactive communication in response to some form of request

Publishing – proactively presenting information on our website

Publicising - proactive communication, typically through the use of press releases, social media, blogs or actively contacting journalists for example.

The aim of the policy is to provide us with an effective operating framework, which allows us to communicate with focus, direction and confidence to gain the maximum impact and effect. It is in line with both our Regulatory Action Policy and our Publication Scheme.

2 Understanding our legal boundaries and prejudice to our regulatory functions

All parts of the ICO are engaged in regulatory activity of one form or another. Regulatory activity includes the more 'formal' regulatory action that results in us serving an official, public notice on an organisation. It also includes the less obviously formal regulatory work we do to empower, educate and influence those we regulate to improve their information rights practice.

Our work will often attract interest from the public, media or other parties. There will also be potential value in the proactive publication of our work and its outcomes.

Whatever the regulatory activity, we adhere to a statutory prohibition against sharing certain information obtained by us or furnished to us about those we regulate.

This prohibition is described at section 59 of the Data Protection Act. In basic terms, if one of the following criteria cannot be met we commit a criminal offence under section 59 of the Data Protection Act if we disclose information not already in the public domain about those we regulate

The criteria are as follows:

- We have the consent of the individual or organisation to make the disclosure.

- We have been provided with the information for the purpose of sharing it with the public as required by the DPA or FoIA.

- The disclosure is necessary for the discharge of our functions under the DPA, FoIA or any EU obligations.

- The disclosure is necessary as part of civil or criminal proceedings under the DPA or FoIA.

- The disclosure is necessary in the public interest.

A full copy of the text from s59 is available here:
http://www.legislation.gov.uk/ukpga/1998/29/section/59?view=plain

Once we are satisfied that we have a legal basis to publish or disclose the information, we must also be content that were we to do so, we would not prejudice our own work as a regulator, or that of others we may be working alongside.

Communicating information about our regulatory activities may include, but not be limited to:

- confirming that we are investigating an issue or engaging with a particular organisation to discuss their current or future information rights practice and compliance,

- updating on the progress or outcome of our most formal regulatory work which would typically result in a notice, report or decision being issued or served on a particular organisation and published on our website, or

- updating on the progress or outcome of our more informal investigations or information rights practice discussions.

Where our work to consider a particular matter or issue is not yet complete, there will be limits to how open and transparent we can be without prejudicing our regulatory function. It is also important that

organisations should feel confident that they can discuss certain matters with us in confidence, where it is appropriate to do so.

When we engage with those we regulate we should take the opportunity to make them aware of our status as a public authority subject to the Freedom of Information Act and draw their attention to this policy for more information about our approach to publishing and publicising our regulatory activities. We should also encourage the organisations and stakeholders we engage with to highlight to us any information they provide which they consider to be confidential.

We will then take these views into account when deciding if publishing information about our regulatory activity is in the public interest or prejudicial to our regulatory functions.

Nevertheless, our priority is always to work to improve information rights practice and compliance amongst those we regulate. This will be our primary focus when deciding whether to publish information about our formal or informal regulatory activity.

Where we do not have, or believe we need, the consent of the organisations involved, the following considerations should be taken into account when deciding whether publishing or publicising our regulatory activity is in the public interest or likely to be prejudicial to our regulatory function.

Factors in favour of publishing or publicising:

- There is an opportunity for education or breach prevention.
- The issue is new or ground breaking and therefore particularly note or newsworthy.
- If the issue meets a communications, corporate or information rights objective.
- If publication or publicity would help, or not genuinely prejudice, an investigation.
- Publicity is likely to deter others.
- There's a risk to our reputation of not publishing or publicising.
- The issue, or our involvement, is already in the public domain and publication would help clarify our involvement or the facts of the matter in question.
- Publication or publicity would demonstrate improvement to information rights practice.

Factors preventing or deterring publishing or publicising:

- Releasing information could prejudice a trial or other legal proceedings.
- An investigation is underway that could be hindered by publicity, or the investigation may come to nothing.
- Our publishing would include personal information and it would be unfair to put it into the public domain.
- An organisation has a legitimate expectation that their contact with the ICO would not be published or publicised.
- Publication or publicity would be unlikely to lead to improved information rights practice or compliance.

3 Guiding principles

Principle one - publicising or confirming our involvement

We can become involved with a regulatory matter in a range of ways. We may be alerted to it by a member of the public, a third party or by the organisation concerned 'self-reporting' an incident to us. We may also instigate our own research or involvement in a given issue based on analysis of intelligence gathered from a variety of sources.

Our default position is that there is generally likely to be a legitimate public interest in being open about the issues we are considering at any given time and the organisations involved. Genuine prejudice to our regulatory activity is also unlikely for the vast majority of our civil or informal work. We would not typically provide a running commentary on our investigations or discuss our progress, but we will generally be comfortable for it to be known that we are looking into a particular matter or incident with a commitment to share appropriate information about the outcome, once it is known.

We would consider not sharing this kind of information where it was genuinely felt that sharing would be likely to prejudice our consideration or investigation of a given matter or incident. We may also choose not to share this information if we believe any of the organisations or stakeholders involved have a legitimate expectation of confidentiality, either at that particular stage of the regulatory process or more generally.

Principle two - formal regulatory outcomes

By 'formal regulatory outcomes' we mean those where some form of notice or report is served or issued following our regulatory activity. The default position is that all formal regulatory activities, including significant decisions and investigations, are to be published, and where appropriate publicised, once the formal regulatory outcome is reached.

Regulators, stakeholders and individuals say they want to see us taking formal regulatory action where it is warranted and it is one of the criteria by which they judge our reputation. The best way of publicising our activity is by being as open and transparent as possible.

Principle three - informal regulatory activity

By informal activity we mean our work which does not result in the serving of formal notices, reports or decisions. This regulatory activity typically sees us discussing, educating, negotiating or influencing standards of information rights practice and compliance with those we regulate in an effort to promote good practice.

There is an important balance to be struck here. We know there is often a genuine interest from the public in understanding our involvement with a given matter or issue. It is also often in our own interests to be open about our work even where it does not result in formal regulatory action. A lot of very positive and significant improvements to information rights practice are achieved informally.

We also recognise however that some informal engagement with our stakeholders is only possible because an appropriate degree of confidentiality is in place.

It is important that we make our decisions on a case by case basis when striking a proportionate balance between open and transparent regulation and stakeholder expectations.

Principle four - inform, consult or consent?

Depending on how formal the regulatory activity is, and the type of information involved, it may be appropriate for us to inform, consult

with or seek the consent of the organisations named in our communication before it is published.

Stakeholders want us to have good relationships with them. We need to ensure these relationships are based on a mutual understanding that we will use the full range of regulatory options available to us as appropriate.

We will not risk damaging our reputation by agreeing with an organisation that we won't publicise our formal action against them or that we will give advance warning. As an independent regulator, there is no obligation for us to contact the press office of an organisation we are taking formal action against before issuing a press release. We are also under no obligation to proactively share the content of releases with organisations or give out the likely date of issue.

However, in our engagement with an organisation about formal regulatory action against them, we will point to this document to explain how we will communicate regulatory action. It is for that organisation to make their press office aware and to decide how they will prepare for any media calls they may receive.

Where we are planning to publish information about less formal regulatory activity, we will consider if it is possible or appropriate to inform the organisations involved. This may be so we can take their views into account before deciding whether to publish some or all of the information. It may also be to give them the opportunity to prepare their own commentary or press release.

For example, if we publish information summarising the number of complaints we received about all the organisations in a particular sector, we may provide those organisations with the information that relates to them in advance, so they can prepare their public response in time to coincide with our publication.

More generally, when we are communicating with organisations we will make them aware that the information they give us may be subject to disclosure by us, either in response to a specific information request or as part of our publication of examples of our work to improve information rights practice. When doing this, we will invite organisations to highlight any information they would like us to treat in confidence and take their views into account when deciding if publication is appropriate.

4 Governance and authority

While there will be general agreements about how to communicate our regulatory activities, we do recognise that different cases may need different approaches. Some cases will need careful consideration of the communication required to protect and promote our reputation.

Where decisions about publicising information about our regulatory activity are not routine, they can be escalated to the most relevant Head of Department. Heads of Department may then seek the agreement of the Strategic Tasking and Co-ordinating Group (STCG).

In some cases, we may be working alongside other regulators on an investigation. In these circumstances, we will liaise with the other regulatory bodies to discuss and agree our approach to communications.

5 Practical examples of communicating our regulatory activities

The following are some examples of our typical regulatory activity together with our usual approach to making them public.

Concerns reported to us

- Would typically confirm we are looking into a particular matter about a named organisation if asked, providing only basic information about the nature of the concern to avoid prejudice to our consideration of it.

- Would provide statistical summary of concerns handled once complete, either in response to information requests or as part of any planned publishing.

- Where publishing is intended to illustrate organisations responsible for numbers of concerns, we will provide those organisations with an opportunity to produce their own narrative to accompany the release.

- Will publicise any trends or themes that are particularly note or newsworthy.

Self-reported incidents

- Would typically confirm we are looking into a particular matter about a named organisation if asked, providing only basic information about the nature of the incident to avoid prejudice to our consideration of it.

- Would provide statistical summary of incidents handled once complete, either in response to information requests or as part of any planned publishing.

- Where publishing is intended to illustrate organisations responsible for numbers of incidents, we will provide those organisations with an opportunity to produce their own narrative to accompany the release.

- Will publicise any trends or themes that are particularly note or newsworthy.

Criminal investigations

- Won't usually publish anything about them until the investigation is concluded.

- Would consider publishing limited information during an investigation if knowledge of it was already in the public domain and further communication would be considered likely to further our investigatory or regulatory aims.

- Will take into account our obligations under any relevant codes of practice such as the 'Victims Code of Practice'.

- May publicise details once we've reached an outcome and if the matter was considered particularly note or newsworthy.

Civil investigations

- Generally comfortable to confirm we are investigating or considering a particular matter.

- Would not provide a commentary as our work progressed unless we felt public privacy or information rights were at risk or we wished to deter similar practices to those being investigated.

- Would provide basic details of the outcome in statistical reports.

- May provide more detailed case studies once matters are concluded if this would be a good example of improvement to information rights practice.

- May publicise if we felt the issue was particularly newsworthy.

Preliminary notices

- More likely to publish aggregate story.

- May publicise if there is an overriding public interest, all parties agree, the matter was already in the public domain, or if there is a regulatory need.

Undertakings

- Will publish all undertakings on our website for two years.

- Where they relate to section 55 and are given by individuals in lieu of possible prosecution they will normally be put on our website in an anonymised form.

- Will publicise depending on news value or if there is a need to address public concerns.

Prosecutions

- We will report on prosecutions in our Annual Report to Parliament, which also goes on our website.

- We may inform journalists in advance.

- We will adhere to contemporaneous reporting rules.

- We may issue a news release.
- In some cases we'll provide the case summary to a journalist.

Cautions

- We may publicise cautions depending on news value.
- More suited to aggregate story.

Enforcement Notices

- Published on our website and reviewed after two years.
- We will publicise these where to do so will help promote good practice or deter non compliance.

S159 orders (Consumer Credit Act)

- May publicise these depending on news value.
- More suited to an aggregate story.

Injunction application

- More suited to an aggregate story.

Application for Enforcement order

- May publicise these depending on news value.

Information notice

- Likely to publicise if it's in the public domain.
- Likely to publicise if there's an expectation of an update or we need to show we have taken action.
- May publicise if it helps the investigation.

Search warrant

- We will publish these in aggregate in the annual report.

- Will publicise details, subject to the considerations set out above relating to criminal investigations.

- We are likely to publicise if it's in the public domain.

- We are likely to publicise if there's an expectation of an update or we need to show we have taken action.

- We may publicise if it helps the investigation.

Civil Monetary Penalties

- We will publicise the serving of a monetary penalty.

- We will not normally publicise the notice of intent. This is more suited to an aggregate story, unless there is an overriding public interest to publicise it, all parties agree, if it was already in public domain, or if we suspect the story has been leaked or if there is a regulatory need.

Action taken following concerns raised and incidents reported

- We will publish quarterly information highlighting information rights practice improvements made following concerns and incidents reported to us, but where formal regulatory action was not appropriate.

- This will include naming organisations where the public interest warrants it.

FOIA decision notices

- We will publish these on our website unless to do so would unfairly disclose personal information or prejudice related legal proceedings.

- We will publicise these, depending on news value.

- We are likely to publicise if there's an expectation of an update or we need to show we have taken action.

FOIA practice recommendations

- We will publicise these, depending on news value.

FOIA assessments S47

- We may publicise these depending on news value (and depending on whether it is subject to a confidentiality agreement and/or whether we have the agreement of the organisation).

- Also suited to an aggregate story.

- We will consult with the National Archives and/or the Deputy Keeper of the Records for Northern Ireland if the matter relates to records management.

Monitored bodies

- We will publicise the names of public bodies we are monitoring for the purposes of assessing compliance with s10 FOIA, r5 EIR or internal reviews on a quarterly basis.

- We may also publicise the names of public bodies that have been brought to our attention as a result of other types of poor practice.

Audits and Advisory Visits

- We will publish the name of organisations that have received an audit or advisory visit. If we have visited an organization, we will confirm the fact of the visit, but only share details of the visit with consent of the organisation.

- With the consent of the organisation involved, we will also publish our final report.

Liaison and practice improvement discussions

- We may choose to publish details of our engagement with an organisation, or group of organisations, where there is a public interest in doing so and to do so would not prejudice our regulatory function.

- We will always consider if an organisation has a legitimate expectation of confidentiality when deciding if there is a public interest in publishing details of our work with them.

6 Likely tools for communicating regulatory activities

This is not an exclusive or exhaustive list, but gives a good indication of the ways we might choose to publicise ICO regulatory activities. The Communications Planning team will decide which to choose, in consultation with colleagues in relevant departments.

- Journalists' briefings
- News releases
- Website/internet
- Annual Report to Parliament
- E-newsletter
- Blogs
- Social media eg Twitter
- Letters
- Briefings to stakeholder groups.
- Special reports to Parliament (on the decision of the Commissioner)
- Quarterly 'improving practice' reports