

Prioritising access to information complaints – a consultation



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Information Commissioner's Office

Introduction

Transparency and freedom of information is fundamental to good government. They are essential components of our constitutional framework. The Information Commissioner's role is key to ensuring the legislation that gives people their right to access public information works as well as it can.

When launching ICO25, our new corporate strategy, for consultation the Information Commissioner set out that:

"The story of the ICO's regulation of FOI is one of doing more with less in real terms. Limited funding, a sustained increase in cases brought to us, an increased need to support stretched public authorities and the impact of the pandemic on staffing have created a perfect storm. We cannot continue in the same way.

"The proposals I set out today involve trying different approaches. Some may work well, some may not work, some may need tweaking. But it is absolutely clear to me that in a world of increasing demand, and shrinking resources, we simply cannot keep doing what we've been doing and expect the system to improve."

We are working to improve on delivery across the board in our FOI casework services with a number of initiatives. This includes:

- using dispute resolution techniques where we can;
- offering more support for public authorities to help them get it right first time; and
- improving the quality of decision-making when requests are first made.

This proposal is designed to address some of the delay that has crept into the system which undermines the intention of the freedom of information legislation. We want to make information rights work more effectively, particularly on cases which have a heightened public interest.

To do this, we propose a new approach to proactively prioritise those cases with the highest public interest. We aim to deliver appropriate resolutions in these cases as quickly as possible.

We know that at the end of every complaint is a person simply trying to exercise their statutory right to get hold of information they need. We will, of course, continue to resolve all the complaints we receive in line with our statutory duties. We will also endeavour to resolve all the cases we receive as quickly as possible. But we must also accept that, following the increase in cases in recent years, we need to make better choices about how we allocate our resources to those issues with the highest impact.

What this consultation covers

The Information Commissioner is responsible for resolving complaints about the handling of information requests under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations (EIR).

The ICO25 plan made clear that we will innovate when looking for improved outcomes for people making information requests, while seeking greater efficiencies from our appeals service. It also set out that we will be transparent in our approach, explaining any necessary trade-offs as we provide best value for the government grant-in-aid which funds this important work.

This consultation sets out, and seeks views on, how we propose to prioritise our FOI and EIR complaint handling so that, where needed, we can focus quickly on cases that are of significant public interest. It explains how we have worked up to now and our proposed changes to better prioritise our work.

The current ICO approach to prioritisation

Under [our current published service guide](#), we set out that, if someone asks us to prioritise their complaint, a manager considers their reasons for requesting prioritisation.

To date, we have applied the following tests to decide whether we will prioritise certain cases, although we do not include these in our service guide:

- Is the information required for public consultation or to inform public debate?
- Has the requester made similar requests to multiple public authorities or otherwise linked cases?
- Does it raise novel issues?
- Is there an opportunity to gather data and intelligence to inform other work?
- Is there a live court case or similar for which the requester needs the information?
- Are there any personal health reasons that mean we should accelerate the case?

At the moment, we consider requests for prioritisation on a case-by-case basis and only accept them in exceptional circumstances.

Our proposed approach to prioritisation

We want to make the factors we consider when prioritising cases clearer. We will then use these new criteria, finalised after this consultation, to ensure that we allocate prioritised cases to our caseworkers to work on as quickly as possible.

The criteria

The proposed criteria we would use are:

- Is there a high public interest in the information requested? Does it raise a novel or clearly high-profile issue that we should look at quickly? This may include whether:
 - the case is subject to significant media interest (or may be in the future, if a journalist makes the request);
 - the case concerns an issue that involves a large amount of public money, either nationally or in the context of the size of the public body involved; or
 - the requester needs the information to respond to a live and significant public consultation and the timeframe for achieving resolution is reasonable to inform the decision-making process.
 - Is the requester a person or group who is raising information rights awareness, supporting vulnerable groups or raising awareness of potentially significant public interest issues? This may include a request from:
 - a journalist;
 - a civil society group, or otherwise on behalf of others; or
 - an elected representative.
 - Are vulnerable groups or people potentially significantly affected by the information requested? This may include information:
 - which covers policies, events or other matters that potentially have a significant impact on vulnerable people or groups;
 - that has a high potential impact or harm on a proportionately large number of people nationally or in a particular locality; or
 - that may directly affect the requester's health or another issue, that means they need a swift resolution (eg, it may impact on treatment or is about a live court case).
 - Would prioritisation have significant operational benefits or support those regulated? For example, is the request:
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- novel, or could provide the basis for guidance or support for other regulated bodies;
- linked to a response to several similar cases, and quick resolution would help this; or
- part of a round robin request.

We will publish our new criteria once the consultation period has finished.

How we will apply the criteria

When someone submits their complaint to us, we will ask them to let us know if they think any of the new criteria applies to their case. We will simplify our digital submission process to help them to do this. We will also encourage people to use it wherever possible to speed up our case handling. However, we will still accept complaints through other reasonable routes.

We will also use these criteria proactively when assessing a complaint. Caseworkers will decide whether to prioritise a case, without the need to seek approval within the ICO.

We recognise the requester-blind principle set out in FOIA. Requester-blind means that the public authority is considering whether they can disclose the requested information to the world at large. It is not deciding whether they can disclose the information only to the person that asks for it. Although we are considering using the requester type as a potential public interest criteria, the requester-blind principle remains intact under this approach. Whilst under the criteria set out for consultation, we may decide to prioritise a case based on the nature of the requester. However, we will still investigate the case applying the requester-blind principle that disclosure is not just to the requester, but to everyone. We are seeking views on this and all of the criteria proposed during the consultation.

Our prioritisation decision will be final. The existing right to complain about our handling of a case, in addition to the statutory right to appeal a final decision we make to the Information Tribunal, will remain unaffected.

We will keep our approach under review and ensure caseworkers are supported with the right tools to make these decisions based on our experience of implementing the final approach we take in practice. We will report on the number of prioritised cases as part of our routine data releases.

What does prioritisation mean?

When a case is prioritised, we will handle it at pace at all stages. Prioritisation does not mean that we will predetermine the outcome of a case. We may uphold the complaint or we may not. Where possible, we will resolve a case based on the information available to us when we receive it, either through a decision notice or dispute resolution. This will provide regulatory certainty to the

requester about our decision as quickly as possible. They or the public authority can then move forward as they wish to access other remedies, including to the tribunal.

We expect that public authorities will provide their full and final arguments in the internal review response to the requester, and that they will identify, locate and review any withheld information as part of the request handling process before a case reaches our office. However, we understand that we will have some cases where we need further information to make our decision, or where alternative dispute resolution is appropriate. When engaging with public authorities on prioritised cases, we will set short deadlines, recognising that the information should be readily available. We will use our statutory information notices to compel a response when public authorities do not meet those deadlines.

Whether we prioritise a case or not, we will continue to explore how we can achieve a swift and good-quality outcome on each allocated case. This may include issuing much shorter decisions, particularly where we are simply upholding the original decision and do not need to duplicate quality work. We will invest our time in the detailed decisions where they meet our prioritisation criteria. We will spend less time in those decisions that don't meet our criteria or are unlikely to have a wider impact.

A draft decision tree and process map is annexed to this consultation setting out how we would assess whether to prioritise a complaint. We estimate that we will prioritise around 10-15% of our cases.

How will we know we've been successful?

To support this approach, we also propose adapting our current service standards. We are proposing new standards that we would publicly report on our progress against.

We will finalise these as part of our planning for 2023/24 onward, but our initial intention is as follows:

- We will allocate prioritised cases within four weeks of the case being available for investigation (*new measure)
- We will allocate all other cases within 12 weeks of the case being available for investigation (*new measure based on previous experience)
- We will complete 90% of cases within six months of receipt (*increased from 80% previously)
- We will have fewer than 1% of cases older than 12 months (*existing measure)

Refusing complaints

Under s.50(2) of FOIA, the Commissioner can decide not to make a decision if there has been 'undue delay' or a request is either 'frivolous or vexatious'.

We define 'undue delay' as being submitted more than three months after the person complaining to us has received their final response or last substantive contact with the public authority.

We propose reducing this period to six weeks, unless there are exceptional mitigating circumstances (such as illness or a prolonged absence from being able to check correspondence). This is because we do not believe it should take too long to identify concerns with the handling of an information request. We think six weeks provides enough time to make a complaint. FOIA requires public authorities to highlight the right to complain to the ICO when they are issuing a final refusal notice.

We currently define 'frivolous' as when a complaint has no serious intent or is considered unworthy of serious treatment. We propose to amend our service guide to make clear that we will consider a complaint frivolous when there is such a low public interest in the information requested that it would be a disproportionate use of our resources to investigate it.

We currently still investigate a number of complaints where public bodies have concluded that a request is vexatious. The Commissioner has recently updated his guidance on this issue following clear rulings from the Information Tribunal. Following this work, there is now a clear position on the tests that a public body should apply when assessing whether a request is vexatious.

We already take account of the Commissioner's guidance on vexatious requests when considering whether a complaint itself is vexatious. We propose that, when it appears to us that a public body has clearly followed the Commissioner's guidance, modelled on the tests set out by the Tribunal, we will not make a decision as we will consider the complaint itself vexatious. This will ensure that public resources, both our own and those of the public body, are not further wasted on vexatious requests and complaints.

In addition, the Commissioner reserves the right to not investigate a complaint on any matter if he deems it vexatious himself when applying the Tribunal's tests and his own guidance. This is irrespective of any decision the public authority makes.

We will continue to investigate cases where it appears to us that:

- the public authority has not applied the tests at all;
 - there is evidence to suggest they may have applied the tests incorrectly;
- or

- the complaint we have received appears not to be vexatious for other reasons.

Consultation questions

We are seeking views as part of this consultation on the following areas.

Question 1: Do you agree that, to maximise the benefit from the resources available to the Commissioner for his work on access to information complaints, he should prioritise cases of more significant public interest rather than continuing the 'cab rank' approach of dealing with cases in date order? If you don't agree, please explain why?

Question 2: Do you agree with the proposed factors that will inform the ICO's decisions on which cases to prioritise? If not, which do you not agree with and why? Are there any additional factors you would include?

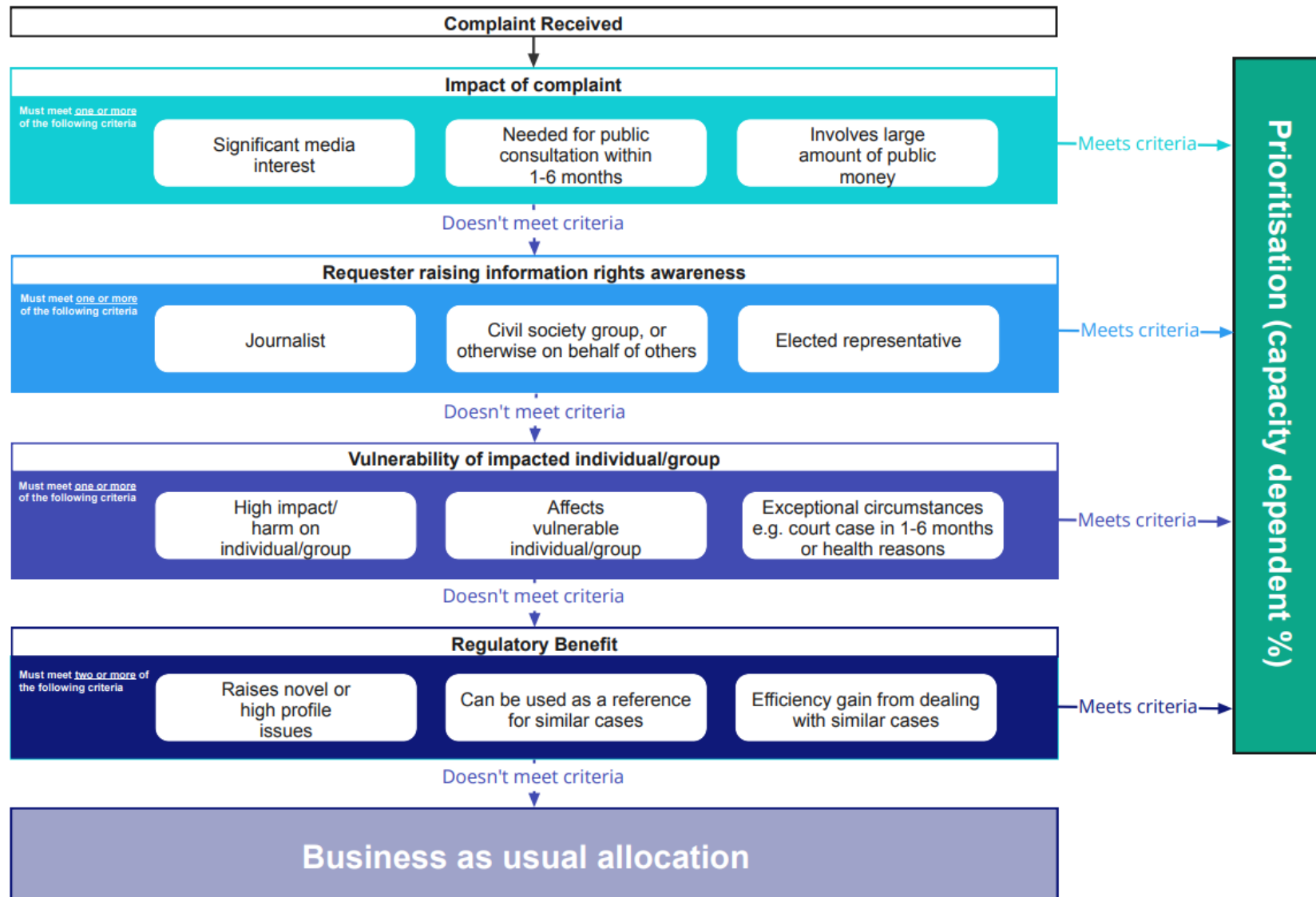
Question 2a: In particular, do you agree that prioritising cases based on who has made the request is an appropriate public interest factor? If so, are there any other groups or types of requester you think should be covered?

Question 3: Do you have any comments on the service standards (or Key Performance Indicators) we should set for dealing with our FOI and EIR complaints?

Question 4: Do you agree that 6 weeks is sufficient time to bring a complaint to the ICO? If not, please explain why you think additional time is needed or what any exception criteria should include?

Question 5: Do you have any comments on the ICO's approach to implementing the Commissioner's statutory right to not make a decision where a complaint is vexatious or frivolous?

Annex A – Decision Tree



Annex A – Process Map

