

Freedom of Information

ICO Enforcement Strategy



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

1 FoI Enforcement Strategy

The first 18 months of the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR) has been both successful and challenging for the Information Commissioner's Office (ICO). It has also been very much a learning experience and that is equally true for public authorities.

The vast majority of public authorities are taking freedom of information (FoI) seriously. Regrettably, some are not. Public authorities have now had ample opportunity to learn about FoI and to develop suitable systems to properly meet their responsibilities when dealing with information requests. The Commissioner will now be taking a more robust approach towards the small number of public authorities that repeatedly fail to meet those responsibilities. He will do this through the use of Practice Recommendations and Enforcement Notices.

2 Promoting good practice – ICO's overall aims

The Commissioner's duty to promote the following of good practice relates to both the requirements of the FOIA and EIR and the provisions of their related codes of practice. The Commissioner recognises that public authorities will be at different levels in terms of, for example, the procedures and resources that they have for dealing with information requests. Some authorities will do well and others not so well. Nevertheless, the Commissioner expects high standards of performance especially in relation to the timeliness of dealing with requests. The ICO will continue to provide authorities with help and support but where necessary will take appropriate action. Through promoting good practice the Commissioner aims to:

- promote open government.
- bring about a culture of maximum disclosure; and
- deliver benefits for citizens and public authorities.

3 The factors driving good practice - "carrots and sticks"

The achievement of "good practice" within a statutory framework will be secured for public authorities in many different ways. A spectrum of approaches will be needed.

3.1 Voluntary programmes / self interest

Many public authorities will not need external attention. Learning from handling FoI requests, engaging with citizens and seeking appropriate advice can all help improve the systems that public authorities employ for dealing with requests. This can in turn lead to improved trust and confidence through

better customer service, greater transparency and accountability. In these situations the need will not arise for ICO intervention.

3.2 Structured intervention

When the ICO becomes aware of situations where public authorities are regularly or seriously failing to meet expected standards of good practice it will intervene by taking appropriate action (see Annexe 1). The type of intervention will be appropriate to the failure and proportionate. The interventions or actions the ICO can take include:

- Specific advice and guidance from ICO and others
- Exhortation and negotiation
- Assessments
- Practice Recommendations
- Positive and negative publicity
- Special Reports to Parliament

3.3 Regulatory intervention

This will be considered when there is clear evidence of more serious systemic or repeated breaches by public authorities of Part I of the FOIA or Parts 2 and 3 of the EIR. There may also be some situations when the ICO considers regulatory intervention appropriate for a single breach where that breach is deliberate or reckless and could result in significant detriment. In appropriate cases the Commissioner will issue **Enforcement Notices**.

4 Overall approach to ICO intervention

This Enforcement Strategy leads on from the provision of guidance and advice in the two to three years running up to implementation of FoI and the experience gained through the handling of complaint cases.

The ICO is keen to build on the good start evidenced in the first 18 months and is now ready to adopt a more pro-active approach to monitoring public authorities' performance. The ICO's enforcement focus will be on changing authorities' behaviours not on resolving individual cases or punishing past failures. However, past performance will be taken into account where authorities continue to fail to meet their obligations and responsibilities. Working to improve performance in this way will carry the added benefit for all of reducing complaints to the ICO and appeals to the Information Tribunal.

4.1 Initial drivers / intelligence sources

The ICO will employ a range of methods to identify potential candidates for structured or regulatory intervention. These will include:

- Experience with complaints (active monitoring by ICO).
- Wider ICO monitoring, for example, issues of general public concern raised by Parliament, the media, Department for Constitutional Affairs, liaison groups.
- Exhortation and negotiation not producing results or giving rise to concerns.
- Information Notices.

4.2 Selective approach

The ICO will take a responsible and proportionate approach to failures to follow good practice. While every endeavour will be made to work with public authorities we will take robust action where it is considered appropriate. The factors to be considered when determining the appropriate action will include:

- The available tool.
- Targeting by, for example, sector or functional activity.
- Educative and deterrent impact on other public authorities - generally or within sector.
- Evidence of wilful or deliberate abuse by public authorities of the legislation or codes.
- Intelligence base (ICO knowledge).

4.3 Guiding principles

This Enforcement Strategy is consistent with the five Principles of Good Regulation (see Annexe 2) established in 2005, by the Better Regulation Task Force (BRTF) and the recommendations of the Hampton Review. The BRTF was replaced by the Better Regulation Commission on 1 January 2006.

5 Assessments, Practice Recommendations and Enforcement Notices

What they involve / How they work

5.1 Assessments

The Commissioner may with the consent of a public authority carry out an assessment to determine if the authority is following good practice. (Initial selection may arise through invitation or for example, through ICO monitoring or working in conjunction with the National Archives (TNA).)

This may be done verbally through a series of questions and answers, through correspondence or in appropriate cases through visiting the relevant authority and conducting an on-site assessment.

Where the assessment is being conducted in relation to the section 46 Records Management Code of Practice, the assessment will be carried out in conjunction with the Keeper of Public Records and in the case of Northern Ireland with the Deputy Keeper of Records.

Following an assessment there are a number of possible outcomes:

- No further action required;
- Agree an action plan and timescale for implementation with the public authority; or
- Issue a Practice Recommendation.

5.2 Practice Recommendations

Where the Commissioner considers that the practice of a public authority does not conform with that proposed in the codes of practice he may give that authority a Practice Recommendation.

A Practice Recommendation will specify the steps the Commissioner considers should be taken to bring about conformity.

A Practice Recommendation will be in writing and will refer to the particular provisions of the code of practice with which the Commissioner considers the public authority's practice does not conform.

Practice Recommendations in relation to the section 46 Records Management Code require consultation with the Keeper of Records and the Deputy Keeper of Records in relation to Northern Ireland. The Commissioner has a Memorandum of Understanding with TNA and the ICO will be working closely with TNA to ensure good practice in this area.

Practice Recommendations will be clearly identified as such so as to avoid confusion with more general advice and guidance provided by the ICO either verbally or in routine correspondence.

The Commissioner will consider the following criteria when determining whether an assessment or Practice Recommendation may be required:

- Invitation from the public authority.
- Evidence of a public authority struggling to meet its FOI responsibilities.
- Serious or repeated non-compliance with Code requirements.
- An alternative course of action to an immediate Enforcement Notice.

The ICO will closely monitor the implementation of any agreed action plan and the adoption of any Practice Recommendations.

5.3 Enforcement Notices

Where the Commissioner is satisfied that a public authority has failed to comply with any of the requirements of Part I of the FOIA or Parts 2 and 3 of the EIR he may serve that authority with an Enforcement Notice.

An Enforcement Notice differs from a Decision Notice in that it is action initiated by the Commissioner rather than following a complaint from an applicant who believes that their request for information has not been properly dealt with.

In most cases, though not necessarily all, an Enforcement Notice will address systemic or repeated breaches.

An Enforcement Notice will specify the following:

- Details of the requirement or requirements with which the Commissioner is satisfied that the public authority has failed to comply.
- The Commissioner's reasons for reaching that conclusion.
- The steps the authority must take and the timescale for doing so, in order to comply with the relevant requirements.
- Details of the right of appeal.

Enforcement Notices may also be served where a public authority has failed to adopt a publication scheme or where it fails to make information available in accordance with its scheme.

The Commissioner will consider the following criteria when determining whether to take enforcement action or issue an Enforcement Notice:

- Systemic, repeated or serious non-compliance with the FOIA or EIR (especially delay)
- Evidence that obligations are being deliberately or persistently ignored or not taken sufficiently seriously
- When examples or precedents need to be created
- When issues need to be clarified or tested
- As a means of grouping together several similar complaints against same public authority
- Failure to adopt a publication scheme
- Failure to make information available in accordance with the authority's publication scheme

6 Transparency Policy

When we decide that some form of structured or regulatory intervention is necessary or desirable in the case of a particular public authority, we will normally make a public statement to that effect and give an indication of our intended approach. More generally, we will make information available on the number of cases we pursue, their nature and the outcomes. We will also publish the details of some illustrative cases that have been considered for enforcement action, whether or not action is in fact taken.

In addition, we will publish findings which are of wider import that may affect a range of public authorities or citizens generally.

Annexe 1

Statutory powers available to ICO

The Freedom of Information Act 2000 (FOIA), section 47, places a duty on the Commissioner to promote the following of good practice by public authorities. In particular it places a duty on him to promote observance by public authorities with the requirements of the FOIA and the provisions of the related codes of practice, the section 45 Access Code and the section 46 Records Management Code. In addition, Part IV of the FOIA provides the Commissioner with various enforcement tools including Decision Notices (s50), Enforcement Notices (s52) and Information Notices (s51). Failures to comply with these notices may be referred to the court, where they may be dealt with as contempt of court.

To provide for a consistent approach in both the handling and regulation of information requests Regulation 18 of the Environmental Information Regulations 2004 (EIR) provides for the FOIA enforcement provisions to also apply in relation to the EIR. Furthermore, Regulation 16(5) of the EIR provides for the general provisions under section 47 FOIA, above, to apply to the EIR.

As well as the enforcement tools available to the Commissioner he also has the power to issue non-enforceable Practice Recommendations under section 48 of the FOIA in relation to non-conformity with the Codes of Practice. These provisions also apply to the EIR by virtue of Regulation 16(5).

Enforcement tools

The main options are:

Enforcement Notice s52.

This is a binding enforceable notice served by the Commissioner on public authorities. The notice specifies the requirements of Part 1 with which a public authority has failed to comply, the steps it is required to take and the timescale for doing so. This is to be used in cases involving systemic or repeated breaches of Part I of FOIA or the EIR as opposed to Decision Notices (s50) which are used when an individual makes a complaint to the Commissioner about the handling of their information request. Failure to comply with a notice will usually result in the Commissioner certifying that fact in writing to the court for the matter to be dealt with as contempt of court.

It should also be noted that a breach of section 77 FOIA, may lead to a criminal sanction.

For example, where the investigation of concerns in relation to records management relates to the inappropriate or deliberate destruction or concealment of information with the intention of preventing disclosure to which an applicant would have been entitled.

Information Notices s51

This is a binding enforceable notice. The Commissioner may serve an information notice where he reasonably requires any information to determine whether a public authority has complied or is complying with the requirements of Part I or if its

practices conform with the Codes of Practice. An information notice may also be served in relation to a section 50 complaint.

Other ways in which the ICO encourages and secures compliance and good practice

Practice Recommendations s48

This is a non-enforceable recommendation in relation to conformity with the Access and Records Management Codes of Practice. A practice recommendation indicates to a public authority the steps which, in the Commissioner's opinion, are necessary to ensure conformity with the Codes. The Commissioner will normally make practice recommendations public either by publishing them proactively or making them available on request in line with our Transparency Policy. Although a practice recommendation is not directly enforceable, a failure to comply with a Practice Recommendation may lead to a failure to comply with the FOIA or EIR.

Assessment s47(3)

This is an assessment made by the Commissioner, with the consent of the public authority, as to whether that authority is following good practice including conformity with the s45 Access Code and the EIR Code. In relation to the conformity of public authorities with the Records Management Code of Practice such assessments will be made in conjunction with the Keeper of Records or in the case of Northern Ireland the Deputy Keeper of Public Records.

Negotiation

This is not a formal enforcement power but an approach that will be widely used by the Enforcement team in order to bring about conformity with the Codes and compliance with the FOIA and EIR. Public authorities will be given every opportunity for voluntary compliance. However, it is important in building and maintaining public confidence in and respect for the system that the Commissioner develops procedures which are robust and transparent in taking steps to ensure that public authorities fulfil their statutory obligations.

Report to Parliament s49(2)

A failure to take account of a Practice Recommendation may be published by the Commissioner, for example in a special or Annual Report to Parliament. The Annual Report will also include details of Enforcement action taken against public authorities.

Annexe 2

The Better Regulation Task Force was replaced by the Better Regulation Commission on 1 January 2006.

The Better Regulation Task Force Principles

- | | | |
|-----------------|---|---|
| Transparency | - | We will be open about our approach to enforcement action and open about the action we take and the outcomes we achieve. |
| Accountability | - | We will include information on the use of our enforcement powers in our annual report to Parliament. We will make sure that those who are subject to enforcement action are aware of their rights of appeal. |
| Proportionality | - | We will put in place systems to ensure that enforcement action we take is proportionate. 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 enforcement powers. |
| Targeting | - | We will target enforcement 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 enforcement powers. |