



Freedom of Information

Monitoring Strategy

1. Background

The start of 2009 marked the fourth anniversary of the implementation of the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR). In the years prior to the implementation, public authorities were required to either adopt one of the Commissioner's model publication schemes or to submit a bespoke scheme for approval. As of 1 January 2005 they were under a duty to publish information in accordance with their scheme. These schemes expired on 31 December 2008.

2. The publication scheme Development and Maintenance Initiative (DMI)

In 2005 the Information Commissioner's Office (ICO) reviewed the effectiveness of publication schemes. The outcomes of this review highlighted the need to develop and improve the proactive dissemination of public sector information.

The review identified the need for:

- consistent approaches to the inclusion of information
- a requirement for improvements to the maintenance of schemes
- further awareness-raising of the general public regarding information which is readily available and how to access it

The objective of the DMI was to encourage and help public authorities to improve and expand publication schemes through:

- proactively disseminating information
- consistently making information available
- providing uncomplicated and swift access to the information they routinely make available

More specifically, it aimed to

- develop a list of core classes for all public sector bodies
- produce comprehensive guidance specific to each public authority sector
- progress all sectors towards a culture of maximum release and a scheme structure to enable a consistency of core classes across public authorities
- identify and disseminate good practice in relation to maintaining publication schemes
- direct and support public authorities to creatively consider how to promote and publish the information they make readily available

In the first instance we collected and collated opinions and ideas regarding the content, maintenance and dissemination of publication schemes from professionals, practitioners and users.

Following this initial fact finding numerous workshops were held with sector specific practitioners and representative bodies to develop core classes, maintenance regimes and dissemination methods. Existing networking groups were also invited to provide an input into these discussions.

The initiative also enrolled an advisory panel made up of FOI experts and interested parties. This group provided a 'sounding board' for ideas, brought a user perspective to the work as it developed and provided feedback when appropriate.

There are three key elements to the revised policy on proactive dissemination:

1. The model publication scheme – a commitment document, approved by the ICO for adoption by all public authorities
2. Sector specific definition documents – containing the definitions of information covered by the seven core classes
3. A means by which the information made routinely available by an authority can be easily identified and accessed, a 'guide to information'

3. The Model Publication Scheme

As a result of the Publication Scheme DMI the ICO introduced a model publication scheme that all public authorities were to adopt from 1 January 2009.

Authorities must also produce a 'guide' to the specific information which they hold and is covered by any of the scheme's seven classes. We expect authorities to ensure that the information can be easily identified and accessed by the general public.

To assist public authorities to develop a guide to information, we have produced a series of definition documents for the main public sectors. These documents identify the type of information we would expect to be included in each class within their guide to information.

For some smaller authorities such as parish councils and primary schools, we have produced template guides to information.

With effect from 1 January 2009, all public authorities should:

- have adopted the model publication scheme
- have produced a guide to information using either our definition documents or template guides to information

- be publishing in accordance with it

4. Monitoring

The ICO will regularly review the model scheme and definition guidance. Authorities should review and update their guide to information and its contents on a regular basis.

From 1 April 2009, the Commissioner will begin proactive monitoring of the adoption of, and publication in accordance with, the new scheme, as well as proactive dissemination under the EIR. Our monitoring will also provide an important opportunity to review more general compliance with the FOIA and the EIR and to assess the practices of public authorities.

Monitoring of the operation of publication schemes and the routine release of information will generally be carried out using public authority websites. We will target different sectors for specific periods of time (for example, central government for 2 months, police forces for 3 months). There will also be an element of targeted monitoring within certain sectors, for example strategic health authorities and those authorities where we are already aware of compliance issues.

We aim to monitor at least 20 public authorities per month and typically this will involve:

- Confirming that the authority has adopted the model publication scheme
- Confirming that the authority has produced a guide to information
- An initial check against the key types of information identified in the ICO sector-specific definition guidance or template guides, eg:
 - for principal local authorities – the Council directorate structure
 - for police authorities – the expenses and allowances paid to or incurred by Authority or Board members and senior employed staff
 - for health bodies - performance against targets (KPI) and/or a performance framework
- A review of an authority's guide to information with particular emphasis on the medium and accessibility of that information, and any charges made
- Checking that any charging regime is clear and coherent and backed by published policies
- Establishing that internal review procedures and timeframes conform with our guidance and the codes of practice
- A review of general request handling procedures in use at the authority, including those for transfer of requests
- An analysis of the authority's statistics in relation to request and complaint handling
- A review of the authority's disclosure log (where one exists)

The monitoring carried out during 2009 will provide useful feedback and intelligence for the ICO, which will help inform the Commissioner's future strategies in relation to good practice and enforcement.

5. Enforcing

The vast majority of public authorities are taking their FOI responsibilities seriously. Through the Commissioner's DMI, public authorities have now had ample opportunity to learn about and adopt publication schemes and develop suitable systems to ensure that they publish in accordance with them. The ICO will therefore now be taking a more robust proactive approach towards public authorities that consistently fail to meet these responsibilities.

The Commissioner will adopt a targeted but proportionate risk-based approach to monitoring and enforcing in this area promoting the effective use of his limited resources (see also Annexe 2 – Better Regulation Task Force Principles).

Where monitoring identifies non-compliance or other issues, we will, in accordance with our FOI Enforcement Strategy:

- Contact failing authorities on an informal basis to establish the problem areas and to seek informal resolution, where necessary through a Practice Recommendation
- Consider formal enforcement action only after serious, repeated or systemic failure to comply

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.

The Commissioner's Enforcement Strategy specifically states that "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".

6. Promoting Good Practice

The Commissioner's duty to promote the following of good practice relates to both the requirements of the FOIA and the EIR, and the provisions of their related codes of practice. The Commissioner recognises that public authorities will follow different procedures and allocate different resources in relation to their

access to information obligations. The ICO will therefore continue to provide authorities with help and support but will where necessary take appropriate action. Through promoting good practice in relation to publication schemes the Commissioner aims to:

- promote open government
- maximise the proactive and progressive release of information
- bring about a culture of maximum disclosure consistent with good government
- deliver benefits for citizens and public authorities

Authorities demonstrating good practice in relation to publication schemes and other aspects of our monitoring activities may be specifically identified in ICO stakeholder communications.

7. Reporting Performance

The ICO will produce periodic monitoring reports identifying our activities, examples of good and poor practice, and where appropriate any actions taken. Reports may be sector specific setting out the 'general performance of the sector' or authority specific in relation to, for example, particularly good or poor practice. Actions such as Practice Recommendations and Enforcement Notices are already published on the ICO website as a matter of course.

8. Information Charter

When we decide that some form of structured or regulatory intervention is necessary or desirable in the case of a particular public authority, we may 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.

9. Guiding principles

This Monitoring 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 which in turn was replaced by the Risk and Regulation Advisory Council in January 2008.

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.