STANDARD OPERATING PROCEDURE (SOP) FOIA & EIR – *Monitoring of authorities timeliness*

Introduction

Under section 47 of the Freedom of Information Act 2000 (FOIA) the Commissioner has responsibility to perform his functions in a manner that promotes the observance of public authorities in the requirements of Part 1 of that Act and Parts 2 and 3 of the Environmental Information Regulations 2004 (EIR). He is also responsible for promoting the following of good practice.

Under section 52 of the FOIA the Commissioner can serve on a public authority a notice requiring it to comply with the provisions of Part 1 of that Act and Parts 2 and 3 of the EIR. Under section 48 of the FOIA the Commissioner can issue a recommendation about compliance with Codes of Practice.

The Commissioner's intention is to use these provisions, in a manner consistent with his general regulatory strategy, to improve compliance with section 10 of the FOIA; regulations 5 (2) and 11(4) of the EIR; and the requirement to conduct FOIA internal reviews in a timely manner.

Purpose of SOP

The purpose of this SOP is to standardise our approach to monitoring authorities' timeliness in dealing with requests and internal reviews. It clarifies the circumstances in which monitoring is appropriate, explains how long monitoring should be carried out for, and describes the steps that may be taken.

The SOP should be read in conjunction with the Policy for Freedom of Information Regulatory Action;
http://www.ico.gov.uk/what_we_cover/taking_action/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/freedom_of_information_regulatory_action_policy.ashx

Legislative context

FOIA

Section 10 (1) of the FOIA requires that an authority respond to a request for information promptly and in any case within 20 working days. There are three exceptions from this requirement:

- Where regulations permit it;

- Where a fees notice (section 9(2)) has been issued. In such circumstances the 20 working days is put on hold until payment is received;

- Where the authority needs additional clarification from the applicant in order to identify and locate the information requested (section 1(3)). When this occurs the 20 working days begins once clarification is received;

Further time is also permitted where the authority needs to consider the balance of public interest having applied a qualified exemption (section 17(3)). The authority must indicate within 20 working days what qualified exemption has been applied. Commonly referred to as the Public Interest Test (PIT), an authority may extend the time for compliance until such time *'as is reasonable in the circumstances'*. The FOIA does not define the word "reasonable", but in the Commissioner's view extensions to the time for compliance should be limited to exceptionally complex cases and in no circumstances should the total time taken exceed 40 working days. This approach is set out in published good practice guidance

EIR

Regulation 5(2) of EIR requires that an authority respond to a request as soon as possible and no later than 20 working days from the date of receipt. This timeframe may be extended up to 40 working days if the authority reasonably believes that the complexity and volume of the request makes it impracticable to respond sooner. Unlike the FOIA, the additional 20 working days is derived from the legislation itself (regulation 7(1)).

The requirements of regulation 5(2) are echoed in the regulation 16 Code of Practice (part IV), providing us with two potential forms of regulatory action when addressing delays.

Internal Reviews

For the FOIA, internal reviews are recommended practice, the parameters for which are set out in the section 45 Code of Practice. The Code does not specify a timeframe in which reviews should be completed, but the Commissioner's view, as set out in published good practice guidance is that the vast majority should take no longer than 20 working days. In exceptional circumstances it may be appropriate to take longer, but the total time taken should not exceed 40 working days. Despite the non-statutory basis for reviews under the FOIA, they are considered important and in most circumstances the Commissioner will not accept a section 50 complaint unless the authority's internal review procedure has been exhausted.

For EIR, the requirement to provide a review procedure is set out within the legislation (regulation 11(4)) and an authority has up to 40 working days to respond. The EIR regulation 16 Code of Practice echoes this requirement.

It is therefore possible for the Commissioner to consider an Enforcement Notice, undertaking or a practice recommendation to address poor practice in this context.

Rationale for monitoring

In order to exercise our regulatory powers effectively, we need to identify those authorities where timeliness appears to be poor and, where this is confirmed, take action to address this.

Our complaints database (CMEH) provides some information on individual breaches of the legislation and this can be used as an initial trigger. By asking authorities to provide their own statistics on timeliness and by monitoring their progress over a set timeframe, we can collate detailed information on performance and target our regulatory action more effectively.

Triggers for monitoring

Intelligence on an authority's compliance with section 10 of the FOIA, regulation 5 (2) of the EIR and on internal review performance is likely to come from three main sources:

- Complaints database (CMEH) and other internal business intelligence (including outcomes of previous monitoring);
- Ministry of Justice's statistics on FOIA performance[1]; and
- Media coverage and other external sources.

There are two key triggers for monitoring which apply to the timeliness of handling requests and internal reviews:

- Evidence of repeated delays; and
- Evidence of significant delays.

Consideration of both elements is important as an authority which appears to be performing well overall may still have a number of requests which are significantly in excess of the appropriate timeframes. Additionally, we will consider any previous actions we have taken in relation to timeliness and the profile/sector of the public authority.

This information will be used to risk assess which public authorities to contact to ensure monitoring is targeted, proportionate and effective in line with our regulatory action policy.

[1] http://www.justice.gov.uk/publications/freedomofinformationquarterly.htm

Repeated delays are difficult to quantify, and we must be careful to avoid setting a precedent from which authorities assume that non-compliance with a set percentage of requests is acceptable. However, we must target our resources effectively and as a general guide should seek to consider intervention through risk assessment if:

- we have evidence, from the MoJ statistics or other sources, which suggests that an authority is responding to less than 85% of requests and/or reviews within the appropriate timescales, or;
- our analysis of complaints received by the ICO suggests that we have received three or more complaints citing delays within a specific authority within a six month period

In order to identify **significant delays**, the Intelligence Hub will review the cases recorded to establish the cumulative delays. Case Officers in Complaints Resolution will also be encouraged to share 'soft intelligence' about their experiences with public authorities – this will feed into the overall picture of compliance.

Requests – additional steps required by public authorities

For both the FOIA and the EIR authorities are expected to notify the applicant that additional time is required within 20 working days of recipient of the request. If it fails to do so, the authority will be in breach of section 17(2) of the FOIA or regulation 7(3) of the EIR.

For both the FOIA and the EIR we should continue to consider the reasonableness of any extensions to time required sought by an authority and feed this into our assessment.

Procedures

In terms of how monitoring of timeliness is to be handled within the office the following procedures should be followed:

1. The Intelligence Hub will regularly assess business intelligence in relation to timeliness, and where appropriate direct other departments towards authorities / authorities of potential concern;

2. If, following internal consultation with Complaints Resolution, the Regional Offices and other relevant departments, the Intelligence Hub is satisfied that triggers have been met, a list identifying the authorities posing the greatest risk of ongoing non-compliance, with potential for monitoring, will be produced and circulated;

3. The Intelligence Hub may produce a second list of authorities posing a lower risk of ongoing non-compliance where it may be appropriate to write to them, but monitoring would not be proportionate;

4. Where an authority is to be given written advice or required to submit figures for ongoing monitoring, the relevant Complaints Resolution Team will create a case (ENF case in relevant Complaints Resolution team queue) and will be responsible for ensuring that all the relevant standard templates are present and that they are adapted to suit the circumstances of the case in question;

5. Once the case is created, the reference number should be provided to the Intelligence Hub, as they will retain central responsibility for producing the list and reporting;

6. The Complaints Resolution Officer will then write out to the authority, using the standard templates.

7. Where monitoring is undertaken it will be for Complaints Resolution to consider whether to monitor timeliness in respect of requests, reviews or both.

8. When writing to the authority and pursuing monitoring, the Complaints Resolution Officer should explain the basis of our concerns; the possible sanctions should an authority fail to improve; the period for which monitoring will be carried out (usually three months); and what they can expect from the ICO in terms of frequency of contact. The Complaints Resolution Officer should also use this opportunity to address any other compliance or conformity issues that have come to their attention. Any dates for returning information to the Commissioner should maximise the potential for us to collate completed data, and with this in the mind the date of return should be set by the Complaints Resolution Officer;

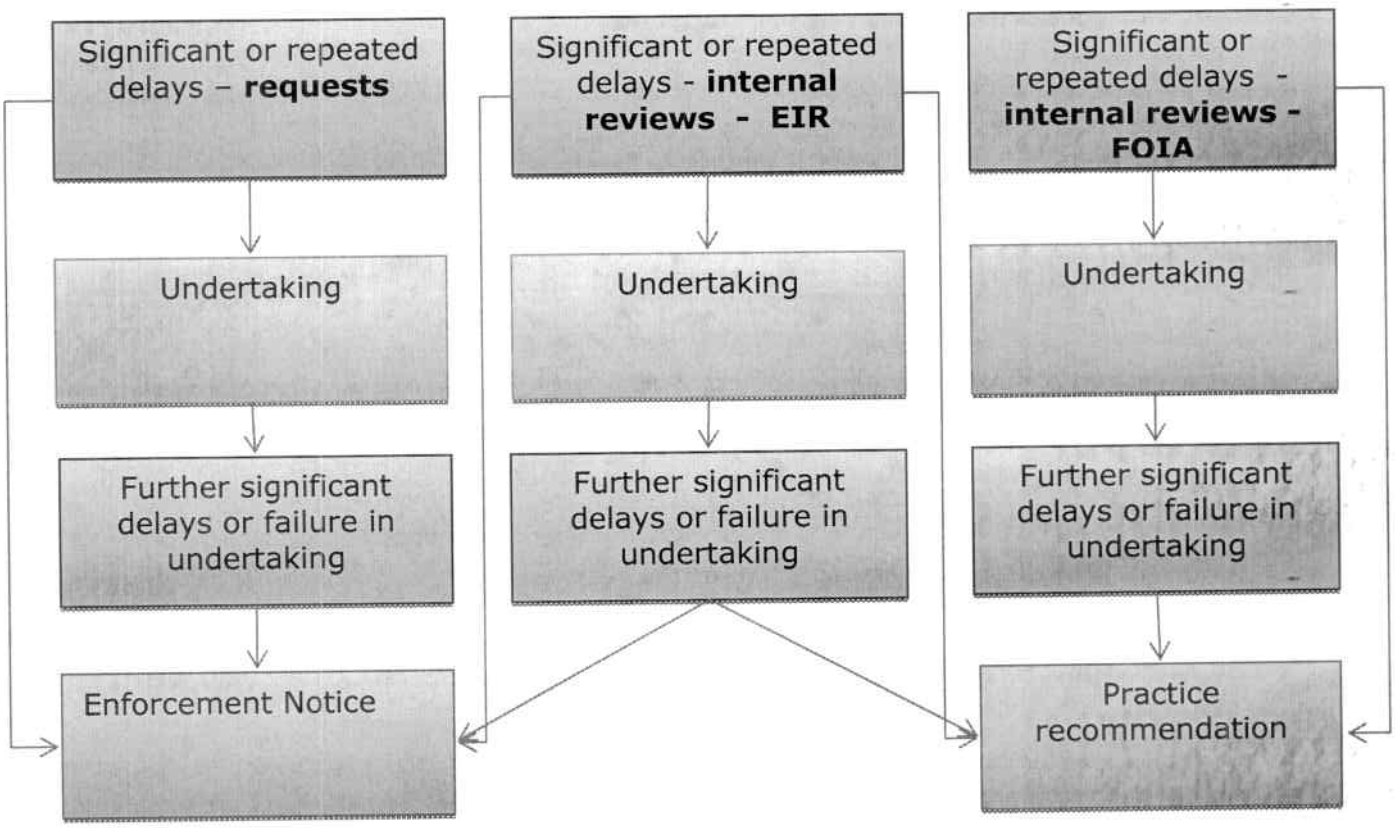
9. Monitoring will usually be carried out for three months. In some circumstances it may be necessary to extend this, for example if there are exceptional reasons why an authority is unable to demonstrate an improvement in this timescale, or if there are practical reasons which make a three month period unsuitable. In some cases, an authority may receive too few requests within three months for the Commissioner to reach a sound conclusion on its progress. In others requests received within the monitoring period may not be dealt with by the time of its planned conclusion but remain 'in-time' for the purposes of the legislation. In such circumstances we should consider extending the monitoring period. Any proposed changes to the length of the monitoring period should be discussed with the relevant Complaints Resolution Group Manager, the Intelligence Hub and where appropriate, the Head of Enforcement before they are agreed with the authority;

10. If, after a period of three months (or alternative agreed timeframe) the authority fails to demonstrate an adequate improvement, Regulatory Action will be considered. At this point a Case Working Group consisting of the following will be convened: relevant Complaints Resolution and Enforcement staff and, where appropriate, the Director for Freedom of Information;

11. A course of action will be agreed and taken forward as appropriate. The appropriate route will depend on whether the poor performance concerns compliance with the legislation or non-conformity with the Codes of Practice.

12. When considering whether an Enforcement Notice is the appropriate remedy, the Case Working Group must give careful consideration to the steps that are likely to be specified in order for the authority to comply with the requirements of the legislation. If it is not possible to specify steps an Enforcement Notice will not be viable.

Failure to improve – potential steps



13. The Complaints Resolution Officer should check the status of any section 50 cases used to inform the view of poor performance. In particular, care should be taken to ascertain whether there is any intention to issue a Decision Notice in relation to the delays identified. In the event that a Decision Notice is likely, it will be necessary to discuss the matter with the Officer(s) dealing with the section 50 case(s) and the appropriate Group Manager(s). This is necessary to ensure that there is clear agreement as to whether a Decision Notice; an Enforcement Notice; an undertaking; a practice recommendation or a combination is the most appropriate approach.

14. The Complaints Resolution Officer and the relevant Group Manager will work with the Head of Complaints Resolution and the Corporate Affairs Team to

ensure that regulatory action is published on the ICO's website and that any associated press coverage is coordinated.

Failure to co-operate with monitoring

Public authorities are expected to co-operate with the Commissioner's enquiries and in the unlikely event that an authority fails to do so, an Information Notice (section 51) may be issued.

Sufficient improvement

It is not possible to provide a set criteria on the extent to which we would expect an authority to improve. This is because the sufficiency of improvements is heavily influenced by the context of the authority's resource, commitment and ability within the confines of its structure to achieve compliance. It is also influenced by the extent to which an improvement is required – essentially the 'gap' between present compliance rates and that which is acceptable to the ICO. For example, an authority whose compliance is less than 10% at the outset of the process but achieves 70% at its conclusion could be considered to have achieved a significant level of improvement. Equally, it will still be failing to achieve compliance in 30% of cases. Indicators for sufficiency are therefore, by their very nature, generalised:

Indicators

- an improvement in compliance of more than 40%;
- a total compliance rate of 85% or above;
- a significant reduction in outstanding (and overdue) requests;
- significant investment, whether that be resource or technological solutions, to improve future request handling;
- improvements to policies and procedures or staff training;
- the achievement of greater efficiencies in request handling (for example the removal of sign-off or additional review processes where they are no longer required).

The achievement of one or more of the above does not remove the possibility of formal regulatory action; rather they should help shape consideration of whether such action is appropriate. It may still be necessary for an authority to formalise its commitment to the above by (for example), signing up to an undertaking.

Lessons learnt and best practice

It is anticipated that a number of the authorities monitored via this process will achieve significant improvements in compliance. As part of the ICO's role as an

influencer and educator, novel and particularly effective methods of improving compliance will be promoted and shared with others.