

Understanding freedom of information compliance monitoring

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Public Law analysis: The Information Commissioner's Office (ICO) recently announced that Trafford Council will be monitored over the timeliness of its responses to freedom of information requests. Jeremy Isaacson, associate at Farrer & Co, considers the background to this announcement and the various issues surrounding the monitoring of freedom of information requests.

What is the background to this announcement?

The Freedom of Information Act 2000 (FIA 2000) requires public authorities to respond to freedom of information requests 'promptly' and in any event no later than 20 working days following the date of receipt. In certain circumstances a public authority can claim an extension to consider the application of the public interest test for exemptions which are 'qualified'.

If a public body fails to respond within the statutory time limit, the requester can complain to the ICO. The ICO will then usually write to the public authority, telling them to respond to the request. Where there have been significant delays in responding to a request and the requester has complained about the handling of the request, the ICO will usually note the delay if it issues a decision notice relating to the request.

However, where the ICO finds public authorities persistently failing to comply with requests within the time limit, it can take regulatory action by monitoring the public authority's compliance with FIA 2000.

What does 'monitoring' mean in this case?

Public authorities that are monitored can expect to have to explain to the ICO the reasons for their failure to meet the requirements of FIA 2000 and to explain the steps they are going to take to improve.

In relation to concerns about delays, the public authority would be expected to show how they are going to deliver improvements to their response handling procedures to ensure that the relevant deadlines are met.

Depending on the responses provided, the ICO may decide to take further regulatory or enforcement action.

According to the ICO, 'the process of monitoring is therefore an opportunity for the authorities concerned to demonstrate that the requirements of the legislation are taken seriously'.

What is the ICO's approach to monitoring activity?

The ICO aims to take a proportionate approach to monitoring, focusing on public authorities in serious or persistent breach of FIA 2000.

The ICO adopts the following 'rules of thumb' in deciding whether to contact a public authority in relation to compliance:

- four to eight or more complaints which cite delays within any six-month period, or
- it appears that less than 85% of requests are receiving a response within the appropriate timescales (this applies to public authorities which routinely publish their FIA 2000 compliance statistics), or

- evidence of a possible problem in the media, other external sources or internal business intelligence

What does monitoring mean for the public body concerned?

Monitoring means that the public body has to respond to the ICO's enquiries and also take steps 'on the ground' to improve its handling of FIA 2000 requests.

This might mean investing in case management software, employing more staff who can help respond to FIA 2000 requests, or adopting new policies or procedures concerning FIA 2000 compliance.

How long does monitoring last?

The ICO typically monitors public authorities for a period of three months.

What are the implications for a public authority being monitored and for individuals requesting information from that authority?

The public authority being monitored can expect to have to demonstrate significant improvements in its request handling procedures and the timeliness of its responses. If monitoring fails to bring about sufficient improvements, the ICO may take formal enforcement action against the public authority concerned.

Monitoring by the ICO is unlikely to have a big impact on individuals requesting information, although they can probably expect to receive a speedier response than they otherwise would have.

What are the key considerations to be mindful of when advising a public authority in this area?

The key piece of advice for public authorities is to not wait until the end of the 20 working day response period to start searching for the information and considering exemptions. Many public authorities fall at this first (basic) hurdle, especially in large organisations when often it can take some time for the request to reach the right person. Public authorities should have request handling systems in place to ensure that freedom of information requests do not get lost or ignored.

Where claiming an extension for consideration of the public interest test, public authorities should still ensure that the initial response (confirming whether information is held and which exemptions are being considered) is still provided within the 20 working day time limit.

Finally, in my experience, most requesters are relatively understanding, as long as they are kept up to date on the progress of their request, especially where there are good reasons for any delays.

Are there any trends emerging in terms of the approach (both of public bodies and the regulator) to the timescales under FIA 2000? How does this case fit within that context?

There is a long history of requesters being frustrated by lengthy delays in responding to FIA 2000 requests, and increasing pressure on the ICO to take action against public authorities who persistently fail to respond in time.

The ICO's approach has been bolstered by the findings of the Independent Commission on Freedom of Information, which has recommended strengthening FIA 2000 to introduce a change to the way public authorities are able to extend the time for responding when considering the public interest test work and a fixed 20 working day deadline for conducting internal reviews. This is another area of persistent delays as the period of conducting an internal review is currently open-ended and subject only to being responded to within a reasonable time frame.

In March 2016 the Independent Commission on Freedom of Information reported on its independent review of FIA 2000—including recommendations relating to time limits and monitoring powers.

With the dissolution of the Independent Commission on Freedom of Information and changes at the top of the Cabinet Office and the ICO, do you anticipate any changes to FIA 2000 regime?

As well as the changes to deadlines described above, the Independent Commission also recommended new legislation to require larger public authorities (100+ employees) to publish their FIA 2000 compliance statistics and all of their responses to requests. This would make it much easier to identify public authorities who were routinely failing to respond within the statutory time limit.

The government's response to the Independent Commission's report indicated an endorsement of this recommendation, but the government has made it clear that it does not propose to make legislative changes. Instead, any changes will be introduced via the freedom of Information code of practice (which is statutory guidance), so it remains to be seen whether this will improve compliance with FIA 2000 by public authorities.

Interviewed by Alex Heshmaty.

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