

# Interventions:

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## Our approach and procedures

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Scottish Information Commissioner



Scottish Information  
Commissioner

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## Glossary and abbreviations

Term used	Explanation
<b>Codes of Practice</b>	Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the EIRs; Scottish Ministers' Code of Practice on records management by Scottish public authorities under FOISA
<b>Commissioner</b>	Scottish Information Commissioner
<b>EIRs</b>	Environmental Information (Scotland) Regulations 2004
<b>FOI</b>	FOISA and the EIRs
<b>FOISA</b>	Freedom of Information (Scotland) Act 2002

# Interventions: our approach

## What interventions are

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1. As part of the Scottish Information Commissioner's duty to enforce freedom of information (FOI), the Commissioner and his staff carry out interventions in cases where a Scottish public authority is failing to meet the requirements and standards set out in legislation and the Scottish Ministers' Codes of Practice.
2. This document and the procedures below describe how those interventions are carried out, including:
  - how and on what basis decisions to intervene are made;
  - how we communicate with the authority and what we ask of them; and
  - how we evaluate and report on the improvements made.
3. As explained in the Procedures, interventions can vary from a recommendation or requirement to take particular remedial action, through to a detailed audit of processes, practice and culture. The level of intervention depends on:
  - whether the practice failure is deemed minor or more significant;
  - whether the failure is relatively short-term or recurring; and
  - whether the causes can be easily rectified or are more systemic.
4. Interventions are generally initiated following routine analysis of quarterly statistics submitted by authorities via the Commissioner's online statistics portal. This analysis highlights trends such as rates of late responses to requests for information and/or requests for review, as well as unusual patterns in the use of certain exemptions and other provisions.
5. An intervention may also be opened as a result of us being made aware – through an investigation or contact from a third party – of failures in authority practice. For example, these failures can be in relation to: publication schemes, searches for information, use of exemptions, content of notices, provision of advice and assistance, or the conduct of reviews.

## The purpose of interventions

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6. The primary intention of interventions is not to penalise authorities for poor practice, but to support them in improving their performance, including by identifying and resolving or overcoming any internal issues within the public authority that are impacting on that performance. However, where an authority fails to take appropriate action or to achieve a target outcome, the Commissioner has the power to issue formal practice recommendations and/or enforcement notices.
7. We will publish information periodically about the interventions we undertake, and once an intervention is closed, will ensure appropriate learning points are made available for other authorities to benefit from where possible.
8. As stated in our Strategic Plan 2020-24, although our capacity to carry out interventions may fluctuate depending on resource availability and the volume of applications we receive, they

are a proportionate, efficient and effective way of resolving identified FOI practice failures. Interventions represent proactive enforcement, with the aim of improving practice not just in one case but across the board, and are essential to achieving many of our Strategic Objectives.

9. If you have any questions about our approach to interventions or the content of these procedures, please [contact us](#).

# Intervention Procedures

## Introduction

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10. The Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 both give the Commissioner the power to act where a public authority is not complying with requirements they set out or with the Scottish Ministers' Codes of Practice. These powers include:
  - (i) promoting good practice
  - (ii) assessing whether an authority is following good practice
  - (iii) issuing practice recommendations where it appears to the Commissioner that an authority is not complying with the Codes of Practice
  - (iv) issuing enforcement notices where the Commissioner is satisfied that a public authority has failed to comply with FOI law.
11. Separately, the Commissioner has a duty, on receipt of an application, to investigate whether a public authority has dealt with an information request in accordance with FOI. That work is subject to separate procedures – see the Investigations Handbook.
12. In this document, the Commissioner's Intervention Procedures reflect the action which the Commissioner will take proactively ("an intervention") to improve public authority practice more generally.
13. The Commissioner's Enforcement Policy sets out the Commissioner's policy on what will be enforced and the outcomes that enforcement aims to achieve. This policy states that one of the possible ways that enforcement action will be taken is through "an intervention" and that the aim of this type of enforcement action is to identify and resolve the challenges facing the authority and to enable the authority to achieve and/or maintain good practice. An intervention may result in a mutually agreed set of actions, or an improvement plan.
14. The Intervention Procedures (this document) set out in more detail when action will be considered and the procedures that will be followed when undertaking an intervention.
15. Current funding and personnel levels do not include specific allocations for intervention activity, and as a result all interventions are conducted within and using existing available resource.
16. These procedures set out:
  - (i) how we gather evidence to inform interventions.
  - (ii) the criteria we apply to decisions to intervene.
  - (iii) intervention activities we may undertake.
  - (iv) how we manage interventions.

## Decisions to intervene

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### Sources of evidence

17. Decisions to intervene are based on evidence of a breach of statutory duty in FOI law or non-compliance with a Code of Practice (as set out in the Enforcement Policy). Most decisions to intervene formally relate to recurrent breaches or non-compliance.
18. We routinely record, in our case handling system, any non-compliance observations noted in the course of our day to day business – including through investigations and enquiries. Non-compliance observations are not interventions, but simply recording a concern. Non-compliance *notifications*, however, are interventions – see below.
19. We can also receive qualitative information from other sources, including meetings with stakeholders, approaches to the Commissioner or their staff by third parties, and relevant media reports about FOI.
20. Our [Enquiries Procedures and Investigations Handbook](#) set out how these records are created and maintained.
21. Every quarter, we analyse the data provided by Scottish public authorities to the Commissioner's FOI and EIR statistics portal. The quarterly report provides analysis of trends arising and identifies concerns about particular authorities' performance.
22. The quarterly report is submitted to a Quarterly Interventions Meeting, with the aim of identifying early any of the concerns listed in the Enforcement Policy so that we can consider intervention action as soon as possible.
23. The Quarterly Interventions Meeting discusses the progress of current interventions and, depending on capacity and/or resource, agrees any new intervention action required. Decisions to intervene are often made at a QIM, but can also be made at any other time, in accordance with the "Who decides to intervene?" section below.

### Intervention levels

24. The objective of an intervention is to remedy the breach or non-compliance within a reasonable period of time. An Intervention should be proportionate to the concern identified and made at the appropriate level to achieve the desired outcome.
25. Depending on the circumstances, an intervention may be at one of the following levels:
  - (i) *Non-compliance notification – minor failure to follow good practice:*  
A member of the Commissioner's staff alerts the authority to the issue and *recommends* remedial action.
  - (ii) *Level 1 – failure to follow good practice:*  
A member of the Commissioner's staff alerts the authority to the issue and *requires* remedial action.
  - (iii) *Level 2 – practice failure:*  
A member of the Commissioner's staff raises the issue with the authority, initially at Chief Executive level or equivalent, and requires steps to be taken to resolve the issue and achieve a target outcome.
  - (iv) *Level 3 – serious systemic practice failure:*  
A member of the Commissioner's Senior Management Team raises the issue with the

authority's Chief Executive or equivalent, and requires a detailed action plan to be put in place to address the failure and achieve a required outcome.

- (v) *Level 4 – consistent, ongoing failure to comply with FOI law and guidance:*  
The Commissioner uses his statutory powers to address the problem, which may include practice recommendations or enforcement action.

26. Interventions may include an assessment phase where appropriate to identify in detail the nature and/or extent of the breach or non-compliance.

### **Who decides to intervene?**

27. Non-compliance notifications and Level 1 interventions can be initiated by any member of the Commissioner's staff who identifies a concern, without the need for prior agreement of their line manager.

28. A decision to open a level 2 intervention may be taken by:

- (i) The Commissioner
- (ii) The Head of Enforcement or a Deputy Head of Enforcement
- (iii) The Head of Policy and Information

29. A decision to open a level 3 intervention may be taken by the Commissioner or the Senior Management Team, usually following a recommendation by:

- (i) The Head of Enforcement
- (ii) The Head of Policy and Information
- (iii) A Quarterly Interventions Meeting

30. A decision to open a level 4 intervention may only be taken by the Commissioner, usually on the advice of the Head of Enforcement.

31. For interventions at Levels 2, 3 and 4, there will always be a formal record of the decision to intervene and why it was taken. This may be a manager's instruction to an officer or a minute of a meeting at which the decision was taken. This is to be recorded in the relevant case file. A record of interventions (including Level 1 interventions) which have been raised in the previous quarter is reviewed at each Quarterly Interventions Meeting.

### **Levels of intervention – further detail**

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#### **Non-compliance notifications**

32. Non-compliance notifications aim to communicate minor concerns about following good practice, as identified through our day to day business (such as applications, enquiries or decisions) to authorities. In these cases, we may provide advice or recommendations for remedial action.

33. These notifications are recorded in the non-compliance tab within the relevant case file. Overall volumes of non-compliance notifications and top areas of concerns are reported to the Quarterly Interventions Meeting. Where there is evidence of recurring concerns, it may be decided that further analysis is necessary.



## Level 1

34. Level 1 interventions aim to remedy failures to follow good practice. They are opened in order to set out and record concerns - such as failures to meet statutory timescales, issues with publication schemes, failures to submit quarterly statistics or other similar breaches - and require action. Where necessary, a Level 1 intervention may begin with a request for further information in relation to an initial concern, in order to determine the nature of the action required. All relevant documentation related to Level 1 interventions is recorded in an intervention case file in the case management system.
35. Level 1 interventions should generally be initiated and concluded through communication (either by telephone, email or letter) with the lead FOI practitioner within the authority. Letters 10a and 10b provide templates for common types of Level 1 interventions.
36. If the authority fails to comply with the required action, or if non-compliance continues in spite of actions taken, the intervention may be escalated to Level 2 (subject to the decision being made by the appropriate member of the Commissioner's staff – see the "Who decides to intervene?" section above). A template letter is available in the case management system for use to advise the authority that an intervention has been escalated.

## Level 2

37. Level 2 interventions aim to remedy recurring or more substantial or substantive practice failures –breaches or non-compliance issues that may not be resolved by a Level 1 intervention – and require a number of actions to be taken by the authority, agreed in advance by an FOI Officer or above.
38. Once an intervention at this level or above has been opened, day to day management of the case will usually be allocated to an FOI officer as the "intervention officer", overseen by an "intervention manager". The intervention manager will be agreed when the intervention is opened and will usually be the person who agreed the intervention or the officer's line manager. All relevant documentation regarding a Level 2 intervention should be stored in an intervention case file in the case management system.
39. Level 2 interventions should generally be communicated to the lead FOI practitioner within the authority, but will usually be initiated with a letter to the Chief Executive or equivalent. Intervention letter templates 11a and 11b in the case management system provide a basis for common types of Level 2 intervention correspondence.
40. In a Level 2 intervention, depending on the circumstances, the authority may be required to:
  - (i) identify and explain the causes of the identified area of concern;
  - (ii) complete a self-assessment toolkit module (if appropriate); and
  - (iii) specify a series of actions to be taken, with an indicative timescale.
41. During the implementation and monitoring phases, the intervention officer will ask the authority to provide regular updates of progress against the action plan and/or relevant performance data.
42. If the authority fails to comply with the required action, or if non-compliance continues in spite of actions taken, the intervention may be escalated to Level 3 (subject to the decision being made by the appropriate member of the Commissioner's staff – see 'Who decides to intervene?' above). The relevant template letter in the case management system may be

used as a basis for advising the authority that an intervention has been escalated (although a Level 3 intervention may require a more complex set of actions than the template includes).

### Level 3

43. Level 3 interventions aim to remedy serious, systemic practice failures and require the authority to devise and deliver an action plan, which is agreed in advance by the Commissioner, the Head of Enforcement or the Head of Policy and Information. This will generally be more appropriate in:
  - (i) more serious cases;
  - (ii) more complex cases where detailed research may be required; or
  - (iii) cases where a Level 2 intervention has failed to achieve improvements.
44. Once an intervention has been opened, day-to-day management of the case will usually be allocated to one or more FOI officer/s as the “intervention officer/s”, with close supervision by one or more senior managers – the “intervention manager/s” – who may also call upon the support of other members of the Commissioner’s staff in the course of the intervention.
45. Level 3 interventions should generally be communicated to the Chief Executive of the authority or equivalent, unless and until delegated responsibility within the authority is agreed with the intervention manager. All relevant documentation about Level 3 interventions should be kept in an intervention case file in the case management system.
46. In most Level 3 interventions the authority will be required to:
  - (i) identify/research and provide a detailed explanation of the causes of the identified areas of concern;
  - (ii) complete any relevant self-assessment toolkit module and share the findings with the intervention officer and intervention manager ; and
  - (iii) produce a detailed action plan, setting out a number of actions and measures to be taken, and agree timescales and deadlines.
47. In some, but not all, Level 3 cases, we may conduct a detailed assessment of a particular aspect of an authority’s practice, which may involve:
  - (i) requiring the authority to provide information (this may be via an Information Notice – see templates SL28a and SL29a/b, which must be used, and may only be signed by the Commissioner, the Head of Enforcement or a Deputy Head of Enforcement);
  - (ii) inspecting the authority’s systems or documents
  - (iii) holding meetings or interviews with relevant staff or senior managers of the authority. ([Appendix 3: Criminal offences](#) and [Appendix 4: Whistleblowing](#) must be read before an interview takes place. Staff should take a copy of these procedures, and the Commissioner’s Whistleblowing Policy, with them to any such meetings.)
48. The intervention officer and the intervention manager will agree the authority’s action plan and timeframe for completion. This important stage may be iterative as plans may require significant amendment before they are capable of approval.

49. During the implementation and monitoring phases, the intervention officer or the intervention manager will ask the authority to provide regular updates of progress against the action plan and/or relevant performance data.
50. If the authority fails to agree an action plan or fails to comply with the required actions, or if non-compliance continues in spite of actions taken, consideration will be given by the Commissioner to escalating the intervention to Level 4.

#### **Level 4**

51. Level 4 interventions generally address very serious or consistent concerns, or cases of repeated breaches, and may also be used in the event of a refusal (or clear failure) to comply with FOI law or the Codes of Practice. These interventions are often, but not exclusively, in the context of previous interventions by the Commissioner, particularly where lower levels of intervention have not been successful or complied with.
52. Once a Level 4 intervention has been opened, day-to-day management of the case will usually be allocated to:
  - (i) the Head of Enforcement or
  - (ii) the Head of Policy and Information or
  - (iii) a Deputy Head of Enforcement, supervised by the Commissioner and/or the Head of Enforcement.
53. In these cases, the Commissioner may:
  - (i) decide to carry out an on-site or off-site assessment of an authority's practice;
  - (ii) issue (or give warning of an intention to issue) a Practice Recommendation in terms of section 44 of FOISA specifying the steps that an authority must take in order to conform with the Codes of Practice;
  - (iii) issue (or give warning of an intention to issue) an Enforcement Notice under section 51 of FOISA requiring an authority to take specified steps to comply with Part 1 of FOISA or with the EIRs.
54. Level 4 interventions must always be communicated to the Chief Executive of the authority or equivalent. All relevant documentation relating to a Level 4 intervention should be stored in an intervention case file in the case management system.

#### **Process for Level 2, 3 and 4 interventions**

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55. Level 2, 3 and 4 interventions involve the following steps:
  - (i) Opening the intervention
  - (ii) Intervention planning
  - (iii) Implementation
  - (iv) Monitoring progress
  - (v) Reviewing outcomes
  - (vi) Closing the intervention

(vii) Internal reporting

56. Each of these steps is described in detail below.

### **Opening the intervention**

57. Where the case is to be assigned to an intervention officer for day to day management, the intervention manager will send a written instruction to the intervention officer to commence the intervention. The written instruction should set out:

- (i) the level of the intervention
- (ii) details of the concerns/breach identified
- (iii) instruction to open the case file
- (iv) a precis of the evidence for those concerns
- (v) an instruction on whether the manager considers that an assessment phase is required, and if so what degree of assessment is considered appropriate
- (vi) a timeline for preparation of a draft intervention plan
- (vii) the names of any other colleagues to be involved in the intervention.

58. From this point, the intervention officer is responsible for opening, maintaining and updating the case file. This includes:

- (i) Opening the new intervention case file in the case management system. The public authority data and the following fields in the Intervention tab must be added/completed:
  - Date
  - Raised by
  - Intervention type
  - Area of concern
  - Synopsis
  - Related to Case
  - Is follow up response from public authority required?
  - The intervention officer must also add any background information to the Documents section. This includes, where relevant, a copy of the report to the Quarterly Interventions Meeting which identified the concern and/or recommended the intervention action
- (ii) Updating the Status box in the case workflow to reflect changes:
  - Initial contact: includes assessment (by authority or by the Commissioner)
  - Action planning: from date of submission of action plan to date agreed
  - Implementation: authority implementing action plan and providing regular updates

- Monitoring: where we impose an extended period of monitoring following the implementation period.

(iii) Records management (see [Appendix 1: Records management](#)).

## Intervention planning

59. Within two weeks of receiving the case, the intervention officer should draft an intervention plan and send it to the intervention manager and any other nominated colleagues.
60. Where necessary, for example to discuss any complex issues or decisions, the intervention officer may also convene a case meeting with the intervention manager and nominated colleagues. This meeting should usually be held within a week of circulating the draft plan.
61. In some cases, we know enough about the practice concern to draft a reasonably full intervention plan. In other cases, we need more information, particularly from the public authority. The development of an intervention plan is often iterative. The aim at the draft stage is to complete the plan as far as possible and, where there is uncertainty, to identify this and the actions that will be taken towards completing the full plan.
62. A completed intervention plan should:
  - (i) set out the evidence for making the intervention, including non-compliance reports, statistical reports and research from wider sources;
  - (ii) describe the scope and scale of the intervention, including the intervention level and the practice area(s) to be addressed, with reference to FOI law or the Codes of Practice;
  - (iii) where practicable at this stage, list the proposed targets for improvement to be achieved. These must be Specific, Measurable, Actionable and Realistic. For example, the authority is to:
    - (a) Issue 90% of responses on time in the next quarter, or for 2 or more consecutive quarters within [specified time period];
    - (b) Issue notices compliant with [section X or regulation X] to requests, from [specified date]; or
    - (c) Provide full explanations in every refusal for where exemptions or exceptions are applied, from [specified date];
  - (iv) (generally) also detail:
    - (a) the authority's current performance levels (what is giving cause for concern);
    - (b) whether any further assessment is required and what it seeks to establish / achieve;
    - (c) the proposed actions to be taken by the authority or the Commissioner, with timescales;
    - (d) how progress will be monitored; and
    - (e) proposed outcome targets;
  - (v) explain how the intervention will be reported; and

- (vi) offer an estimate of how long we expect the intervention will take to achieve the outcome (to be amended if appropriate when the intervention plan is agreed, or dependent on the authority's performance during the intervention).
63. The intervention manager should approve the intervention plan within three weeks of allocating the case.

## **Implementation**

64. Following approval of the intervention plan, the intervention officer should draft a formal letter to the authority from the intervention manager.
65. The letter will:
- (i) advise the authority it is subject to an intervention and state the level of the intervention;
  - (ii) explain why the Commissioner is making the intervention, with reference to FOI law and/or Codes of Practice, and the evidence that led to our concern;
  - (iii) outline what the intervention aims to achieve (with qualitative and quantitative targets as appropriate) or, if an assessment is required first, how this will be carried out and what it aims to establish;
  - (iv) describe the action required of the authority at this stage, e.g. to conduct a self-assessment, provide a draft action plan for approval, or seek co-operation with an initial assessment;
  - (v) state the expected timescales for the steps in the intervention; and
  - (vi) provide a link to these procedures so that the authority can understand the intervention action and what may happen if the desired improvement is not achieved.
66. The following template letters in the case management system can be used as a basis for the opening intervention letter, as follows:
- Intervention Letter 11a – Level 2 intervention relating to statistics submissions e.g. late responses
  - Intervention Letter 11b – Level 2 intervention relating to other matters e.g. publication issues, misuse of an exemption, content of notices, conduct of reviews, advice and assistance

The above templates can be adapted for Level 3 or 4 interventions if appropriate.

67. Where the intervention letter requires initial actions to be taken or information provided by the authority, the intervention officer should ensure that these are carried out promptly – seeking updates from the authority where necessary.
68. When the authority provides the required information and/or evidence of actions taken, the intervention officer should discuss with the intervention manager, then contact the authority to confirm completion or request further information as appropriate.
69. If an assessment phase is required, this should be carried out as described in the intervention plan and alongside any other implementation actions.

## **Monitoring progress**

70. The method of monitoring of the intervention depends on the nature and scale of the intervention. In many cases we require a specified practice issue to be resolved or a process amended. Confirmation by the authority that it has complied with the requirement (ideally with evidence) will usually be sufficient for us to close the intervention.
71. Other cases, however, require more complex monitoring of performance over time. In such cases we will generally require monthly submission of progress against the action plan, e.g.
- Regular updates of steps taken to improve practice
  - Submission of regular performance statistics
  - Evidence of improvements, such as copies of training materials
72. The intervention officer is responsible for ensuring the authority provides satisfactory confirmation of compliance or regular progress reports. The intervention officer must carefully examine all updates provided to ensure they comply with what the authority was asked to do.
73. If individual updates achieve a desired improvement, the intervention officer should confirm this to the authority and notify the intervention manager and any nominated colleagues.
74. If the authority's updates are unsatisfactory, the intervention officer should communicate this to the authority, resolving any misunderstandings and agreeing a date by which the desired improvement will be achieved. If an authority appears to be resisting compliance, the intervention officer should alert the intervention manager, who may recommend (internally) escalating the level of the case, or contact a senior manager in the authority.

### **Reviewing outcomes**

75. At the end of the monitoring period, an evaluation must take place of whether the desired outcome has been achieved and whether the improvement is likely to be sustained.
76. The intervention manager may decide to:
- (i) close the intervention altogether (see Closing an intervention below);
  - (ii) close the intervention, but continue quarterly monitoring of practice to ensure performance is sustained;
  - (iii) extend the monitoring period to allow for further improvements; or
  - (iv) escalate the intervention e.g., to a higher level of intervention or to a practice recommendation/enforcement notice.
77. The intervention officer will provide details of the outcome of the review via an intervention summary and/or a note to the Quarterly Interventions Meeting.

### **Closing an intervention**

78. Closure is confirmed through a formal letter approved by the intervention manager. It confirms that the required improvements have been made (or, if not, why the intervention is being closed at this stage) and advises of any further monitoring. The relevant template letter in the case management system may be used as a basis for advising the authority that the intervention has been closed.
79. Before closing an intervention case file in the case management system, the intervention officer must ensure:

- (i) all relevant information is saved within the file; and
- (ii) all extraneous information is securely destroyed – with particular care taken to destroy any third-party personal data such as in copies of samples of information requests.

80. Any hard copy files should be destroyed in line with our records retention schedule.

81. An intervention summary should be completed using the relevant template, describing the objectives and achievements of the intervention, and stored in the case file.

### **Internal reporting**

82. The intervention officer is responsible for providing:

- (i) regular progress updates to the intervention manager; and
- (ii) updates to the Quarterly Interventions Meeting (due five working days in advance before the date of the meeting).

Information may also be shared directly with other members of the Commissioner's staff, in particular to ensure that Investigation Officers are aware of ongoing interventions with authorities with whom they may be in contact.

### **External reporting and publication**

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83. The Commissioner's Annual Report provides information on the intervention caseload for the year, including volume and types of interventions that have been undertaken and may include specific case studies. Reports are also made to the Senior Management Team and these will be published on the Commissioner's website where appropriate.

84. If appropriate, and subject to discussion at the Quarterly Interventions Meeting, summary information about ongoing intervention activity may also be published, for example via the email newsletter or website articles.

85. In addition, with the approval of the intervention manager and/or the Quarterly Interventions Meeting, information about a completed intervention may also be published as above, with a focus on highlighting lessons learned.



## Appendix 1: Records management

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### General

1. Staff must comply with the Commissioner's Information and Records Management Handbook (VC85931) when working in the office premises and remote working. When remote working, staff must also comply with any temporary remote working guidance which relates to records management. The following points give some additional information specific to interventions.
2. **Information relating to an intervention must be kept safely and securely. Remember that it is a criminal offence to disclose information obtained in relation to an intervention without lawful authority.**
3. All correspondence received (or prepared) in connection with an intervention must be saved in the relevant WorkPro file as soon as possible. Accurate records of all telephone conversations and notes from meetings (bearing in mind our duties under data protection legislation) must also be added to the WorkPro file at the earliest opportunity, so that an accurate, up-to-date record of the case is maintained.
4. All drafts of letters or emails which are not used should be deleted as soon as possible.
5. Unless the case involves national security or is deemed exceptionally sensitive by the Head of Enforcement (when separate arrangements will be made), any paper files or document boxes used in relation to the intervention will be kept in a locked cupboard in the case manager's room. The cupboards must be kept locked at all times, except when in use.
6. Files and document boxes must never be left unattended and must be locked away when not in use.

### Removing case files from the building

7. Ideally, case files (or parts of files) should not be taken out of the office, but if there is a genuine need to do this, it must be cleared with the appropriate manager first. Case files (or parts of files) may also need to be removed when the office premises are temporarily closed and members of staff have been instructed to work remotely.
8. A record of any permission given to remove a case file (or part of a file) from the office premises, stating the period that the file (or part of file) has been allowed out for, must be logged in the outgoing file register (held by the Head of Enforcement), at the point of removal. The return of the file (or parts of file) must also be recorded in the register.
9. Refer to Appendix 7 of the Investigations Handbook for the latest practice on this area.

### File security when outside the building

10. In the event of a file (or part of files) being taken out of the building, it is the officer's responsibility to ensure that the file (or part of file) is not put at risk. The following guidance should be followed by any member of staff who has been given permission to remove a case file (or part of file) from the office premises:
  - Files (or parts of files) must be returned to the office as soon as possible. Files (or parts of files) should be taken straight home, or straight to the meeting with the public authority involved. If this is not possible, they must be locked out of sight in the boot of the car only until such time they can be returned to the office or, failing which, kept temporarily in the officer's home.

- When carrying files (or parts of files) in public, officers must ensure that they are concealed and well protected from the elements. Officers must never leave files (or parts of files) unattended in any public place.
- Officers must not work with files (or parts of files) on public transport or in public areas, e.g. cafés. They may contain sensitive information and so should not be put at risk of being accessed by the general public.

### **Procedure for lost or stolen files**

11. The Commissioner's Information and Records Management Handbook and Data Protection Policy and Procedures set out the procedures for data incidents. Staff must familiarise themselves with these procedures.
12. The main thing to remember is that, in the event of a data incident, it must be reported immediately to the Finance and Administration Manager (FAM) and a Data Incident Management Plan should be set up. In the FAM's absence, the incident must be reported to the Head of Corporate Services, and if the Head of Corporate Services is not available another member of the Senior Management Team).
13. The staff member's line manager should also be notified immediately.
14. In the event of a file going missing while it is out of the building:
  - If it is lost, the staff member must check all places where it might have been left/stored.
  - If it cannot be found after extensive searching, the officer must inform FAM and the appropriate manager immediately, who will then assess whether the file is at risk of unauthorised access, what information has been lost and what information is recoverable from scanned versions.
  - If the file has been stolen, FAM and the appropriate manager must be informed immediately and will inform the local police in the area where it was stolen, if they have not been informed already. Again, FAM and the appropriate manager should also determine with the member of staff what information has been lost and what is recoverable from scanned documents.
  - If an original evidence file has been lost in transit every effort must be made to locate it. If this fails, the responsible Officer must then inform FAM and the appropriate manager, who will determine if the police should be informed.
  - If an original file has been stolen in transit, FAM and the appropriate manager should be informed and will contact the police in the area where it was stolen, if they have not already been informed.
  - It is the responsibility of the appropriate manager to inform the public authority, as soon as possible, that the information has been lost or stolen.

## Appendix 2: Examples of further research/assessment

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1. On allocation, the intervention officer should carry out any further research and analysis to ensure they have a detailed understanding of the breach or failings identified. That will inform the way they approach the authority and the questions they may ask. It will also help determine whether an assessment phase is required (if not already identified/determined).
2. The depth of research and analysis is determined by the practice area; the extent and type of information we already hold; the intervention officer's understanding of the issues, etc. It may involve the authority being asked to provide information and/or carry out a self-assessment. Such requests for action from the authority should ordinarily be discussed with the intervention officer's supervisor prior to a request being made.
3. Examples of further research and analysis which may be appropriate are set out below.

### **Example Concern 1: Failure to respond within statutory timescales**

4. The intervention officer will have the statistical performance information that suggested the need for the intervention and will need to know whether there are any obvious indications of the causes of the delays, e.g. staff absence or changes, training issues, a lack of management oversight.
5. Research which may be appropriate:
  - (i) Do the authority's FOI statistics indicate a significant increase in requests?
  - (ii) How does this authority's performance compare with that of similar authorities?
  - (iii) Is there relevant background in investigation case files and decision notices?
  - (iv) Do non-compliance reports suggest this is part of a wider problem?
  - (v) Are colleagues within the Commissioner's office aware of the reasons for the problems (e.g. as a result of attendance at an FOI network meeting)?

### **Example Concern 2: The authority's response notices are not legally competent**

6. The intervention officer needs to establish the extent of, and specify, the issues that lead to that general conclusion.
7. Research which may be appropriate:
  - (i) Are errors in the authority's responses consistent (suggesting a problem with response templates) or are they different across a number of cases?
  - (ii) Is the problem localised to one part of the authority (we need to focus on that part) or is it common across the authority (we need to apply the intervention authority-wide)?
  - (iii) Could problems be due to insufficient knowledge, inadequate resourcing, absence of guidance or even a cultural issue within the authority?
8. Sources include Decision Notices, non-compliance reports, and investigation case files. If there is insufficient information, it may be appropriate to obtain a sample of responses to information requests from the authority or to view its template responses.

## Appendix 3: Criminal offences

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1. It is a criminal offence, under section 65 of FOISA and regulation 19 of the EIRs, for a public authority, or any person employed by, or subject to the direction of the authority, to alter, deface, block, erase, destroy or conceal a record held by the authority with the intention of preventing information being disclosed in response to an information request. An information request must have been made for the information before an offence will be committed. It is not an offence to alter, etc. a record in advance of an information request being made.
2. It is possible, during an intervention, that an allegation will be made that a criminal offence has been committed. If that happens, the allegation should be brought to the attention of the Head of Enforcement (or, in their absence, a Deputy Head of Enforcement) immediately.
3. In the event that such an allegation is made *during an interview*, the next steps will depend on who is alleged to have committed the offence.

### **Allegation that a third party committed an offence**

4. In the event that someone alleges that a third party has committed an offence under section 65 or regulation 19, the interviewer should tell the person making the allegation that:
  - (i) what they have just said suggests that a criminal offence may have been committed under section 65 or regulation 19 in that they appear to be alleging that there has been a deliberate attempt to prevent information being disclosed in response to an information request
  - (ii) if we have reason to believe there is evidence to suggest an offence may have taken place, we will refer the matter to Police Scotland
  - (iii) they can either continue to tell us what happened, or might have happened, or we could come back to the allegation at a later date once we have had a chance to consider what they have told us
5. The matter can then be dropped, or discussed further, depending on the views of the interviewee. The interviewee should also be informed of our whistleblowing guidance (Appendix 4) and referred to [C5 Whistleblowing: Prescribed Persons - the Scottish Information Commissioner](#).
6. The allegation must be discussed with the Head of Enforcement (or, in their absence, a Deputy Head of Information) as soon as possible.

### **Self-incrimination**

7. If, during an interview, the interviewee suggests that they themselves committed a criminal offence under section 65 or regulation 19, the interviewer needs to caution them. It is important that the following words are used:

*"I need to stop you there. I have to advise you that, under section 65(1) of the Freedom of Information (Scotland) Act 2002 and regulation 19 of the Environmental Information (Scotland) Regulations 2004, it is a criminal offence for anyone employed by a public authority, for an officer of a public authority, or for someone who is subject to the direction of a public authority, with the intention of preventing the disclosure of the information, to alter, deface, block, erase, destroy or conceal a record held by the public authority.*

*I am at the stage where I consider that an offence under section 65(1) and/or regulation 19 may have occurred and consideration may be given to reporting the matter to the police.*

*At this stage, I have to advise you that you are now under caution - I must inform you that you are under no obligation to answer any questions but anything that you do say, will be written down and used as evidence. Do you understand?"*

8. In the unlikely event that this happens, the interviewer should end the interview immediately after the caution and bring the matter to the attention of the Head of Enforcement (or, in their absence, a Deputy Head of Enforcement) immediately.

## Appendix 4: Whistleblowing

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1. The Scottish Information Commissioner is a prescribed person under the Public Interest Disclosure Act for the purposes of FOISA and the EIRs. That means that any disclosure made to the Commissioner or to the Commissioner's staff will be a protected disclosure provided the disclosure is being made in good faith and provided the person making the disclosure reasonably believes that the matter relates to a breach of FOI law.
2. If, during an interview in relation to an intervention, the interviewee suggests that they are concerned that their public authority may be breaching FOISA and/or the EIRs and that they are concerned that they may be penalised in some way by telling us about what happened, the interviewer should:
  - (i) remind the interviewee that the Commissioner is a prescribed person under the Public Interest Disclosure Act for the purposes of FOISA and the EIRs and refer them to the policy [C5 Whistleblowing: Prescribed Persons - the Scottish Information Commissioner](#)
  - (ii) recommend that the interviewer read their employer's whistleblowing policy before continuing with the interview, think about getting independent legal advice or contacting Protect (the UK's whistleblowing charity) on their free, confidential [Advice Line](#).
3. Whistleblowing will not necessarily happen during an interview. Any correspondence which appears to include a whistleblowing allegation, whether or not connected to an intervention, should be brought as soon as possible to the attention of the Head of Enforcement (or, in their absence, a Deputy Head of Enforcement).



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