

Intervention Procedures

Scottish Information Commissioner



Scottish Information
Commissioner

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Glossary and abbreviations

Term used	Explanation
The Commissioner	The Scottish Information Commissioner
FOISA	Freedom of Information (Scotland) Act 2002
DHOE	Deputy Head of Enforcement
HOE	Head of Enforcement
HOPI	Head of Policy and Information
P&I	Policy and Information Team
The Section 60 Code	The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
WorkPro	The SIC's case management system

Introduction

1. This document sets out the procedures that the Scottish Information Commissioner (the Commissioner) will follow to apply her Enforcement Policy on non-compliance with FOI legislation. The Commissioner will intervene where it is identified that an authority's practice is or may be:
 - (i) in breach of its statutory duties under the Freedom of Information (Scotland) Act 2002 (FOISA) and/or the Environmental Information (Scotland) Regulations 2004 (the EIRs);
 - (ii) falling short of Government guidance, particularly the Section 60 Code.
2. The procedures identify the:
 - (i) type of evidence we will gather in order to appraise public authority practice
 - (ii) criteria that will be applied in order to inform the decision to intervene
 - (iii) levels of intervention activities we may undertake, and
 - (iv) how interventions will be managed and reported.
3. All interventions will be appropriate and proportionate, and based on robust and accurate evidence.
4. "Intervention" covers a range of activities: from providing advice and assistance to authorities in relation to good practice, to formal enforcement action carried out under the Commissioner's Enforcement Policy.

Sources of information

5. The main sources of information and data informing decisions to intervene will be:
 - (i) Information from non-compliance reports from WorkPro
 - (ii) Analysis and benchmarking of statistical data obtained from a range of sources. This will include the Commissioner's data about decisions and benchmarking data provided by Scottish public authorities through the FOI and EIRs statistics portal.
6. Information recorded in WorkPro will be predominantly from applications and enquiries made to the Commissioner. We will also record relevant concerns identified from third-party sources.
7. WorkPro reports will be circulated to SMT, DHOEs and P&I monthly. They will cover the preceding 18 months. The format and content of WorkPro reports will be owned and managed by the HOPI.
8. The types of compliance issues that we record are common across all case types in Workpro (applications, enquiries and interventions). Practice issues will be recorded in WorkPro. Guidance on how to record non-compliance issues and specific interventions is included in the Enquiries Procedures and Investigations Handbook. These issues will be reviewed and updated by the P&I Team six-monthly. Practice issues will include the category "other". This will allow the inclusion of specified issues arising between six-monthly reviews.

9. Information from our statistics portal will be used to verify or explore issues identified through WorkPro-based monitoring. Reports from the portal will enable us to compare authorities' data in relation to particular issues identified through on-going monitoring. For example:
 - (i) Section 10 and 21 breaches (failure to respond)
 - (ii) Proportion of requests deemed to be vexatious
 - (iii) Proportion of requests where clarification has been sought
10. Before carrying out any interventions that have been identified from WorkPro or statistics portal reporting, we will conduct further research to establish the nature, level and seriousness of any specific practice issues. This will include a consideration of any previous compliance issues that have been identified and, for example, issues identified on the whatdotheyknow website. We will also invite an authority to comment before commencing any more formal interventions.

Levels of interventions

11. Interventions are categorised as follow:

Level 1

12. These are minor failures to follow good practice. In these cases, we will provide informal advice and assistance to authorities, pointing out the failure and suggesting remedial action. In such cases, individual officers are empowered to give advice to authorities if a relevant failing is identified as a result of an application or enquiry to us and to decide what follow-up action is required.

Level 2

13. These are ongoing failures by an authority to follow good practice in a specific area of practice. In these cases, an appropriate manager (DHOE, HOE, HOPI or the SIC) will usually contact the authority to discuss the issues and suggest remedial action, supported by an FOIO. The appropriate manager will retain an overview but may delegate initial contact to the FOIO depending on the circumstances of the case. For example:
 - (i) Where there has been little or no contact at level 1
 - (ii) Responsibility for the remedial action does not rest at strategic or senior management level in the authority, or
 - (iii) The issue is self-contained and the FOI officer in the authority can resolve it.
14. Level 2 interventions require follow-up contact with the authority to ensure that appropriate action has been taken.

Level 3

15. These are more serious or systemic failings which have been identified and we do not consider the issue can be rectified without requiring the authority to put in place an action plan to address the issue. In such cases we may invite an authority to carry out a self-assessment using one or more of the modules in our self-assessment toolkit.

Level 4

16. These are when an authority consistently fails or refuses to comply with FOISA, the EIRs or statutory guidance despite previous interventions by us. In these cases, we may issue (or give warning of our 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 its duties under Government guidance. Alternatively, we may issue (or give warning of our 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. We may also decide to carry out an on-site assessment of an authority's arrangements for handling information requests.
17. Level 4 interventions will be subject to discussion with the SIC and ratification by the HOE and HOPI, and may be actioned by either (or both) of the Enforcement or P&I Teams. Decisions on level 4 interventions will be taken at Senior Management Team (SMT) meetings and allocated to the appropriate Head of Department for action.

Compliance monitoring

18. In the widest sense, interventions involve four broad steps: recording non-compliance, commissioning, fact-finding and suggesting or requiring action (i.e. the actual "intervention").
19. We must always record non-compliance issues when we find against the authority (in full or in part), even if, for example, it was simply a case of disagreeing with an authority on what constitutes substantial prejudice for the purposes of an exemption. Additionally, we should record non-compliance and consider action on other cases, such as settled or withdrawn, if we identify poor practice.
20. We will require remedial action when we perceive the need to do so.
21. **Level 1 interventions** are instigated at the discretion and judgement of the officer. They may be, for example:
 - (i) simply recording a disagreement where we consider the authority got it wrong and we think it would be helpful to note it in case there is a recurrence
 - (ii) a suggestion for improvement that is made in general terms, but is not something we consider warrants us requiring specific remedial action, e.g. *The authority's response to the request did not set out the right to review so I suggested they consider producing template letters and sent them some examples that we use...*
22. In these types of cases there will be no formal monitoring.
23. There may be occasions where the officer records a level 1 intervention that requires the authority to take specific remedial action but which falls short, in their view, of a level two intervention. In which case we should ask the authority to notify us when they have taken the action. For example ... *The authority's response to the request did not set out the right to review. The authority uses template letters so I asked the FOI officer to update the template letter to include the review right and to confirm by XX/XX/XXX that s/he had done so...* If the authority is asked to do something specific, a WorkPro task should be set to check it has been carried out.
24. If the action is not carried out, it is at the judgement and discretion of the officer whether to pursue or escalate the matter. For example, if the officer is aware that the authority has been asked to do this before, they may decide to alert their DHOE to the case. Equally, the

officer may take the view that the benefit to be gained by pursuing the non-compliance at that point does not justify the resources that it would take, **bearing in mind** that we will be alerted to any ongoing compliance issues through Workpro and statistical data reporting.

25. **Level 2, 3 and 4 interventions.** To assist with the administration and monitoring (where required) of more serious intervention cases, we will create an “Interventions Case” on WorkPro for level 2, 3 and 4 interventions. A paper file will be created only where the appropriate officer needs it. Paper files will be destroyed once the administration of the intervention is complete.

Commissioning an intervention at level 2, 3 and 4

26. Each intervention at levels 2,3 and 4 will generally have a “sponsor manager”. The sponsor manager will vary depending on the level and type of intervention. The sponsor manager will be the DHOE, HoD, SIC who is driving the intervention. This may be because they originally initiated it or, for example, because they were delegated with driving it following discussion by the SMT or the IPM.
27. The sponsor manager will carry out or commission data and information analysis. The actual analysis will depend on the practice area, what we already hold, what our concerns are and so on. In some instances it may be simply that we have seen an increase in applications of a certain type, in others a “Report Card” may be appropriate, in others it may be by analysis of other statistical information. This is an important stage because it informs our decision about whether an intervention is appropriate, why and at what level.
28. The sponsor manager will ensure that appropriate approval and sign-off to pursue and intervention is obtained.
29. When the decision to pursue an intervention has been taken, the appropriate HoD will create and allocate a WorkPro intervention case, ensuring all documents to that point are uploaded.
30. The sponsor manager will prepare a briefing note setting out why the intervention is needed, the aims as they exist at that time, any specific instructions and the data (plus any analysis) that informed the intervention decision.
31. The case owner will convene a case meeting with the sponsor manager, line manager and other colleagues, as needed, so that the approach and understanding can be discussed and agreed.

The intervention plan

32. We will create an intervention plan for interventions at level 2 and above. The plan will initially be for internal use, but as it is updated in light of fact finding (i.e. at the point we have reached a view about what intervention is required at what level) it may be appropriate to share it with the authority. The plan will:
 - (i) Set out the intention and aim of the intervention. This is the aim/ outcome that we would like to achieve. It may change or develop over time as we learn more about the circumstances.
 - (ii) Explain the steps that we recommend or require the authority to take. This is likely to develop during the intervention as we understand more about the particular circumstances.

- (iii) Set out the timescales in which we will take actions and when we expect the authority to take (required) actions.
33. The intervention will also include details of compliance monitoring (compliance with the plan, not general FOI compliance). This could include:
- (i) Requiring authorities to provide updates on the outcome of any action plans.
 - (ii) Requiring authorities to report to us on the outcome of a self-assessment module.
 - (iii) Monitoring the steps taken by an authority in response to any recommendations contained in a practice recommendation.
 - (iv) Monitoring and (where necessary) enforcing compliance with an enforcement notice.
34. The intervention plan is likely to be in two phases: initial fact-finding (often by letter to or meeting with the authority), and following that recommendations and action plan as the circumstances require. It is good practice to review the plan at the end of the fact-finding stage and to seek additional management input.
35. There may be circumstances where the fact-finding stage is not needed, but this should be made clear by the sponsor manager or allocating manager when the case is allocated.

Internal reporting

Intervention case reporting

36. Day-to-day reporting on a particular case will be by agreement with the case officer and line manager/ sponsor manager (as appropriate). The critical action is to keep the case in WorkPro up-to-date and to ensure that they respond to P&I's questions for the quarterly report

Corporate reporting

37. The HOPI will report to the IPM quarterly. The report will:
- (i) inform about issues arising from analysis of the information in the WorkPro report
 - (ii) make recommendations about further intervention work
 - (iii) report on progress of existing interventions and the use of level 1
38. Where update information on specific cases is required for completion of the report, P&I should approach the case officer directly if the required information is not obvious from the case.
39. We will report formally to SMT on level 4 interventions including ongoing monitoring and outcomes. Reporting arrangements should be included in the intervention plan.

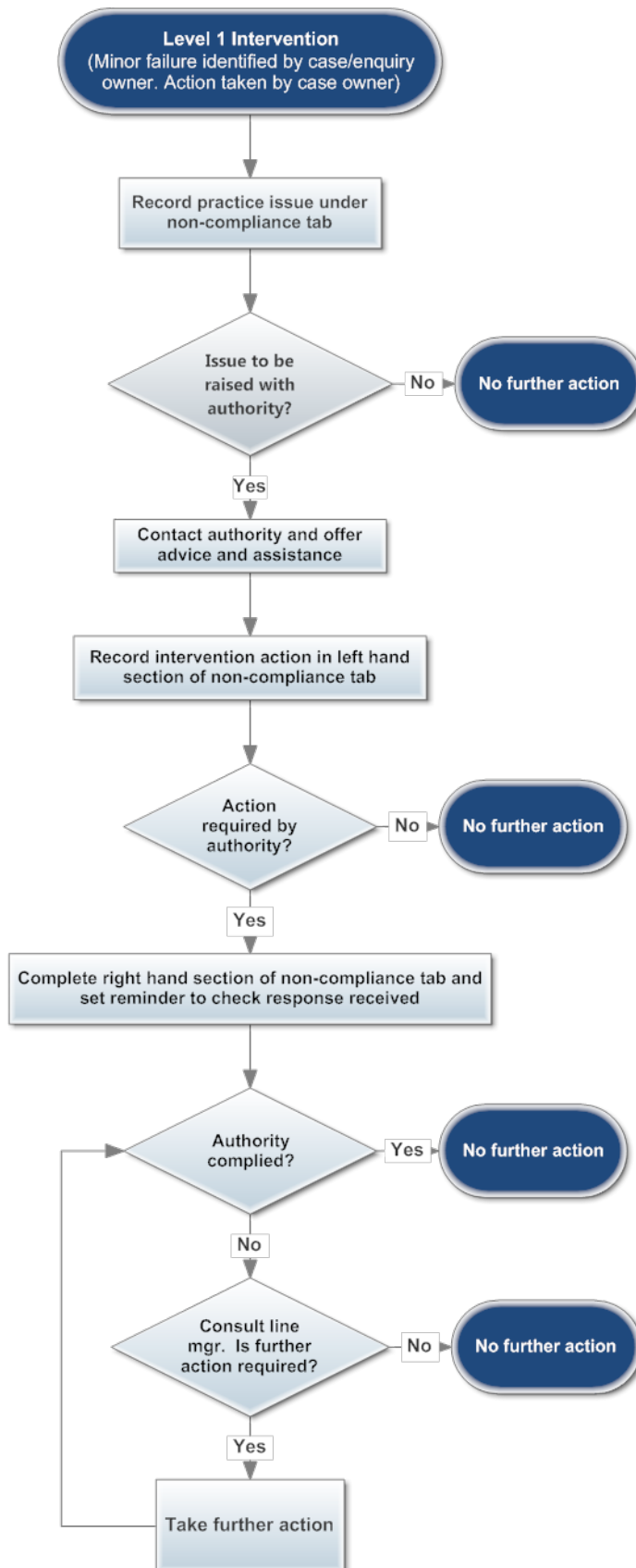
External reporting and publication

40. We will report on the volume and types of interventions that have been undertaken in the Annual Report. Our approach will be to name the authority, summarise the subject matter (but not specific nature) of our intervention and comment on outcomes.

41. SMT may decide to publish an intervention-specific report if it is in the public interest to do so when considering the subject matter or scale of intervention needed. This will be considered on a case-by-case basis.

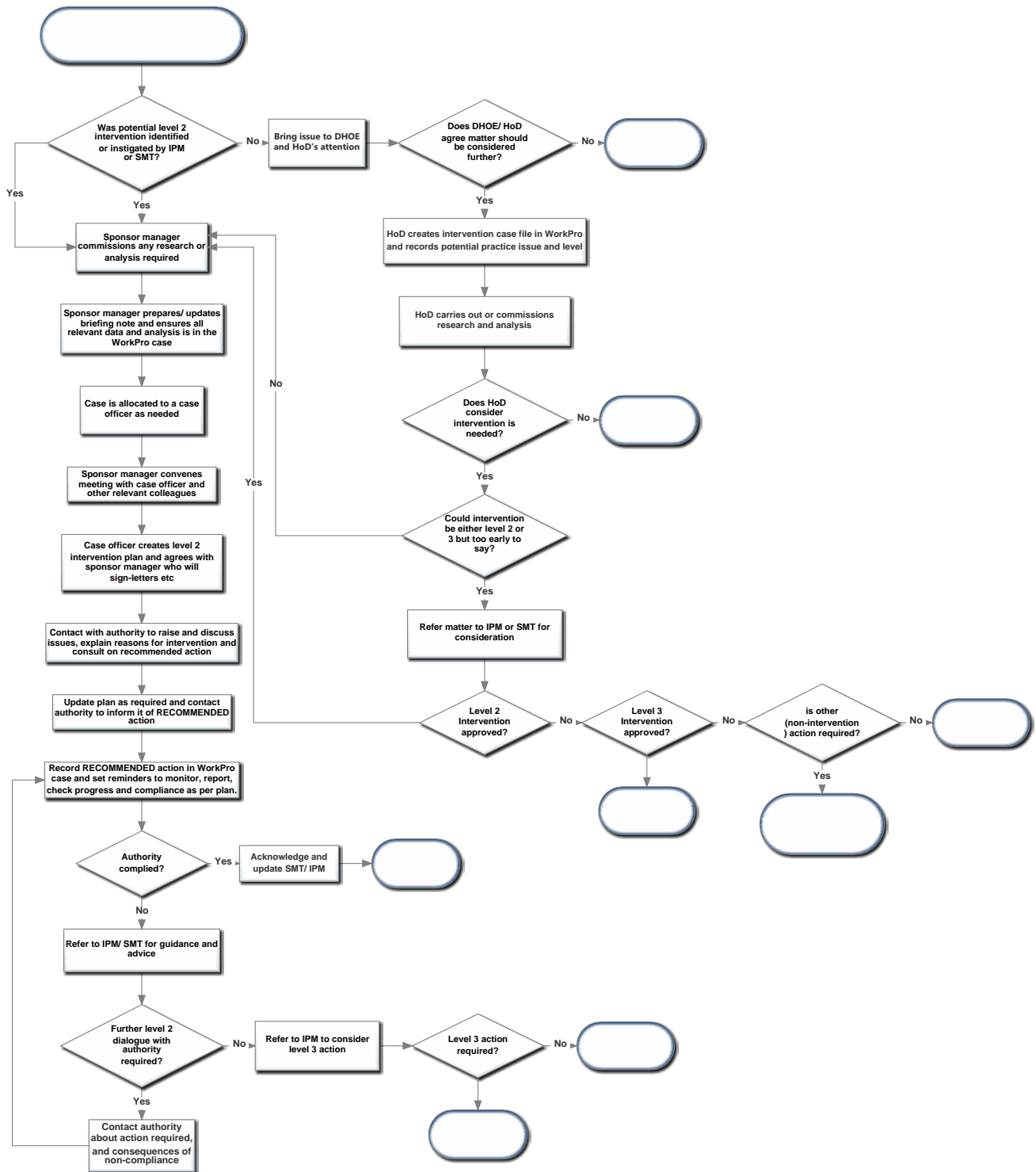
Appendix 1: workflows¹

Level 1 intervention

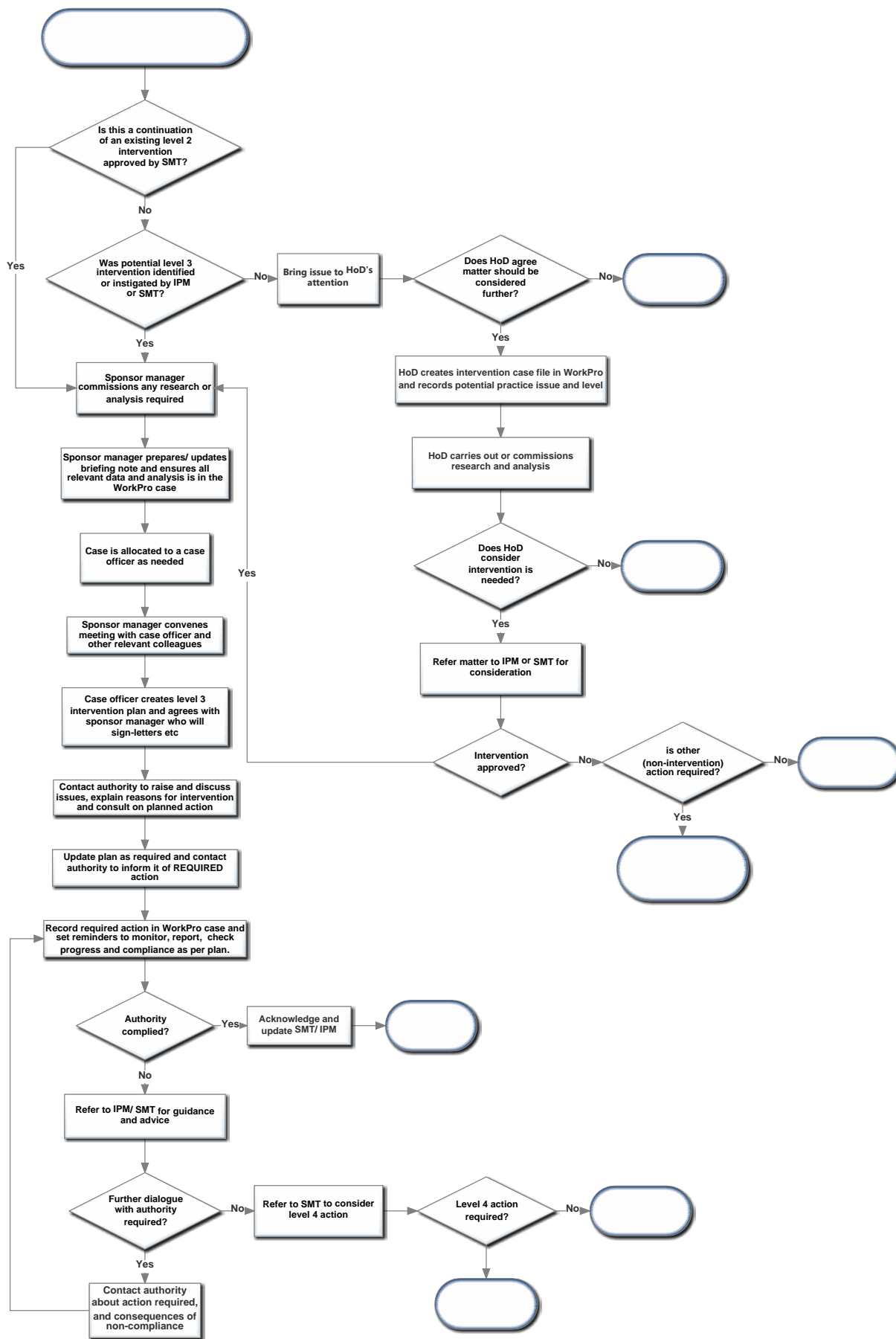


¹ Original flowcharts available in [P:\8.Policy & Communication\IMAGE LIBRARY\Policy and Information Work Plans\Project work plans 2015 - 16\Interventions procedure\Workflow - for intervention procedures](#)

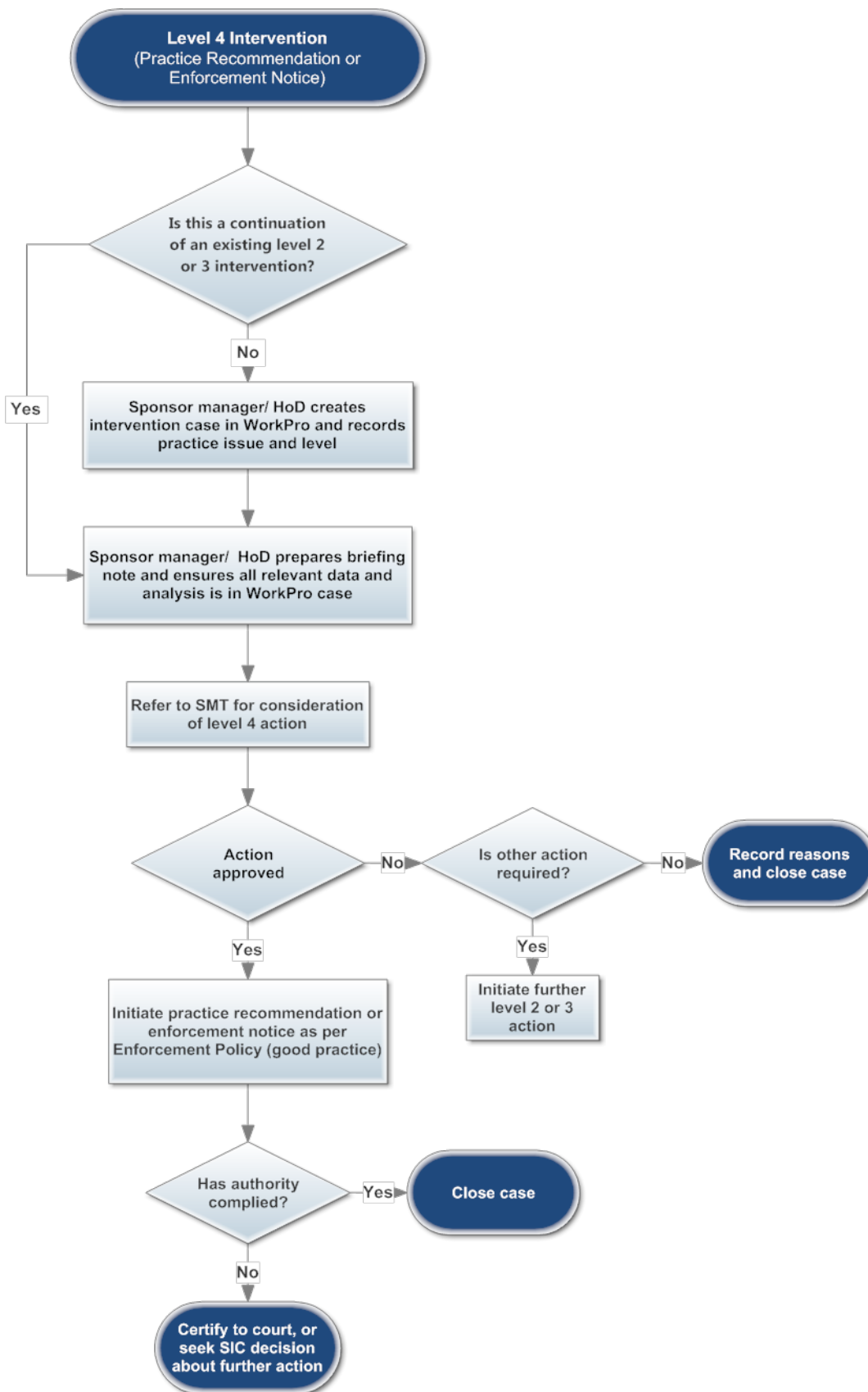
Level 2 intervention



Level 3 intervention



Level 4 intervention



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