

The Information Commissioner’s (Commissioner) duties are set out in the Data Protection Act 2002 (the Act). These duties include:

- the promotion of the following of good practice by data controllers
- the promotion of the observance of the requirements of this Act by data controllers. This can be through the use of the regulatory enforcement powers set out in Part 5 of the Act.

Regulatory powers help the Commissioner change the behaviour of organisations, and individuals, that collect, keep and use personal information. This note sets out how, in general terms, the Commissioner approaches the regulatory aspect of his duties.

Commencing Action

The Commissioner may commence action when

- matters of public concern are raised with us directly or in the public arena
 - for example, the loss of personal data, or concerns due to new, or a change in, particular activities, which may appear to be intrusive.
- a complaint (request for assessment) is received from an individual, or
- concerns become apparent through our other activities, such as consensual audit

Establishing facts

It is important that the Commissioner establishes the facts surrounding the matter. The organisation, and the complainant, will be expected to provide as much information as possible to ensure the Commissioner can establish the facts and enable a view to be formed.

The Commissioner has tools that can be used to obtain sufficient information from the organisation. These are not mutually exclusive and can be used in combination.

<p>Informal request for information</p>	<p>This is not a formal power to require information, but is used to obtain sufficient information to permit the Commissioner to carry out his functions without resorting to formal powers. This normally requires a response within 10 working days and is used when lighter touch regulation is more appropriate.</p>
<p>Information Notice</p>	<p>A formal notice requiring an organisation to supply certain specified information to the Commissioner. Failure to comply with the information notice is an offence, as is making a false statement in responding to an information notice. The organisation has a right of appeal against the issue of an information notice.</p>
<p>Search warrant</p>	<p>The Commissioner has powers of entry and inspection and can obtain a search warrant where there are reasonable grounds for doing so.</p>

In practice, it is usual for an informal request for information to be sent. If no response is received, the response is not sufficient or satisfactory, or in cases that the Commissioner considers that an

informal approach is not appropriate, a formal Information Notice will be issued. A search warrant is generally only sought as a last resort.

When is regulatory action likely?

Having taken into account the detriment caused by non-compliance with the Act and/or principles, the Commissioner will use his regulatory powers where it is considered necessary.

The following are examples of when regulatory action may be considered:

Likely (especially after a previous warning)

- Failure to take adequate security measures
- Abuse of access to systems permitted only in respect of job functions
- Denial of subject access requests
- Failure to notify despite reminders (criminal offence)
- Collecting and retaining personal information on a 'just in case' basis (in particular, sensitive personal information)
- Inaccurate, or long out-dated, personal information
- Unlawful obtaining of personal data (criminal offence)

Unlikely

- Accidental non-compliance with the principles – which is recognised and swift remedial action is taken
- First-time non-criminal breaches by small businesses caused by ignorance of the requirements
- Non-compliance that is not particularly intrusive and has not caused significant detriment – e.g. single mail shot
- Inter-business disputes where there is no detriment to customers

The Commissioner's regulatory tools

There are a number of tools available to the Commissioner for regulatory action. These are not mutually exclusive and can be used in combination.

Negotiated Resolution and Undertaking	<p>Not a formal regulatory power but a form of action used to bring about compliance with the Act and related laws.</p> <p>The Commissioner may request the organisation to take certain steps to ensure that it complies with the requirements of the Act in the future. Such informal requests will be taken into account should any further complaints be raised.</p> <p>Negotiated resolutions can be backed with a formal undertaking given by an organisation to the Commissioner.</p>
Enforcement Notice	<p>A formal notice requiring an organisation or individual to take certain actions specified in the notice to achieve compliance with the Act. Failure to comply with an enforcement notice is an offence. An organisation can appeal an enforcement notice.</p>

Caution	An alternative to prosecution where a criminal offence has been admitted but a caution is more appropriate than prosecution.
Criminal prosecution	A sanction available where there has been a criminal breach of the Act – such as unlawfully obtaining personal data or failure to notify the Commissioner of processing.

Making a decision on taking regulatory action

In deciding whether any formal regulatory action is required, and what form that will take, the following may be considered:

- The detriment to the individual?
- How many individuals are/may be affected?
- Does the attitude and conduct of the organisation both in relation to the case in hand and more generally in relation to compliance issues suggest a wilful, deliberate or cavalier approach?
- Is action justified to clarify the law or principle?
- Is there a likelihood that failure to act would result in a recurrence, or the adverse impact will have an ongoing effect?
- Is there a need to set an example to a particular business sector?
- Does a failure by the organisation to follow relevant guidance, a code of practice or accepted business practice support the case for action?
- How far do we have a responsibility to organisations that comply with the law to take action against those that do not?
- Would it be more appropriate or effective for other action to be taken by other means (e.g. another regulator, or legal action through the courts)?
- Is the level of public interest so great as to support the case for action?
- Is the cost of remedial action reasonable to the issue?
- What is the risk to our adequacy decision, the credibility of the law, and to our reputation and influence of taking or not taking action?

Publicising regulatory actions

The Enforcement Notices and signed Undertakings are publicised and made available on the Commissioner’s website, with the names of complainants redacted.

Further information

Further information on complying with the Act is available in the document library on the website along with guidance on how the Commissioner deals with complaints made by individuals (requests for assessment) – “Dealing with a complaint”.