

# Investigations Policy

Investigations conducted under Section 57(3) of the PATI Act

## Table of Contents

Introduction .....	3
Mandate and Values .....	3
What We Will Investigate and Why.....	4
What We Will Seek to Achieve .....	5
How We Will Investigate: Section 57(3) Investigation Approach.....	6
Step 1: Assessing the Need for an Investigation.....	6
Step 2: Framing the Investigation .....	7
Step 3: Notifying the Public Authority .....	7
Step 4: Establishing and Confirming the Factual Findings.....	8
Step 5: Evaluating the Public Authority’s Practices and Procedures.....	9
Step 6: Discussing the Findings and Conclusions with the Public Authority .....	10
Step 7: Reporting and Communication.....	11
Section 57(3) Investigation Flowchart .....	13

## Introduction

1. This document sets out the Information Commissioner's policy on investigations conducted under Section 57(3) of the Public Access to Information (PATI) Act 2010:

*The Commissioner may at any time carry out other investigations into the practices and procedures adopted by public authorities generally or any particular public authority for the purposes of compliance with the provisions of this Act.*

2. This policy explains when the Information Commissioner will use her initiative to conduct these investigations and sets out the objective criteria she will use to determine whether there is sufficient factual evidence to justify a Section 57(3) investigation. The policy also outlines the general investigation approach along with the expected outcomes the investigation aims to achieve.
3. A Section 57(3) investigation by the ICO is separate from an independent review by the Information Commissioner under Part 6 of the PATI Act into a public authority's decision on an individual PATI request for records.

## Mandate and Values

4. Our fundamental approach is rooted in the Information Commissioner's mandate to promote public access to information, including by providing guidance to public authorities about their obligations under the PATI Act and by engaging in oversight of their compliance with these obligations.
5. This approach will drive the Information Commissioner's investigations under Section 57(3) and is guided by three core values: *independence, integrity* and *fairness*.

### **Independence**

- a. We will work independently to oversee compliance with the PATI Act.
- b. We will take action when the PATI Act and our policies say we should.
- c. We will use the full force of the Information Commissioner's powers to promote and safeguard the right to access information.
- d. We will ensure that when carrying out her functions, the Information Commissioner is not subject to the direction or control of any person.<sup>1</sup>

### **Integrity**

- e. We will make objective, evidence-based decisions based upon the reasoned application of the PATI Act's provisions and our policies to well-founded facts.
- f. We will fulfil the Information Commissioner's mandate according to the requirements of the PATI Act and our policies, without favour, partiality or self-interest.

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<sup>1</sup> While no person can direct or control the work of the Commissioner in fulfilling her mandate under the PATI Act, the Commissioner's final decisions may be subject to scrutiny in several ways. For example, a binding decision by the Information Commissioner is subject to judicial review. Similarly, any report issued by the Information Commissioner must be provided to the Minister responsible for the PATI Act and the public authority concerned, as well as appended to the Information Commissioner's annual report laid before the Legislature. As a controlling officer of public funds, the Commissioner is accountable to the Accountant General and the Auditor General.

## **Fairness**

- g. We will ensure a thorough and timely investigation.
- h. Our communications will be courteous, professional and direct.
- i. We will apply the same law and policies to every public authority and individual.
- j. We will explain our findings and conclusions to the public authority and, where appropriate, to the public.

## **What We Will Investigate and Why**

- 6. Under the PATI Act, the Information Commissioner has the legal responsibility and authority to ensure compliance with the Act's provisions. This includes:
  - a. the duty under Section 51(1) to provide guidance to public authorities concerning the obligations imposed under the PATI Act;
  - b. the power under Section 57(3) to initiate an investigation into a public authority's practices and procedures adopted to comply with the PATI Act; and
  - c. the discretion under Section 57(4) to issue a report on her findings and conclusions, including any good practice recommendations.<sup>2</sup>
- 7. Public authorities' obligations under the PATI Act relate to how requests are handled, the giving of advice and assistance to requesters, making certain information routinely available to the public, and reporting on PATI-related activity.
- 8. As noted below, the ICO's overall aim is to work with all parties to achieve compliance with, and full understanding of, the PATI Act and its duties and obligations.
- 9. To achieve this, the ICO will continuously monitor public authorities' practices and procedures to assess their compliance with the PATI Act through a variety of means, including:
  - a. lessons learned through decisions on applications for independent review by the Information Commissioner;
  - b. intelligence gained through applications for independent review, decisions, inquiries, media reports and complaints made directly to the ICO (that are not applications for independent review by the Information Commissioner);
  - c. analysis of statistical information; and
  - d. assessments of public authorities' practices.
- 10. In many situations when monitoring raises concerns about a public authority's practices and procedures, the ICO will work with the authority to identify and informally resolve the challenges the public authority is facing, without the need for an investigation.

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<sup>2</sup> The Commissioner also has the authority to "review the information statement of any public authority to determine if it complies with" the PATI Act and to issue an order requiring the public authority's compliance (Section 7); to monitor a public authority's provision of "other information" that the PATI Act requires it to make routinely available and issue an order requiring the public authority's compliance (Section 8); and to decide applications for review of public authorities' decisions on PATI requests and issue binding decisions (Part 6 and Section 56).

11. In these situations, the ICO's aim will be to support the public authority to achieve good practice. Similar to when a public authority proactively asks for guidance from the ICO, the approach by the ICO will centre on informal discussions, guidance and agreement on appropriate ways of improving the practices and procedures.
12. In some circumstances, an investigation under Section 57(3) will be necessary to identify and address needed improvements to a public authority's practices and procedures. This may occur, for example, when relations breakdown between the public authority and the ICO during informal discussions about difficulties with the public authority's practices or procedures.
13. An investigation may also be necessary when a concern about a public authority's practices and procedures raises doubt, in the mind of the public, about the security of their rights under the PATI Act.
14. In such situations, relations between the public authority and Information Commissioner may still be favourable, but a formal and transparent process is needed to restore the public's trust in the public authority and the security of their rights under the PATI Act.

## What We Will Seek to Achieve

15. The primary aim of any investigation taken under Section 57(3) is to enable the public authority to achieve and maintain good practice, for the benefit of both the public and the public authority.
16. We will seek to work cooperatively and constructively with the public authority and where improvements to its practices and procedures are necessary, we will strive to create an improvement plan that the public authority and Information Commissioner can agree upon.
17. In exceptional circumstances when a public authority refuses to engage the Information Commissioner or seeks to conceal or obscure the facts that establish what the public authority's practices or procedures are, or refuses to adopt needed improvements in its practices and procedures, we will use the full force of the Information Commissioner's powers to promote and safeguard the public's rights under the PATI Act.

## How We Will Investigate: Section 57(3) Investigation Approach

18. When compliance monitoring suggests that a public authority's practices or procedures need improvement to meet its obligations under the PATI Act, and informal resolution either fails or is inappropriate, the Information Commissioner will take the following 7-step general approach to conduct an investigation under Section 57(3) of the PATI Act.

### Step 1: Assessing the Need for an Investigation

19. The ICO conducts initial inquiries to obtain sufficient factual evidence to justify an investigation of the public authority concerning its practices and procedures.

#### ICO's Action

- a. The ICO will identify factual evidence which shows that, on the balance of probabilities, the public authority's practices or procedures need improvement to achieve compliance with one or more of its obligations under the PATI Act. The factual basis cannot be speculative or a mere suspicion. This factual evidence may be established, for example, through:
  - assessing the Information Commissioner's decisions over time involving that public authority;
  - interviews and written submissions from requesters, members of the public or from individuals within a public authority;
  - analysis of repeated complaints directed towards one public authority; or
  - analysis of statistical information involving a public authority's actions under the Act.
- b. To justify initiating an investigation, the Information Commissioner will consider whether a *pattern* of non-compliance with the PATI Act establishes, that on the balance of probabilities, improvements to a public authority's practices and procedures are needed.
- c. Typically, a *single* instance of non-compliance may be more appropriately addressed through other means, such as a requester's application for independent review by the Information Commissioner, or the ICO working with a public authority to provide guidance for changing its procedures.
- d. However, sometimes evidence of a single instance of non-compliance may prove sufficient to justify an investigation. This occurs when it raises a concern about the public authority's practices and procedures that cannot be adequately corrected through a requester's application for review or by an order issued by the Information Commissioner. This happens only when the harm caused by the non-compliance cannot be undone, e.g., when a requester's confidentiality is breached; and not in situations where the harm can be corrected by review, e.g., when a record is withheld and later ordered disclosed by the Information Commissioner.

### **Step 1 Example**

Requesters are repeatedly seeking an independent review by the Information Commissioner of a particular public authority's refusal to respond to PATI requests within the required time. The ICO examines the Information Commissioner's decisions over the past year involving that public authority. Analysis of the decisions reveals that the public authority failed to give a timely response to 70% of the PATI requests it received. The Information Commissioner concludes that this factual evidence establishes that on the balance of probabilities, the public authority's practices and procedures are insufficient to achieve compliance with the PATI Act. This justifies initiating an investigation under Section 57(3).

## **Step 2: Framing the Investigation**

20. The ICO defines the scope, content and initial process for the investigation.

### **ICO's Action**

- a. If the Information Commissioner finds that an investigation is needed, the ICO will define the specific practices and procedures, or the precise compliance issues being investigated. We will also identify the public authorities included in the investigation.
- b. During this stage, the Information Commissioner will also decide whether the evidence of non-compliance raises concerns within the broader public about the effectiveness or security of their rights under the PATI Act. If this occurs, the Information Commissioner will consider announcing the initiation of the investigation and its scope.
- c. The purpose of the announcement is twofold. First, it will inform the public that the Information Commissioner has identified the possible harm to the public's rights under the PATI Act. Second, the public will know that any required improvements to the public authority's practices and procedures will be recommended and recorded. As explained below, written notification to the public authority will include the Information Commissioner's decision to announce the investigation.

## **Step 3: Notifying the Public Authority**

20. After clearly defining the scope, content and initial approach for the investigation, the ICO will give the public authority written notification of the investigation.

### **ICO's Action**

- a. The ICO will provide written notification to the relevant public authority or authorities that the Information Commissioner has initiated an investigation. The notice will explain:
  - the scope and purpose of the investigation;
  - the steps in the investigation; and
  - the aim to achieve an agreement on improvements to the practices and procedures, if any are needed.
- b. In the interest of transparency, if a public announcement is to be made about the investigation, the ICO will include this information in the notification to the public authority.

- c. If necessary, the Information Commissioner will discuss with the public authority any immediate or interim steps that are required to avoid ongoing non-compliance, pending the conclusion of the ICO's investigation.
- d. At this stage, the ICO will also begin assessing how the investigation will be reported on at its conclusion.

#### **Step 4: Establishing and Confirming the Factual Findings**

21. To evaluate whether any improvements are needed to the public authority's practices and procedures, the Information Commissioner must first have an accurate, complete and clear understanding of how the public authority is fulfilling its obligations under the PATI Act. The Information Commissioner will work with the public authority to establish, confirm and agree upon the factual findings for the investigation concerning the authority's practices and procedures under review. The Information Commissioner will then adopt her factual findings.

##### **ICO's Action**

- a. Through constructive engagement with the public authority, the ICO will develop the factual findings that must be established for the Information Commissioner to complete an effective evaluation of the practices and procedures under review.
- b. Initial factual information about the practices and procedures may be collected via discussions with the public authority and/or through written questions from the ICO and answers provided by the public authority.
- c. The ICO's inquiries (through discussions and/or written questions) will seek comprehensive, accurate and clear information about the relevant practices and procedures in operation at the public authority. This may include requesting information about training, policies, procedures, resource allocation, current practices and any corrective steps already taken.
- d. When the ICO receives sufficient information to understand the public authority's practices and procedures, the ICO will ask the public authority to review and confirm the Information Commissioner's factual findings. The public authority, in most circumstances, will accept the factual findings as an accurate representation of its practices and procedures. Or, if the public authority disagrees with the accuracy of the factual findings, it has the opportunity to submit further supporting proof to justify changes to the Information Commissioner's factual findings.
- e. Once the public authority and ICO have reached as much agreement as possible about the factual findings, the Information Commissioner will adopt her factual findings for the investigation.
- f. In some instances, some findings of fact may remain disputed or unconfirmed by the public authority. The Information Commissioner will acknowledge the impact of the disagreement or refusal to confirm the factual findings upon her ability to complete a comprehensive, accurate and effective evaluation of the public authority's practices and procedures.

#### **Step 4 Example**

As in the example above, analysis of the Information Commissioner's decisions over the past year involving a public authority reveals it failed to respond in time to 70% of the PATI requests it received. The Information Commissioner concluded earlier that this indicates a problem with the public authority's obligations under the PATI Act that justified starting an investigation under Section 57(3). The public authority has been notified of the investigation and its scope.

The public authority strongly disagrees with the Information Commissioner's analysis that it had failed to respond, in a timely manner, to 70% of its PATI requests. The public authority takes an entrenched position early on when the ICO tries to have an open discussion about ways to improve its practices and procedures. The Information Commissioner decides to undertake her fact-finding inquiries by sending written questions to the public authority, along with the ICO's Investigations Policy and Guidelines for Public Authorities.

The ICO sends a series of questions asking the public authority to outline its practices and procedures used to receive PATI requests; to explain how it handles PATI requests when the Information Officer is on vacation or otherwise absent for extended periods; to describe the PATI training provided to staff who handle PATI requests; and to identify any quality control measures in place to alert the public authority when pending requests have not been answered within the required time.

After looking at the ICO's material, the public authority understands the purpose of the inquiry better. It recognises that cooperating with the ICO investigation is beneficial because the process would allow it to identify the shortcomings in its procedures and receive advice on how to make improvements.

The public authority decides to give full and complete answers to investigation questions, along with copies of its procedures and other documentation. The Information Commissioner's factual findings include that the public authority had routinely missed deadlines to acknowledge and respond to PATI requests because the Information Officer had been on long-term sick leave and no procedures were in place to deal with this. The public authority reviews and accepts the Information Commissioner's findings of fact.

#### **Step 5: Evaluating the Public Authority's Practices and Procedures**

22. The Information Commissioner will review the factual findings to evaluate the adequacy of the public authority's practices and procedures and to reach conclusions concerning any necessary recommendations for improving the public authority's compliance with the PATI Act.

##### **ICO's Action**

- a. Applying the PATI Act, law, policy, ICO Guidances and good practice to the factual findings, the Information Commissioner will assess the specific practices and procedures under review for their ability to achieve compliance with the relevant obligations under the PATI Act.
- b. The Information Commissioner will make conclusions to clearly identify any areas of improvement needed in the practices and procedures and will make good practice recommendations to address them.

## **Step 6: Discussing the Findings and Conclusions with the Public Authority**

23. The ICO will discuss the Information Commissioner's findings and conclusions with the public authority and, if appropriate, will determine how any needed improvements will be addressed.

### **ICO's Actions**

- a. The ICO will share the Information Commissioner's factual findings and conclusions with the public authority. The ICO will also request that the public authority accept the factual findings and any recommended improvements.
- b. If, viewed in light of the Information Commissioner's conclusions and recommendations, the public authority is no longer willing to accept the Information Commissioner's factual findings or wishes to make a clarification of the facts, it will have another opportunity to make formal submissions of factual evidence for the Information Commissioner's consideration.
- c. In situations when the Information Commissioner has recommended changes to the practices and procedures, the ICO and the public authority will determine if the practices and procedures can be improved through a mutually agreed set of actions, or an improvement plan.
- d. The ICO will work with the public authority to implement the improvements. The final aim is to enable the public authority to achieve and maintain good practice. Agreed improvements may include:
  - training, or advice about training;
  - sharing of good practice from and with other public authorities; or
  - developing improved practices and procedures.
- e. If relations with the public authority break down or the public authority's actions are ineffective for improving its practices and procedures, the Information Commissioner may prepare an investigation report under Section 57(4). Her investigation report will discuss the inability to establish an agreed improvement plan with the public authority and will include her conclusions about the additional improvements that are needed.
- f. The Information Commissioner may take these conclusions into account when conducting future independent reviews of the public authority's decisions in individual PATI requests, or when engaging in other oversight of the public authority's compliance with the PATI Act.

### **Step 6 Example**

As in the above example, the ICO discovers that during the last six months, a particular public authority has not responded within the required time period for 70% of the PATI requests it received. The public authority's written answers reveal that the Information Officer has been on long-term sick leave. During that time PATI requests were collected on his desk with other matters awaiting his return. As a result, the public authority was repeatedly missing deadlines in acknowledging and responding to PATI requests.

The ICO discussed the Information Commissioner's factual findings with the public authority. The public authority accepted her findings and cooperated with the investigation process and the Information Commissioner's recommendations. The ICO and public authority agree that the best way to prevent missing deadlines is for the public authority's procedures to be revised to explicitly identify who will receive and process PATI requests when the Information Officer is absent for more than three days. The revised procedures will also require that the Information Officer role is reassigned alongside other essential duties ordinarily redistributed due to long-term absences.

The head of the public authority also agrees to take responsibility for ensuring the public authority follows the revised procedures. As part of the agreed improvement plan he agrees to take actions to have the Information Officer's responsibilities recognised in the list of essential duties; require the new/interim Information Officer to undertake PATI training; to update the authority's Information Statement whenever a new Information Officer is appointed and notify the Information Commissioner.

The ICO accepts that the revised procedures will correct the weaknesses in past practice and enable the public authority to comply with the time deadlines set in the PATI Act. The Information Commissioner accepts the agreed improvement plan as the recommended action for the public authority. The Information Commissioner requests that the new procedures are implemented immediately, and to review their impact with the public authority's performance in six months. The public authority agrees to both.

## **Step 7: Reporting and Communication**

24. The Information Commissioner will determine the appropriate manner to report and communicate further about the investigation.

### **ICO's Actions**

- a. In general, reporting and communication are vital parts of the Information Commissioner's legal responsibility under the PATI Act. The Information Commissioner may prepare an investigation report under Section 57(4) for a number of reasons.
- b. Investigations initiated by the Information Commissioner under Section 57(3) may reveal isolated instances when a single public authority's practices or procedures need discrete improvements to achieve compliance with the PATI Act. In these instances, the improvements may be generally noted in the Information Commissioner's Annual Report, but further specific reporting may be unnecessary.

- c. Other investigations may reveal systemic compliance issues across public authorities that must be addressed through more widespread improvement and reporting efforts, including a report under Section 57(4).
- d. In other situations, when a public authority's improvements provide an example of best practices for others, the Information Commissioner's findings of fact, conclusions and the agreed improvement plan may be recorded in an investigation report under Section 57(4) to facilitate the sharing of the public authority's improved practices and procedures.
- e. The Information Commissioner may also prepare an investigation report on the public authority's improvements to its practices and procedures if she has identified a need to explain them to the public and to reassure the public that their rights under the PATI Act are secure and effective.
- f. Overall, the Information Commissioner will be open in her communications about the results of her investigations; reporting on investigations and the issues raised through a variety of appropriate means, which may include:
  - An investigation report – under Section 57(4), the Information Commissioner may prepare a public report (written or in some other form) of the findings and conclusions of the investigation;
  - The Annual Report – under Section 57(5), any written report issued after an investigation initiated by the Information Commissioner must be included in the Information Commissioner's public Annual Report;
  - Publishing decisions on applications for independent review by the Information Commissioner and practice recommendations;
  - Sharing of good practice and learning, in particular through ICO Guidances, which authorities and requesters are encouraged to follow; and
  - Research, consultation, presentations, learning and educational materials.

## Section 57(3) Investigation Flowchart

