

Meeting: Management Board **Date:** 20 July 2020
Agenda item: 5.2 **Time:** 15 minutes

For decision

Presenter: James Moss

Topic: Approach to updating the Regulatory Action Policy ('RAP') and Statutory Guidance

Issue: Whether the Board is content for the Statutory Guidance, once completed, to go out for public consultation

Reason for report: - On 16 March 2020, just before the closure of the ICO's offices as a result of the CV19 pandemic and associated 'lockdown' a paper was presented to informal management board for discussion on revising and updating the ICO's RAP (copy attached as Appendix 1 for reference)

At that meeting the board gave a steer that they agreed with the proposed approach to split the work required to update the RAP into two parts, with the parts required by law to be formally consulted upon (the Statutory Guidance) to be dealt with separately to the rest of the RAP, but that we should not conduct any public consultation at that point given the prevailing public health situation.

We have been progressing this work in the intervening period in line with that steer and are now at the point where we believe it appropriate to consider conducting the necessary public consultation. A cross office working group has been set up to progress the work with the specific work plan as follows:

OBJECTIVES

- Revise and update the *Statutory Guidance* which must include sections on
 - information notices,
 - assessment notices,
 - enforcement notices, and
 - penalty notices.

- To ensure final sign off of the Statutory Guidance internally by xx 2020
- To undertake full formal consultation of the Statutory Guidance (6 weeks) and to review and amend following consultation responses
- To consult with DCMS and Secretary of State on the Statutory Guidance followed by Parliamentary consultation and approval
- To review, consult and publish the updated Regulatory Action Policy

In respect of overall timescales, the ambition is to reach the stage of completion of the work on the Statutory Guidance including the fining model, by 1 October and the RAP by 31 December 2020. We consider this schedule to be ambitious but achievable provided that we are able to progress to formal consultation as set out in this paper. The reason for the proposed backstop of 31 December is to align with the end of the Brexit transitional period meaning that there will be a fully revised and updated RAP and Statutory Guidance product available for use and published at the point at which the transition period is concluded.

In line with the steer that the Board gave at that earlier informal session, this public consultation will cover the Statutory Guidance element of the current RAP but won't cover the other broader contents of the current RAP.

We are now looking for the Board to support this approach as the overall public health position has shifted since the Board last considered this issue, the work on updating the RAP has progressed and the question of whether it is now appropriate to enter into public consultation is therefore now a live issue which should be re-assessed.

Purpose of report: To decide whether the approach set out above is agreed and whether in light of changes since March 2020 whether the Board now approves moving to formal public consultation on the Statutory Guidance elements of the RAP as soon as the work is ready for that to be done.

Background: In April 2020, we published a document setting out the ICO's regulatory approach as a pragmatic and proportionate regulator during the coronavirus public health emergency. In July 2020 ET reviewed this document and agreed an updated approach document (provided at Appendix 2). This will be published on the ICO's website alongside a supporting statement from the Commissioner and an FOI blog (expected to be during w.c. 13 July)

As the pandemic moves towards the recovery phase, we will further update the document to ensure that the relevant considerations and proposed changes to our regulatory posture can be assessed again at that time. We currently expect this to be around October 2020 but will adjust timescales as necessary.

The relevance of the above to the present paper is that as our wider regulatory approach shifts to take account of the wider public mood alongside evolving

government guidance it is appropriate that matters we had previously put 'on hold' at the start of the pandemic should now be revisited and their progress reassessed.

Discussion: Any consideration of whether it is an appropriate time to enter into public consultation on such fundamental issues is a finely balanced one. In favour of entering into consultation as soon as possible is the fact that until this process is completed the Statutory Guidance cannot be updated and the risks identified in the paper attached at Appendix 1 remain live. Those risks increase the longer this work is delayed. On the other side of the equation there is a risk that entering into public consultation at a time when many public and private sector organisations are still struggling with the impact of CV19 may mean they do not have sufficient resources to properly engage with the consultation meaning in turn we do not receive the best and most useful response enabling us to take account of all relevant views and concerns. Our assessment of the situation is that the balance between those two factors has now tipped in favour of progressing to consultation as soon as possible as the general response to the CV19 pandemic moves from an initial emergency response phase to a more stable recovery phase, albeit with many challenges remaining.

The vision for the project to update the RAP and Statutory Guidance has four key elements:

1. To allow staff (internal facing) those we regulate (external facing) and Government to clearly understand our approach to regulation and to have increased certainty as to likely regulatory outcomes.
2. To remove any confusion or doubt as to how we work and how we will utilise our powers, which is a good in and of itself and also promotes greater compliance with the law.
3. In light of the fast-moving regulatory landscape and the significant increases in our powers since the previous iteration of the RAP was published to ensure that we are relevant.
4. To ensure that all the various limbs of the ICO's work and the various statutes that we regulate are covered by an overarching and consistent model.

The Objectives would be to produce the key deliverables in line with the time frame set out above, with the overarching objective across all deliverables that they be clear, accurate and legally sound:

- Updated Statutory Guidance
- Updated Regulatory Action Policy
- Associated internal and external comms products to socialise and explain those documents post consultation and implementation

Options:

1. Do Nothing and leave the public consultation 'on hold'. Benefits – avoids the risk of consultation not being effective because interested parties do not have sufficient resources to respond. Detriments – the risks inherent in not updating the Statutory Guidance cause significant damage to the ICO's ability to conduct its work and to its reputation.
2. Move forward with the public consultation as soon as possible once the relevant documentation is completed. Benefits – the risks set out at Appendix 1 are mitigated and the office is able to move forward with the revised Statutory Guidance and then move on to working on the rest of the wider RAP project. Detriments – the responses to the public consultation may not be as detailed or wide ranging as might otherwise be obtained were it to be delayed further.
3. Decide to move forward with public consultation but delay commencement to a future date, pushing back completion of the overall workplan into 2021. Strikes a mid-point between the benefits and detriments on options 1 and 2 but means that we do not comply with the proposed revision timetable as set out in the current RAP (see details below)

Recommendations: Option 2 is recommended for the reasons set out above, namely that benefits of proceeding outweigh the risks of further delay.

Next steps: The cross office project group dealing with the Statutory Guidance and RAP work will expedite the proposals for the Statutory Guidance work and aim to send that out for public consultation as soon as possible with a proposed timescale of completion by 1st October for the Guidance and by 31st December for the RAP, which aligns with statements we have made about timing of updates within the current RAP and the IRSP¹.

Resource implications: All necessary resources are already committed and in place in the form of a cross office project group which is already working on updating the RAP and the statutory guidance.

Equality, diversity, and inclusion considerations: It is not considered that there are any equality and diversity considerations in relation to this

¹ The current RAP itself says that "We will keep this Policy under review and evaluate it regularly and at least at the end of the Information Rights Strategic Plan timeline. We will update it to reflect any amendments to legislation, including any implementation of an updated e-Privacy Regulation, and once the final settlement between the EU and the UK post-Brexit is confirmed."

The IRSP in turn confirms that it covers the period from April 2017 to March 2021 so the publicly stated 'hard stop' for the ICO to have reviewed the RAP is by no later than March 2021.

report. The public consultation itself may have such considerations but they will be assessed and dealt with as part of the consultation process.

Alignment with values:

Collaborative – this work engages with the RAP project cross-office group which is a collaborative exercise to ensure the work is progressed and is also collaborative externally with relevant stakeholders who will engage with and respond to the consultation

Service Focused – progressing this work allows the office to provide an improved service to everyone who uses and needs to refer to the Statutory Guidance which is a key resource both for colleagues within the organisation but also externally for organisations who want clarity and certainty as to the ICO’s position on the matters set out within it.

Link to the Information Rights Strategic Plan:

Goal #2: Improve standards of information rights practice through clear, inspiring, and targeted engagement and influence.

Goal #5: Enforce the laws we help shape and oversee

Impact on Risks and Opportunity Register:

Mitigates Risk 73 - As a rapidly expanding organisation we fail to introduce the necessary infrastructure and culture to ensure appropriate compliance with all relevant legal and other obligations expected of a modern regulator

Mitigates Risk 3 - ICO fails to meet expectations when dealing with its regulatory action priorities in a timely and effective way; and hence does not meet the wide range of expectations of stakeholders.

Publication considerations: This report can be published internally and externally but publication of Appendix 2 should be delayed until the final version is published as that document is currently in draft and may change after the drafting of this document.

Author: James Moss, Acting General Counsel

Consultees: James Dipple-Johnstone, Deputy Commissioner

List of Annexes: Appendix 1 – 16.03.20 paper on Revising and updating the ICO’s Regulatory Action Policy

Appendix 2 – ICO updated Regulatory Posture document xx.07.20 – IN DRAFT

The current RAP includes not only guidance which is mandated by s.160(1) but also additional guidance which is discretionary under s.160(2).

The current RAP was published on 7 November 2018 and since its introduction several matters have come to light which would merit re-consideration and review.

Discussion:

A short non-exhaustive list of matters which merit review and reconsideration in the current RAP is as follows:

1. The GDPR fining model on page 27, in particular more detailed guidance on how exactly the amount of any penalty will be arrived at
2. How we use our assessment notice powers and their link to formal enforcement action
3. Correcting/clarifying an apparent typo at the bottom of page 18, which suggests we do require access to legal privileged information
4. How we refer to the regulatory panel at page 26, how that panel should function and when it should be used.
5. Removing the discretionary element of the fixed penalty fining regime following the decision of *Siddiqui v IC* at the FTT, see page 28.

The RAP makes it clear that it will be kept under review and regularly evaluated to reflect any amendments to legislation, "including any implementation of an updated e-privacy Regulation, and once the final settlement between the UK and post-Brexit is confirmed."

All of the above points are of importance and require further consideration and resolution. Given that the legal and regulatory landscape post Brexit transition period remains in certain respects unclear it may well be that further revision of the RAP would be required after that date.

Points in Detail:

(1) GDPR fining model

Under the Old Law (DPA98) the maximum penalty was £500,000 no matter the size of the recipient company or the seriousness of the breach. Under current law the maximum penalty is 20 million Euros (or equivalent in sterling) or 4% of the total annual worldwide turnover in the preceding financial year, whichever is higher. Under the Old Law the ICO adopted and successfully used a banded model where the available amount of financial penalty was split into five bands. There is currently no such corresponding model and the current version of the RAP does not clarify or assist in determining how the ICO will arrive at an amount except in general terms. This risks our enforcement action being criticised and challenged as

arbitrary, opaque, and unfair. We consider resolving this position to be the most urgent of the issues currently arising in respect of the RAP.

(2) Assessment Notice Powers

As noted above Assessment notices are included in the list of mandatory guidance topics under s.160(1) and on the face of it therefore are equally serious powers in their application and consequences. Given that these are, effectively, new powers under the DPA18 the teams utilising these powers have realised there needs to be a more rigorous framework about when we deploy those powers and how we make and document those decisions. This thinking would benefit from being included in any revised RAP.

(3) Access to Privileged Material

Section 143(3) DPA18 (Information Notices) and s.147(3) (Assessment Notices) makes clear that such notices cannot require the production of legally privileged material and therefore that a request for such material is a nullity. Concerns have been expressed that in certain cases the recipient of a notice could assert that material is privileged and there is no obvious way for the ICO to check or corroborate that assertion. How to resolve that concern is a matter for further discussion but the RAP as currently drafted will have to be amended to reflect the clear letter of the law.

(4) The Regulatory Panel

At the time the RAP was developed and implemented the details of the Regulatory Panel had not been fleshed out fully. Seeking to do so and then seeking to apply the model to real life cases has produced several concerns and questions about how the Panel would work in practice. For example, should it meet before or after any Article 60 referral, should it report to the Commissioner or to the decision maker with delegated authority, in which types of cases should it be convened and how should that decision be made.

(5) Fixed Penalty Fines amounts

A recent case before the Tribunal has strongly advised that the current position should be amended as there is uncertainty as to how the model in the RAP should apply and the intention of there being a fixed fines model is that there should be no uncertainty in how the amount of any fine is calculated. Whilst the advice of the Tribunal is technically not binding the view is that it would be prudent to revise

the RAP to take account of that advice and remove the extra discretionary amount currently included for lack of co-operation.

Timing and sequencing of work:

There is a tension therefore between the desire to resolve matters which are of immediate concern urgently and to wait until the political and legal position is clearer post December 2020.

Of the points above the fining model is of most pressing concern given that there are live cases ongoing which require penalties to be decided upon and imposed on a regular basis; indeed, post GDPR monetary penalties have already been imposed under this version of the RAP

It could therefore be decided to conduct a light touch review of the RAP for the time being, on the understanding that we will have to review it again when the regulatory landscape becomes clearer, with the primary aim of clarifying the GDPR fining model as a matter of urgency with a view to getting the RAP out for consultation as soon as possible.

Questions/Topics for discussion:

- What is Management Board's view as to the points of concern raised and their hierarchy of risk
- What is Management Board's view as to timing and sequencing of work balancing the need for prompt resolution of issues against the current uncertainty around the political and legal position during the transition period
- What is Management Board's view more generally (a) as to whether the RAP should seek to be narrowly construed in line with the strict statutory obligations under s.160(1) or should include other discretionary elements as per 160(2) and, (b) if the latter should those elements be included in one document or be divided into separate documents.

Author: James Moss

Consultees: James Dipple Johnstone, Cathy Bamford

The ICO's regulatory approach during the coronavirus public health emergency

Our role as an independent regulator is to act in the public interest, and our approach has always been to be a pragmatic and proportionate regulator.

The coronavirus public health emergency means that we must reassess our priorities and our own resourcing, so that we retain the right balance in these challenging times, focusing on those areas likely to cause the greatest public harm.

This paper sets out how we will regulate during the current public health emergency, focusing in particular on data protection and freedom of information laws.

Background:

These are exceptional times in the nation's history. Parliament and government have enacted emergency legislation and there have been significant impacts on services across government, public bodies, and businesses.

In particular, the current coronavirus public health emergency means that:

- organisations are facing staff and operating capacity shortages;
- a small number of health, local and central government, charities, and law enforcement public authorities continue to face front-line pressures and are re-deploying resources to meet those demands; and,
- organisations are facing acute financial pressures impacting their finances and cashflows.

As a public authority, we must act in a manner which takes into account these circumstances. This includes deciding how we exercise our enforcement powers, how we deliver technical advice and guidance to public and private sector organisations, how we continue to support transparency in public decision making and how we support the public in dealing with their complaints and queries. We acknowledge the important role that people's information rights will continue to have, both around privacy protections and transparency around decision making by public

bodies.

The law gives us flexibility around how we carry out our regulatory role, which allows us to recognise and engage with the unique challenges the country is facing. For example, data protection laws contain checks and balances to ensure that personal information can flow and be effectively utilised for healthcare. Similarly, there are appropriate and proportionate safeguards for individual's personal information that also allow for a recognition of the public interest, for instance in the use of apps, research projects and digital tools that rely on large personal data sets.

There are specific legal requirements which apply to particular work we do and decisions we make. For example, we are required by law to deal with complaints by the public appropriately, and when we take enforcement action there are specific criteria we must take into account. We recognise, however, that the current reduction in organisations' resources could impact their ability to comply with aspects of the law.

We are committed to an empathetic and pragmatic approach, and will demonstrate this through our actions:

- We will continue to recognise the rights and protections granted to people by the law, both around their personal information and their right to freedom of information.
- We will focus our efforts on the most serious challenges and greatest threats to the public.
- We will assist frontline organisations in providing advice and guidance on data protection laws.
- We will take firm action against those looking to exploit the public health emergency through nuisance calls or by misusing personal information.
- We will be flexible in our approach, taking into account the impact of the potential economic or resource burden our actions could place on organisations.
- We will be ready to provide maximum support for business and public authorities as they recover from the public health emergency.

Engagement with the public and organisations:

We are committed to supporting organisations through this period, reflecting the challenges they face. In particular, we acknowledge our role in supporting frontline organisations that provide healthcare or other vital services.

1. We will identify and fast track advice, guidance, or tools that public authorities and businesses tell us would help them deal with, or recover from, the crisis.
2. We will review the economic and resource impact of any new guidance. We will delay any specific guidance that could impose a burden that diverts staff from frontline duties, except where it is needed to address a high risk to the public.
3. We will provide practical support to the public as to how to understand and exercise their information rights during this crisis. This could mean that individuals are advised to wait longer than usual and 'bear with' organisations.
4. When handling the public's complaints about organisations, our approach will take into account the impact of the crisis. This may mean we resolve the complaint without contacting an organisation, for example if it is focussing its resources on the coronavirus frontline, or that we give it longer than usual to respond or to rectify any breaches associated with delay if it is recovering its service and gradually improving timescales.
5. We will look to develop further regulatory measures that are ready to use at the end of the crisis. These would support economic growth and recovery including advice services, sandboxes, codes, and international transfer mechanisms to test flexibility in safe data use.

Regulatory action:

The ICO has a [Regulatory Action Policy](#) which provides guidance as to our approach to regulatory investigations and enforcement action.

As set out in the policy, the ICO will continue to act proportionately, balancing the benefit to the public of taking regulatory action against the potential detrimental effect of doing so, taking into account the particular challenges being faced at this time.

1. Organisations should continue to report personal data breaches to us, without undue delay. This should be within 72 hours of the organisation becoming aware of the breach, though we acknowledge that the current crisis may impact this. We will assess these reports, taking an appropriately empathetic and proportionate approach.
2. When we conduct investigations, we will act knowing there is a public health emergency and seek to understand the individual challenges faced by organisations. We will take into account the particular impact of the crisis on that organisation. This may mean less use of formal powers that require organisations to provide us with evidence,

and allowing longer periods to respond. We also expect to conduct fewer investigations, focussing our attention on those circumstances which suggest serious non-compliance.

3. We will take a strong regulatory approach against any organisation breaching data protection laws to take advantage of the current crisis.
4. We will undertake some risk-based audit work on an offsite basis recognising the travel and contact restrictions that remain in force.
5. In deciding whether to take formal regulatory action, including issuing fines, we will take into account whether the organisation's difficulties result from the crisis, and if it has plans to put things right at the end of the crisis. We may give organisations longer than usual to rectify any breaches that predate the crisis, where the crisis impacts the organisation's ability to take steps to put things right.
6. All formal regulatory action in connection with outstanding information request backlogs will be suspended.
7. As set out in the Regulatory Action Policy, before issuing fines we take into account the economic impact and affordability. In current circumstances, this is likely to mean the level of fines reduces.
8. We may not enforce against organisations who fail to pay or renew their data protection fee, if they can evidence that this is specifically due to economic reasons linked to the present situation, and provided we are adequately assured as to the timescale within which payment will be made.
9. We will recognise that the reduction in organisations' resources could impact their ability to respond to Subject Access Requests, where they need to prioritise other work due to the current crisis. We can take this into account when considering whether to impose any formal enforcement action.

Freedom of Information Act and Environmental Information Regulations:

This unique crisis has required quick decision making and innovative uses of data, including geolocation and geospatial information. There has been, and will continue to be, intense public interest in understanding how and why decisions were taken and how information was used.

Official Sensitive
(Delete this if not sensitive)

We will take an empathetic and pragmatic approach to our role regulating access to information regulation, recognising the importance of transparency, especially where people have seen their civil liberties impacted.

We recognise that the reduction in organisations' resources could impact their ability to comply with aspects of freedom of information law, such as how quickly FOI requests are handled, but we expect appropriate measures to still be taken to record decision making, so that information is available at the conclusion of the emergency. We do not expect this will impact on the ability to take and progress actions that are necessary.

1. We will continue to accept new information access complaints. We will take a pragmatic approach to resolving these complaints, keeping engagement with the public authority to a minimum and being guided by them as to whether they are able to respond to our requests or require more time to do so.
2. We will recognise that the reduction in organisations' resources could impact their ability to respond to access requests or address backlogs, where they need to prioritise other work due to the current crisis. Organisations should recognise the public interest in transparency and seek as far as possible to continue to comply with their obligations for particularly high-risk or high-profile matters.
3. We understand that there have been extreme circumstances where public authorities have had no option but to temporarily reduce or suspend elements of their information access function. As the pandemic emergency response continues to ease, we expect public authorities to reinstate all aspects of their information access function, ensuring that where necessary they have recovery plans in place.
4. We encourage public authorities to proactively publish information they know will be of importance to their communities.

5. We will continue to emphasise and support the importance of proper record keeping during a period of time that will be subject to future public scrutiny.

Conclusion:

With the correct application of flexibility in regulatory response, we do not consider that any of the legislation we oversee should prevent organisations taking the steps they need to in order to keep the public safe and supported during the present public health emergency. There is plenty of flexibility built into the legislation for organisations to use in such times, including some specific public health related exemptions.