

Regulation Under The United Kingdom Freedom Of Information Act 2000

Resource Paper
National Workshop Organised by
Commonwealth Human Rights Initiative

Effective Implementation:
Preparing to Operationalise the New India
Right to Information Law

May 24-26, 2005

New Delhi, India

Mr Phil Boyd
Assistant Information Commissioner, UK

TABLE OF CONTENTS

1. INTRODUCTION	3
2. GENERAL APPROACH	3
3. COMPLAINTS HANDLING	4
DECISION NOTICES	4
ENFORCEMENT NOTICES	6
(a) <i>Enforcement in relation to publication schemes</i>	6
(b) <i>Enforcement in relation to other types of non-compliance</i>	7
INFORMATION NOTICES	8
4. PRACTICE RECOMMENDATIONS.....	9
5. ADVICE AND GUIDANCE.....	9
FRAMEWORK GUIDANCE	10
AWARENESS GUIDANCE SERIES	10
CASEWORK GUIDANCE.....	10
ADVICE ON GOOD PRACTICE.....	10
INFORMATION ABOUT THE COMMISSIONER’S PROCEDURES AND APPROACH TO ENFORCEMENT	10
CASE STUDIES	11
ADVICE FOR THE PUBLIC	11
6. SUMMARY	11
ANNEX 1	13

1. Introduction

1. This paper describes the Information Commissioner's general approach to regulation under the Freedom of Information Act ("the Act") and the Environmental Information Regulations (EIR). In particular, it explains the use of the regulatory mechanisms described in the Act. These are:
 - Decision Notices (s.50) – the formal determination of complaints
 - Information Notices (s.51) – formal requests for the supply of information to the Commissioner
 - Enforcement Notices (s.52) – binding notices served by the Commissioner on public authorities
 - Advice and guidance (s.47)
 - Practice recommendations (s.48) – non-binding recommendations in relation to conformity with the Access and Records Management Codes of Practice
2. The EIR derive from an EU Directive. Although they are different in a number of respects from the Act, the enforcement and regulatory mechanisms of the Act are imported into the Regulations and are thus identical.

2. General approach

3. Despite the superficial complexity of the Act and the EIR, their underlying principles are relatively straightforward. There is a presumption that a policy of transparency, subject to safeguards, is in the public interest. Openness is to be achieved in two ways:
 - through proactive publication of information
 - by giving a general right (the "**right to know**") to be informed whether a public authority holds information of a given description and, if so, to be provided with that information
4. **The right to know** is circumscribed in two basic ways. Firstly there are a number of technical or procedural requirements. These include, in particular:
 - A right for public authorities to require further information to identify and locate information which has been requested
 - Timescales for response
 - A duty to provide advice and assistance
 - A fees and charging regime (elaborated in Regulations and Guidance)
 - Rules regarding vexatious, repeated or, in the case of the EIR, manifestly unreasonable requests
 - A general presumption that information will be supplied in the form requested
 - Issue of refusal notices where requests are turned down
5. Secondly the **right to know** is subject to exemptions or, under the EIR, exceptions. However, in most cases under the Act and in all cases under the EIR the final decision as to whether information should or should not be released must be made after applying the so-called "public interest test". Comprehensive

advice on the meaning of the exemptions, exceptions and the application of the public interest test is available from the ICO web site¹.

6. Both the Act and the EIR make explicit that there is a public interest in the disclosure of information where possible. Even where an exemption is available, the Act does not prevent disclosure. In any event, given that most exemptions in the Act and all the exceptions in the WIR are “qualified”, in most cases reliance on an exemption must be balanced against the public interest disclosure. The underlying presumption of disclosure was not seriously questioned during the passage of the FOI Bill through Parliament. There was a general consensus about the benefits that a policy and a practice of greater openness should bring. At a high level this is expressed in terms of civic renewal or a strengthening of democracy. Whatever form of words is used, the key indicators of success generally recognised in the debate were the rebuilding of the bond of trust between the public and public authorities and increased participation in the democratic process.
7. Consistent with his general role of promoting good practice and awareness of the Act and of adjudicating impartially on complaints submitted to him, the Information Commissioner will aim to contribute towards the goal of building trust. This means creating a framework within which public authorities and the public are encouraged to engage with each other in a non-adversarial manner.
8. To a large extent, public authorities should wish to be as open as possible as a matter of enlightened self-interest. The Commissioner’s underlying assumption is that regulation is not simply a form of policing to be mindlessly applied. Rather it provides the foundation for compliance, and ultimately the teeth, to ensure the effective and smooth working operation of the legislation. The law in effect requires authorities to take ownership of decisions to disclose or withhold, but does not permit undue delay or prevarication and provides for external examination of their decisions. For this approach to succeed, it will be necessary to ensure that the processes of both public authorities and the Commissioner are themselves transparent, reasonably swift and clear.

3. Complaints handling

9. Section 50 of the Act establishes the right to complain to the Commissioner that a request for information has not been handled in accordance with the requirements of Part 1 of the Act and places a duty on the Commissioner to make a decision as to whether or not that is the case.

Decision Notices

10. There are four exceptions to the duty placed upon the Commissioner and although he has the discretion to make a decision, he is not **required** to do so if:
 - There has been a failure to exhaust any local complaints procedure available to the applicant. This is an important provision. The Secretary of State’s Code of Practice on the discharge of function under Part 1 of the Act (the s.45 Access Code) states that public authorities should have a complaints procedure in place. (The Code can be found on the DCA web site

¹ These guidelines have also been included on the Resource CD included in the materials distributed at the Conference on “Effective Implementation: Preparing to Implement the (India) *Right to Information Act 2005*, 25-26 May 2005.

www.foi.gov.uk.) Among other things the Code requires that a local complaints procedure (often referred to as “internal reviews”) must be fair and impartial, independent of original decision-making process which led to the refusal of the applicant’s request, prompt and not unduly bureaucratic. The Code also requires that authorities keep a proper record of how it has handled complaints. The Commissioner will expect to be provided with a copy of the record when reviewing the decision to refuse a request for information.

- There has been an undue delay in making the complaint. A public authority refusing a request for information must explain to the applicant the right to make a complaint to the Commissioner. Unless there are any extenuating circumstances, the Commissioner would expect any complaint to be submitted within two months of the final refusal following any internal review by the public authority.
- The complaint is “frivolous or vexatious.” The Act does not explain these terms. The Commissioner’s general approach to the meaning of “vexatious” in the context of requests for information is set out in Awareness Guidance No 22. A similar approach will be taken in respect of complaints. The Commissioner considers that a “frivolous” complaint is one made with no reasonable prospect of success or, where there is no real interest in the outcome of the complaint. (For instance, a complaint may be judged to be frivolous if it has been explained to the complainant by the public authority that the Information Tribunal has previously upheld a refusal of an identical request but, nevertheless, the applicant makes a complaint to the Commissioner.)
- The application has been withdrawn. At first sight this provision appears simply to allow a complainant to withdraw his or her application to the Commissioner. However, it also gives the Commissioner some latitude to attempt to resolve complaints informally. This may include serving a preliminary decision notice, inviting both parties to a complaint to agree a resolution. A summary of the criteria that will be applied when deciding to go through a preliminary stage is given in Annex 1. The guiding principle is that the Commissioner will go through a preliminary stage where it seems likely that this will produce a better (usually swifter) result, obviating an appeal to the Tribunal. By implication, there will clearly be some cases where a preliminary stage will be inappropriate, for instance when it is clear that a public authority has simply ignored a request or has failed to issue a refusal notice or where a refusal notice or complaint explicitly rejects a compromise.

While it is quite likely that early in the life of the Act a high proportion complainants and public authorities will seek to push the Commissioner to issue a formal decision notice, the hope is that, particularly once we have had the benefit of decisions of the Information Tribunal, a significant proportion of applications for a decision will be withdrawn following the informal resolution of a complaint

11. Where a decision is required, most complaints are likely to require that the Commissioner in essence acts as the referee between two parties – where the complainant is dissatisfied with a Refusal Notice issued by the public authority. These will normally require a judgement as to whether one or more exemptions has been properly applied and, in many cases, whether the public interest in maintaining the exemption(s) in question does indeed outweigh the public interest in disclosing the information. The Commissioner has made it clear that he intends

to be both robust and responsible in approaching this task. The Act requires him to promote good practice in terms of promoting access to official information. But at the same time (subject to the underlying presumption of the legislation in favour of openness) he will not approach complaints with any suggestions of bias one way or the other.

12. The Commissioner aims to be objective and decisive. Decision-making must also be as speedy as possible. Heavy reliance will have to be placed on the contents of Refusal Notices and on specific allegations of non-compliance as put forward by complainants, though allowance will be made for the needs of “non-professional” complainants. The likely volume of cases means that an informal and user-friendly approach will have to be adopted, consistent with the principles of due process. The approach will be professional, but not so exhaustive (where non-critical issues could arise) as to hinder rapid decision-making. Positive and constructive working relationships will be sought with both public authorities and complainants. Consistency will be an important consideration, but not an obsession with precedent given that cases must normally be decided on a case-by-case basis. In this context it may be important to remember that the public interest in disclosure or the maintenance of an exemption is likely to vary over time.
13. The Commissioner intends to issue clear decision notices, setting out (where appropriate) the steps that he considers must be taken. A separate short Statement of Reasons summarising the rationale for the decision in clear terms will allow both complainants and public authorities to consider the possibility of further appeal to the Tribunal. Decision notices and Statements of Reasons will be served on complainants and public authorities simultaneously, who will be given a reasonable time to digest the contents before they are made publicly available. Summaries of selected cases will be published, but only after the period for appeal to the Tribunal has passed, or otherwise following the conclusion of any appeal process.

Enforcement Notices

14. While decision notices will address issues arising out of individual complaints, enforcement notices, issued under s.52 of the Act will be more likely to address systemic or repeated non-compliance. While the emphasis of regulation under the Act will be to assist and encourage public authorities to properly discharge their responsibilities under the Act (rather than to encourage early resort to adjudication by the Commissioner), there will be times when the Commissioner judges that it is appropriate to use his power of enforcement. While public authorities will be given every opportunity for voluntary compliance, it will be important in building public confidence in and respect for the system as a whole that the Commissioner develops procedures which are both robust and transparent in taking steps to ensure that public authorities fulfil their statutory obligations. There are likely to be two types of case.

(a) Enforcement in relation to publication schemes

15. Section 19 of the Act requires that public authorities adopt, renew and publish information according to publication schemes. While the Commissioner will continue to explore ways of easing the administrative burden of devising and adopting schemes, particularly for small public authorities such as GP practices, there are no exemptions from the duties imposed by the section.

16. The Commissioner may become aware of a failure to comply with the duties in a variety of ways:
- failure to respond to advice issued by the Commissioner as to the duty to adopt and publish information according to a scheme;
 - as result of a complaint whether from a member of the public, a whistleblower or another public authority;
 - as a result of proactive compliance activity.
17. Having established that the body in question is in fact a public authority, the Commissioner will take the following steps
- make an informal approach, allowing the public authority to correct any misunderstanding that may have arisen. For instance, it may in fact have adopted a scheme or may not in fact hold any information of the type described in the scheme
 - in the absence of a positive response to the informal approach, consider issuing a Preliminary Enforcement Notice in accordance with the criteria explained in Annex 1. A preliminary notice will generally allow the authority 28 days in which to make representations as to why a final notice should not be served. Representations might include a clear undertaking to adopt a scheme or to publish all the information described in its scheme.
 - in the absence of a positive response to either the informal approach or a preliminary notice, if served, issue an Enforcement Notice, setting out the steps to be taken to comply with section 19.
 - in the absence of compliance with the Notice make an application to the High Court to have the authority punished as if it had committed a contempt of court.
18. Unlike the Act, the EIR do not have a requirement for the adoption of publication schemes. Bodies which are public authorities **only** for the purposes of the EIR have no requirement to adopt schemes. There is, however, a more general duty to publish environmental information progressively. This more general requirement is enforceable, although the triggers for enforcement are necessarily less clear cut than for equivalent action under the Act.

(b) Enforcement in relation to other types of non-compliance

19. As indicated, individual complaints that a public authority has failed to comply with a request for information under either the Act or the EIR are unlikely to lead to enforcement action since the s.50 complaints route, described above, will generally be more appropriate. Enforcement in relation to failed requests for information is thus more likely to arise as a result of repeated or systemic non-compliance in the following circumstances:
- a number of similar adverse decision notices have been issued following separate and unconnected complaints;
 - a clear failure to comply with a practice recommendation (see below) followed by failure to provide a proper responses to requests for information;
 - cases where the authority has clearly indicated that it would not accept a practice recommendation if issued and where there has been a failure to provide a proper response to a request for information;
 - as a result of proactive compliance monitoring by the Commissioner or information provided by a whistleblower or other complainant.

20. It may be worth noting that there may be some additional matters which may be addressed in enforcement notices in relation to the EIR as compared with the Act. In particular, while the Act gives strong encouragement to the provision of an internal complaints procedures but does not make this a strict duty, it is an enforceable requirement of the EIR and, given the importance he attaches to good procedures, it is likely that the Commissioner would take formal action in such cases..
21. The steps taken by the Commissioner would be then be those described in paragraph 15, above.

Information Notices

22. Section 51 of the Act provides that the Commissioner may serve an information notice either in relation to a complaint or if it is reasonably required in order to assess compliance with the requirements of the Act. Information notices should therefore be seen as a secondary tool when considering possible breaches the Act or EIR. It is likely that the majority of information notices will be served in the context of complaints.
23. Common sense and the experience of other jurisdictions suggest that complainants are unlikely to be satisfied that they have received all the information to which they are entitled unless they are satisfied that the Commissioner has carried out a considered review of their case. This implies that in most cases the Commissioner must have access to all the information requested, to the public authority's records of its reasons for refusing disclosure and to any other material which will assist the Commissioner in reaching his decision. While there may be some cases in which the Commissioner may be satisfied without access to this information, these are likely to be a minority.
24. In the interests of efficiency and effectiveness (in particular avoiding unnecessary spending of public money) public authorities are encouraged to supply relevant information to the Commissioner on a voluntary and timely basis. This approach has been agreed in a Memorandum of understanding between the Secretary of State for Constitutional Affairs (on behalf of government departments) and the Information Commissioner. The MoU (available from the ICO web site) provides that all relevant information, including withheld and redacted information, should be provided as soon as possible and in any event within 20 working days of contact from the Commissioner. Although the agreements set out in the MoU only apply directly to central government, they also represent the standards to which the Commissioner expects the rest of the public sector to adopt.
25. The Commissioner will not normally serve an Information Notice unless he believes that relevant information is being withheld from him or there has been undue delay in providing it. However, he reserves the right to do so in appropriate circumstances.
26. The MoU with the Secretary of State recognises that special considerations may arise where national security considerations arise. It may be appropriate to develop other protocols with major public authorities and representative bodies addressing questions such as the security of information.

4. Practice recommendations

27. Section 48 of the Act provides that the Commissioner can issue practice recommendations in relation to the s.45 Access Code and the s.46 Records Management Code. The EIR also provides for a Code of Practice on Access to Environmental Information to be issued by the Secretary of State. The Commissioner's power to issue practice recommendations is imported into the Regulations. Unlike the notices described above, practice recommendations are not legally binding (i.e. there are no sanctions for non-compliance) and, therefore, not subject to appeal.
28. The purpose of a practice recommendation is to indicate to a public authority measures which, in the Commissioner's opinion, will facilitate compliance with requests for information and thus to facilitate the exercise of rights under the Act. It may be important to stress that the purpose is to provide assistance to public authorities. It is quite likely that in many instances a practice recommendation will be agreed with the public authority. This would be likely to occur following the conduct of an assessment under section 47(3) of the Act. Where there is a serious disagreement between the Commissioner and the authority, it may be more appropriate for the Commissioner to consider the issuing of an enforcement notice.
29. Areas which are likely to be covered by practice recommendations in relation to the Access Code include:
- local complaints procedures;
 - refusal notices;
 - the quality of assistance given to applicants.
- In effect practice recommendations under this Code would be designed to effect improvements in administrative procedures.
30. Practice recommendations in relation to the s.46 Records Management Code may only be served after consultation with the Keeper of the Public Records or, in cases in Northern Ireland the Deputy Keeper of the Public Records. Consultation will take place within the framework established by MOUs between the Commissioner, the Keeper and the Deputy Keeper. Again, the aim will be to effect improvements to administrative procedures. The sorts of matters likely to be covered by recommendations under this Code may include:
- maintenance of disposal schedules;
 - indexing;
 - searching;
 - storage;
 - cataloguing.

5. Advice and Guidance

31. Under s.47(1) of the Act, the Commissioner has a duty to promote the following of good practice by public authorities, in particular to promote observance of the requirements of the Act and the provisions of the Access and Records Management Codes of Practice. He also has a duty to provide information about the operation of the Act and good practice to the public. All Guidance from the Commissioner will necessarily be dynamic and subject to amendment or elaboration in the light of experience and, in due course, decisions of the Information Tribunal and the courts. Guidance as published on the Commissioner's web-site can be regarded as authoritative.

32. While the overall purpose of the Commissioner's guidance will be to promote good practice, it may be helpful to distinguish between a number of different strands.

Framework guidance

33. From time to time the Commissioner publishes general advice on matters connected with the Act and the EIR. For instance, his preliminary view of the meaning of the Act was set out in "The Freedom of Information Act 2000: An Introduction". Other guidance includes a guide to the lifecycles of requests. He has also published, "Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000," a study commissioned from the Constitution Unit at University College London.

Awareness Guidance Series

34. The Commissioner has issued high level guidance on many of the procedural requirements of the Act (fees, vexatious requests etc), on the exemptions in Part 2 of the Act and the public interest test. The Commissioner has also published a general overview of the EIR and advice on its procedural requirements. Other EIR guidance has been delayed as a consequence of the Regulations being laid before Parliament later than expected.
35. The aim of the series is to give plain English, interpretative assistance and some practical guidance for a non-technical readership, focussing upon the underlying principles of the Act and the EIR. Although the early focus of the series is on particular sections of the Act and the EIR, future advice may be focussed upon issues affecting particular sectors or interest groups.

Casework guidance

36. Parallel with the Awareness Guidance series, the Commissioner has also been developing more detailed guidance for use by his own staff in dealing with complaints under s.50 of the Act, particularly in different scenarios. Although the primary audience is internal, the intention is to share it with public authorities and possible applicants for information, alerting them to the views of the Commissioner. If they take a different view, they may of course wish to take independent advice

Advice on Good Practice

37. The term "good practice" includes those things which, although not clear requirements of the Act, will contribute to its successful implementation. Examples might include advice on establishing an internal complaint/review procedure or advice on discretionary disclosures of information. The primary source of advice as to good practice, however, will be the Codes of Practice issued under the Act and EIR. The Commissioner is only likely to publish additional good practice advice once there has been experience of requests and complaints under the Act.

Information about the Commissioner's procedures and approach to enforcement

38. It will be important for public authorities that are the subject of complaints under s.50 of the Act or who may be in receipt of an information or decision notice to

have a clear idea of how the Commissioner may proceed in any particular context. The standards to which the Commissioner intends to operate when considering complaints and the targets for response for public authorities is set out in the Memorandum of Understanding with the Secretary of State for Constitutional Affairs referred to in paragraph 22 above.. The Commissioner considers that these standards will apply for complaints about public authorities in general.

39. In addition to this paper, which sets out the Commissioner's general approach, the detailed procedures for the handling of complaints and the servicing of notices will also be published on the ICO web site.

Case studies

40. Practice Recommendations and Information Notices will not normally be published since this would be likely to have the effect of disclosing confidential information about public authorities. (Public authorities would however, be free to publish if they so wished.) Similarly, it is unlikely that the Commissioner would regard it as appropriate to publish Preliminary Notices, given that the purpose is to achieve an informal settlement of complaints. (Again public authorities and/or complainants would however, be free to publish if they so wished.)
41. However, the Commissioner intends to make decision and enforcement notices publicly available. The more significant notices will be published on the ICO web site together with an index of other cases. The Commissioner intends produce summaries of all the more significant cases which he considers. It is likely that publicity will be given to those cases which public authorities are likely to find of greatest assistance in dealing with other, similar requests for information in the future. Published summaries should assist public authorities and members of the public although, as explained in paragraph 12 above, it would be a mistake to regard one decision as setting a binding precedent in others.

Advice for the public

42. The Commissioner is committed to producing advice for members of the public on matters including:
- Access to information through publication schemes
 - Complaints to the Commissioner about refusals of requests for information.

6. Summary

43. FOI and the EIR should both increase the level of participation in public debate and improve the quality of that debate. At the same time they should improve in the quality of decision-making and administration in public life as a consequence of greater accountability Underpinning the Commissioner's approach to regulation under the Act, therefore, is the presumption that transparency, subject to safeguards, is in the public interest.
44. In order to achieve these benefits two things need to happen. Firstly the public must have confidence that the Act will be effectively enforced. To a large extent responsibility for this falls upon the shoulders of the Commissioner who must develop robust complaints handling procedures and who must himself be seen to

make high quality decisions which command the confidence and respect of the public and public authorities alike. In this regard it will be important to stress the underlying values of the Act and to be seen to make full and proper use of the powers given to him by the Act.

45. Secondly, however, it falls to public authorities themselves to seize the opportunities offered to them by the Act to win and retain the trust of the public by engineering the culture change. This change may be characterised as a shift from “need to know” to “right to know”.
46. Regulation in this context will have elements of policing, in particular the use of decision, information and enforcement notices in appropriate cases. Crucially however, effective regulation will also mean encouraging and enabling public authorities to deal effectively with requests for information by making proper use of preliminary notices and practice recommendations and by the provision of clear advice both as to the meaning of the Act the Commissioner’s enforcement procedures. The latter will be particularly important as a means of building trust between the Commissioner and public authorities. Clearly any sense, however mistaken, that the Commissioner is seeking to “trap” public authorities would damage the prospects of effective regulation.

Annex 1

Preliminary Notices

General Policy

1. The Commissioner may serve three legally binding notices. These are Decision Notices, Enforcement Notices and Information Notices. The Council on Tribunals has previously advised that in serving Enforcement Notices under the Data Protection Act it is good practice to first serve Preliminary Notices. The Commissioner's policy in relation to preliminary notices under the FOI Act and EIR builds upon this approach.
2. The purpose of a preliminary stage is not to layer an additional bureaucratic procedure onto the enforcement process, but rather to reduce the number of appeals to the Information Tribunal by allowing all parties, the public authority, the applicant (where applicable) and the Information Commissioner, to reach agreed solutions without the expense, effort and delay which appeals inevitably entail.
3. The governing principle which will be followed is that preliminary notices will be served in those cases where the Commissioner judges that this is likely to lead to a swifter and more equitable outcome both for applicants and public authorities.
4. In the final analysis the decision as to whether to serve a preliminary notice is a matter of judgement. However, the Commissioner will be guided by the following general "rules of thumb". Except in most clear-cut cases, for instance when an organisation clearly falling within the definition of public authority, denies any obligations under the Act, the Commissioner will make an informal approach to a public authority suspected of failure to meet its obligations in order to establish basic facts before serving either a preliminary or a final notice.

Preliminary decision notices

5. The following is a series of general scenarios ranging from cases where a preliminary stage would be unlikely through to ones in which it would be probable.
 - The Commissioner does not consider that it would be appropriate to specify any steps to be taken by a public authority. A complaint may be clearly unjustified, for instance if it is obvious that the authority can legitimately rely upon an absolute exemption. In other cases, complaints may be justified. For instance there may have been a delay in supplying information. However, once the information has now been provided, there will be no steps that can be usefully specified in a decision notice adverse to the public authority. It is unlikely that he will issue preliminary decision notices in these cases.
 - The issues raised in a complaint are simply of a procedural nature. For instance the Commissioner does not consider that a proper refusal notice has been issued or it seems to him that it would be reasonable for the authority to have provided further advice and assistance to the applicant. These cases would be unlikely to merit a preliminary notice.

- A public authority has failed to identify a relevant exemption in refusing a request. In this case, the Commissioner is more likely than not to issue a final decision notice, either ordering the disclosure of information or requiring the authority to reconsider, perhaps relying upon a more appropriate exemption. Such cases are less clear cut than the earlier ones.
- An authority has identified a relevant exemption but has refused information having applied the public interest test. The Commissioner will generally issue a preliminary notice unless the Information Tribunal has previously ruled in similar cases that information should be disclosed on public interest grounds.
- The investigation of a complaint has suggested other exemptions upon which the public authority could credibly rely or other public interest arguments for or against disclosure have transpired. Such cases are likely to be more complex involving large quantities of information and requiring careful judgment by the public authority, including decisions about the detailed redaction of documents. Preliminary notices are likely to be served in these cases.

Preliminary Enforcement Notices

6. A key consideration when considering the issuing of preliminary decision notices will be the interest of the applicant in securing prompt access to the information he or she had requested. This is less likely to be a relevant consideration in enforcement cases in which there are no complainants and when an appeal to the Tribunal can only be made by the public authority.
7. Again, the following is a series of general scenarios ranging from cases where a preliminary stage would be unlikely through to ones in which it would be probable
 - The Commissioner has credible evidence that a public authority has failed to adopt a publication scheme when a model scheme is available. There may be little to be gained by issuing a preliminary notice since the steps to be taken by the authority will be obvious.
 - The Commissioner has credible evidence that a public authority has failed to adopt a publication scheme . However, a model scheme is not available. There may be a better case for the issuing of a preliminary notice if this would allow the authority and the Commissioner to agree the timescale within which a scheme could be practicably developed.
 - The Commissioner has evidence that a public authority has failed to publish information according to its publication scheme. It will often be prudent to issue a preliminary enforcement notice except in those cases where the Commissioner has reliable evidence both that information described in a scheme is held by the public authority and that it is reasonably practicable to publish the information in the form described in the scheme.
 - The Commissioner is considering taking enforcement action as a result of a series of complaints that an authority has failed to meet one of the procedural requirements of the Act. A preliminary stage will normally be appropriate, thus allowing the authority to make representations either as to why apparently systemic non-compliance has a reasonable explanation or why the timescale for compliance by the Commissioner is impracticable.

- Enforcement action is contemplated following a series of complaints, upheld by the Commissioner (and, in particular, the Tribunal), about improper reliance upon exemptions or misapplication of the public interest test. The Commissioner would be highly likely to issue a preliminary notice and thus to afford the authority a final opportunity to make representations as to why enforcement would be inappropriate. Although such cases may appear to be clear cut, it may be, for instance, that the authority is in fact in the process of amending its internal procedures, or that the case triggering consideration of enforcement is not a typical one.

Preliminary Information Notices

7. As indicated in the main body of the paper, it is unlikely that the Commissioner will normally issue preliminary information notices. It is difficult for this reason to describe any general “rules of thumb” besides the general principle that a preliminary notice will be served in those cases where the Commissioner judges that a final notice would be quite likely to lead to a relatively complex appeal to the Tribunal.