

The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens, London EC1N 7RJ

Tel: 020 7831 7477

Fax: 020 7831 7461

Email: admin@cfoi.demon.co.uk

Web: www.cfoi.org.uk



Delays in Investigating Freedom of Information Complaints

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This report examines the delays in investigating freedom of information complaints by the Information Commissioner's Office (ICO).

It is based on analysis of 493 formal decision notices under the Freedom of Information Act and the Environmental Information Regulations published by the ICO in the 18 months from 1 October 2007 to 31 March 2009. The detailed results are shown in the appendices to this report.¹

Main findings

The survey shows long delays by the ICO in completing investigations. On average it took 19.7 months from the date on which a complaint was made to the ICO to the date of its decision notice.

It also shows that:

- 46% of cases took between 1 and 2 years from complaint to decision notice
- 25% of cases took between 2 and 3 years to a decision
- 5% of cases (23 complaints) took more than 3 years
- the longest case took 3 years and 10 and a half months
- 24% decision notices were issued within 12 months of the complaint being made.

¹ Appendices 1 and 2 can be found at the end of this report. Appendix 3, which provides details of all 493 decision notices covered by this study, is available as a separate document which can be downloaded from <http://www.cfoi.org.uk/pdf/foidelayscale.pdf>.

Various factors may contribute to such delays, including a reluctance by the authorities being investigated to respond promptly to ICO requests for further information. To exclude this factor, the survey also examined how long it was before the ICO's investigation into each complaint *began*.

There were substantial delays here too:

- on average it took more than 8 months before the ICO began its investigation into a complaint
- in 28% of all cases it was more than a year before the investigation began
- 19 cases took more than 18 months before the ICO investigation began
- in one case the complaint had been with the ICO for 22 months before its investigation started
- in only 18% of cases did the ICO begin its investigation within 60 days of receiving the complaint.

Many requesters would probably expect to have a final decision within a year of making a complaint to the ICO - but the survey shows that in over a quarter of cases, more than a year passed before the ICO's investigation even started.

Examples

Examples of severely delayed complaints include:

- A requester complained to the Commissioner in April 2005 about West Yorkshire Police's failure to release reports about gun related crime. The Commissioner's investigation began in January 2006 and some additional material was released during the investigation. However, the Commissioner's decision, requiring further disclosures, was not issued until March 2009 - three

years and ten and a half months after the complaint had been made.² This was the longest delay in the cases studied.

- The Department for Children, Schools and Families refused to release information about the government's decision in 2000 to require Leeds Local Education Authority to outsource many of its schools services to a council owned company, later managed by Capita. The requester complained to the Information Commissioner in July 2005. The Commissioner's investigation began in February 2006, 7 months later. However, the decision requiring the release of much of the withheld information was not published until the end of March 2009, 3 years and 2 months after the investigation began and 3 years and 9 months after the complaint to the Commissioner.³
- On January 1 2005 a request was made for the Foreign & Commonwealth Office's analysis of a report in the Lancet medical journal, estimating the number of civilian deaths in Iraq after the 2003 invasion. The requester complained to the Commissioner in July 2005 about the FCO's response. The ICO investigation did not begin until October 2006, 15 months later. Its final decision, requiring publication of some of the withheld information, was published in March 2009, almost 3 years and 8 months after the complaint.⁴
- The Student Loans Company refused to disclose the training manual used by staff in its debt recovery arm. The requester complained to the Commissioner in July 2006, but the Commissioner did not write to the SLC about the complaint until May 2008 - a delay of 22 months. This was the longest delay to the start of an investigation found in this study. The decision notice, requiring the SLC to release the manual, was issued in November 2008, just 5 months after the investigation had begun - a relatively quick investigation. But the delay in

² Decision Notice FS5073382, Chief Constable West Yorkshire Police, 16 March 2009

³ Decision Notice FS50083102, Department for Children, Schools and Families, 31 March 2009

⁴ Decision Notice FS50083726, Foreign and Commonwealth Office, 5 March 2009

beginning the investigation meant that the decision did not appear until more than 2 years and 3 months after the complaint.⁵

- Ofsted refused a request for information about a registered provider of nursery and day care for young children. The requester complained to the ICO in September 2005. The ICO's investigation did not begin until October 2006, 13 months later. The final decision, requiring disclosure, was made in February 2009, 3 years and 9 months after the complaint.⁶
- A complaint to the ICO was made about the Medical Research Council's refusal to release assessments of unsuccessful funding applications for research into ME (myalgic encephalomyelitis also known as chronic fatigue syndrome). The ICO's investigation did not begin until more than 20 months after the complaint. It then took over 17 months more before the decision notice was published. The decision, that the MRC had been entitled to withhold the information, was issued 3 years and 2 months after the complaint.⁷
- A complaint was made about the Cabinet Office's refusal to release information about 2003 meetings between the then Prime Minister Tony Blair and other world leaders. The complaint was received in May 2005. The ICO's first substantive approach to the Cabinet Office took place 16 months later in September 2006. The Decision Notice, upholding the Cabinet Office refusal, was issued in July 2008 more than 3 years after the complaint - though several months of the delay had been caused by the Cabinet Office itself.⁸
- The Department of Health refused a request for the number of abortions carried out in 2003-04 on 11, 12 and 13 year old girls. The complaint to the Commissioner was made at the end of March 2005 and the first letter to the department appears to have been sent 5 months later. However, the Decision

⁵ Decision Notice FS50126264, Student Loans Company, 3 November 2008. The authority subsequently appealed against the decision to the Tribunal

⁶ Decision Notice FS50088727, Office for Standards in Education, 19 February 2009

⁷ Decision Notice FS50074593, Medical Research Council, 7 July 2008.

⁸ Decision Notice FS50077719, Cabinet Office, 21 July 2008

Notice, requiring the information to be disclosed, did not appear until March 2008, almost 3 years after the complaint.⁹

- In November 2005, the Soil Association complained to the Commissioner that it had been refused information about the amounts of a restricted antibiotic used on horses. The substance was suspected of contributing to the spread of antibiotic resistant infections in humans, such as MRSA. The investigation into the complaint only began in May 2007, after a delay of nearly 18 months. The investigation itself took a further 14 months. The Commissioner ultimately ordered disclosure, 2 years and 8 months after receiving the complaint.¹⁰
- A complainant challenged Plymouth Primary Care Trust's decision to withhold parts of a contract with a private healthcare provider for a centre providing non-emergency surgery and diagnostic procedures and for related correspondence with the Department of Health. The Commissioner's investigation did not begin until 18 months after the complaint had been received. The investigation itself took a further 16 months. In June 2008 the Commissioner ordered disclosure of significant parts of the withheld information, 2 years and 10 months after the complaint.¹¹
- A complainant challenged the refusal of Kings College London to disclose its procedures for testing for the use of performance enhancing drugs by athletes. The Commissioner's investigation began 15 months after the complaint was received. It took a further 11 months till the decision notice was published. The ruling, that the authority had been entitled to withhold the information, was issued 2 years and 2 months after the complaint.¹²

The Information Tribunal has sometimes commented on the delays in completing investigations. In one case it noted that it was:

⁹ Decision Notice FS50069392, Department of Health, 18 March 2008

¹⁰ Decision Notice FS50094496, Department for the Environment. Food and Rural Affairs, 3 July 2008

¹¹ Decision Notice FS50084359, Plymouth Primary Care Trust, 5 June 2008

¹² Decision Notice FS50125293, Kings College London, 25 September 2008

“a matter for regret that the Information Commissioner’s office did not make contact with the Cabinet Office in order to start its investigation until over 6 months [from the date of the complaint]...and that it took him a further two years, with lengthy periods of apparent inactivity, before the investigation was completed.”¹³

In another case it noted “two years seems to us an inordinate amount of time for a decision of this kind to be reached.”¹⁴ In a third case it “expressed its concern at the considerable delays” in the handling of the internal review by the Cabinet Office and in the Commissioner’s subsequent investigation, adding: “it is an unhappily common feature of many such appeals that the value of the information is slight by the time that the Tribunal is seised of the matter.”¹⁵

Consequences

The severe delays described here are sufficiently serious and widespread to undermine the FOI Act’s effectiveness and public confidence in it.

- (1) By the time information is received, it may be too late to be of any use to the requester. A delay of 2 to 3 years or more in reaching a decision (as happens in over a quarter of cases) means that the information - even if ultimately disclosed - may be too old to be relevant or no longer of interest to the requester.
- (2) Requesters who have to wait for such extended periods may be so frustrated by the experience that they become reluctant to use the Act again or to complain to the Commissioner about refusals.
- (3) The delays mean authorities which have made mistakes in their handling of requests may carry on doing so for long periods before the Commissioner’s

¹³ Information Tribunal, EA/2008/0030, Cabinet Office and Information Commissioner

¹⁴ Information Tribunal, EA/2008/0053, Mr & Mrs Bedi and Information Commissioner

¹⁵ Information Tribunal EA/2008/0049, Cabinet Office and Information Commissioner

decision puts them right. In the meantime, many other requests may also be wrongly refused.

- (4) Even where the Commissioner ultimately upholds the authority's approach, the lack of a prompt decision increases the chance of further challenges from other requesters, leading to time-consuming internal reviews and more complaints to the ICO.
- (5) If authorities calculate that they can safely withhold information for several years before the Commissioner compels disclosure, a minority may do so knowing they have no good reason, just to 'buy time'.

Delays by authorities

Delays in the Commissioner's office are not the only problem. Significant delays may also occur when public authorities respond to requests. The Act permits the normal 20 working day response period to be extended by a "reasonable" period when authorities need more time to consider the public interest test. The Commissioner says the extension should not exceed a further 20 working days.¹⁶

However the Ministry of Justice's own figures show that in 43% of cases where government departments took a public interest extension in 2008, the extension was more than 20 working days. In about half of these cases the extension was more than 40 working days, though the actual time taken was not monitored.¹⁷ This failure to monitor the longest delays is itself a serious defect which allows the worst cases to avoid scrutiny.

A leading offender has been the National Offender Management Service (NOMS) which in some cases wrote to requesters every month for 12 months, each time

¹⁶ Information Commissioner, Freedom of Information Good Practice Guidance No. 4, Time limits on considering the public interest following requests for information under the Freedom of Information Act 2000

¹⁷ Government departments took a public interest extension in 8% of cases, that is in 1,517 requests. However, the monitoring data deals only with the 1,240 requests where the outcome was known at the end of the monitoring period. Ministry of Justice, 4th Annual Report on the Operation of the FOI Act in Central Government 2008. Table 9

taking a further 20 working day extension. The Information Commissioner suggested that this approach was designed to allow NOMS to “manage” its workload, rather than to consider the public interest and suggested the practice would “encourage allegations of deliberate delay”.¹⁸

Further delay may occur when authorities internally review their own decisions, a step which is normally required before a requester can complain to the ICO. The Commissioner recommends that this stage should normally not exceed 20 working days and should never exceed 40 working days.

However, 35% of all internal reviews completed by government departments in 2008 took more than 40 working days. More than half of these (19% of the total) took more than 60 working days.¹⁹ Here too the actual delay is not monitored, again allowing the most serious delays to avoid detection.

The MOJ’s monitoring suffers from another significant defect. Each year’s statistics only cover those requests whose outcomes are known by February of the following year. Cases which are only completed *after* the following February are not counted with the current year’s statistics but neither are they carried forward to the next year. They are simply excluded from the data altogether.²⁰ The omitted cases are likely to involve the most serious delays, suggesting that the true figures may be substantially worse than the statistics indicate.

The Information Commissioner has identified a number of cases of extreme delays in carrying out internal review. These include:

¹⁸ Information Commissioner, Practice Recommendation FPR0179447, National Offender Management Service

¹⁹ Ministry of Justice, 4th Annual Report on the Operation of the FOI Act in Central Government 2008. Table 7.

²⁰ 277 requests to government departments (18% of the total) for which public interest extensions were taken in 2008 were not included in the 2008 monitoring results, because the outcome was not known in time. On past experience, these cases will not be included with the 2009 monitoring data, but will simply remain permanently unmonitored. Ministry of Justice, 4th Annual Report on the Operation of the FOI Act in Central Government 2008. Table 9

- 15 months by Greater Manchester Police²¹
- 21 months by the Department for Business, Enterprise and Regulatory Reform²² and
- 29 months by NOMS and its then parent department, the Home Office.²³

The last two figures, which involve bodies covered by the Ministry of Justice's monitoring, are examples of delays that will have been excluded from the MOJ's statistics, for the reasons set out above.

More speed?

Most FOI requests to public authorities do not involve such excessive delays. In addition, about a quarter of the ICO's decision notices are published within a year of the complaint. Although many of these involve procedural matters or the less complex exemption issues, they indicate that major delays are not inevitable:

- A requester complained to the Commissioner in November 2008 that the Ministry of Justice had refused to release the list of sites being considered for the building of three large 'Titan' prisons. The Commissioner's decision, requiring disclosure, was issued in March 2009 just under 4 months after the complaint.²⁴
- A requester complained to the ICO that the Civil Aviation Authority had refused to disclose the names of, and action taken against, 10 airlines investigated for failing to comply with a EU regulation protecting passengers whose flights have been disrupted. The ICO's investigation began 3 weeks after the complaint was

²¹ Information Commissioner, Practice Recommendation FPR0184792, Greater Manchester Police

²² Information Commissioner, Decision Notice FS50121519.

²³ Information Commissioner, Practice Recommendation FPR0179447, National Offender Management Service

²⁴ Decision Notice FS50224851, Ministry of Justice, 19 March 2009

received and its final decision, requiring disclosure, was published just under 9 months after receipt of the complaint.²⁵

Not all complaints to the ICO result in a decision notice or even an investigation. Many are opened and then promptly closed, having been judged to be invalid. Others, particularly those involving delays, are dealt with by a letter reminding authorities of their obligations.²⁶ However, some are settled informally because the Commissioner's intervention has led to the release of the requested information. Unfortunately, the lack of published information makes it impossible to judge how often this occurs or how quickly these cases are resolved.

The ICO has recently published a number of proposals for improving the efficiency of its complaints handling, which involve identifying those cases that can be resolved quickly so as to start investigating them as early as possible rather than allow them to wait their turn in the queue.²⁷ Cases of particular public significance will also be identified for fast-tracking. Some of these changes may reduce the delays in *starting* some investigations, though they may mean that other cases will wait longer than at present. Other proposals involve the encouragement of more proactive disclosure as well as other measures. The ICO has also observed that its funding for FOI and EIR work, currently £5.5 million, is not linked to the volume of cases it receives, which continues to grow.

The FOI Act has proved a major success in opening up many previously closed areas of public life. The decisions of the Information Commissioner, together with the Information Tribunal's rulings, have been at the heart of this success.

²⁵ Decision Notice FS50132101, Civil Aviation Authority, 29 May 2008

²⁶ The ICO states that it closes more than 50% of cases within 30 days of receiving them. These complaints are not investigated and are usually closed because: the applicant has not exhausted the internal review process, which is normally required before the ICO will accept a complaint; the applicant has not provided all the required documentation; the complaint is against a body which is not subject to the FOI Act or Environmental Information Regulations at all; or because the complaint is regarded as involving the applicant's personal data, in which case it is classed as a complaint under the Data Protection Act rather than the FOI Act. Complaints about delays are also included in this statistic. The ICO normally deals with them by sending the authority a letter asking it to reply to the request within 20 working days of the letter and then closes the case.

²⁷ Information Commissioner, The ICO's strategy for the discharge of its Freedom of Information Act and Environmental Information Regulations functions, Version 1, 11 June 2009.

However, its effectiveness is being undermined by the damaging delays described here. Significant improvements in both the efficiency of the ICO's complaint handling processes and its funding are essential if this threat to health of the FOI Act is to be addressed.

Maurice Frankel & Katherine Gundersen
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APPENDIX 1. Methodology

This report is based on an analysis of all decision notices published by the Information Commissioner under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004 during the 18 month period from 1 October 2007 to 31 March 2009. A total of 493 notices were included in the study. An additional 12 notices published during this period were not included as they did not indicate the date on which the requester's complaint to the Information Commissioner was received.

The study examined the length of time between the date on which a valid complaint was received by the ICO and:

- the date on which the ICO's investigation began
- the date on which the ICO's decision notice was published.²⁸

In some cases, requesters approached the ICO before asking the public authority to carry out an internal review of its decision or waiting for the result of that review. In such cases, the ICO usually asked the complainant to wait until the internal review had been completed and then contact it again. In such cases, the date of the complaint was taken to be the date on which the complaint was resubmitted or reactivated following internal review.

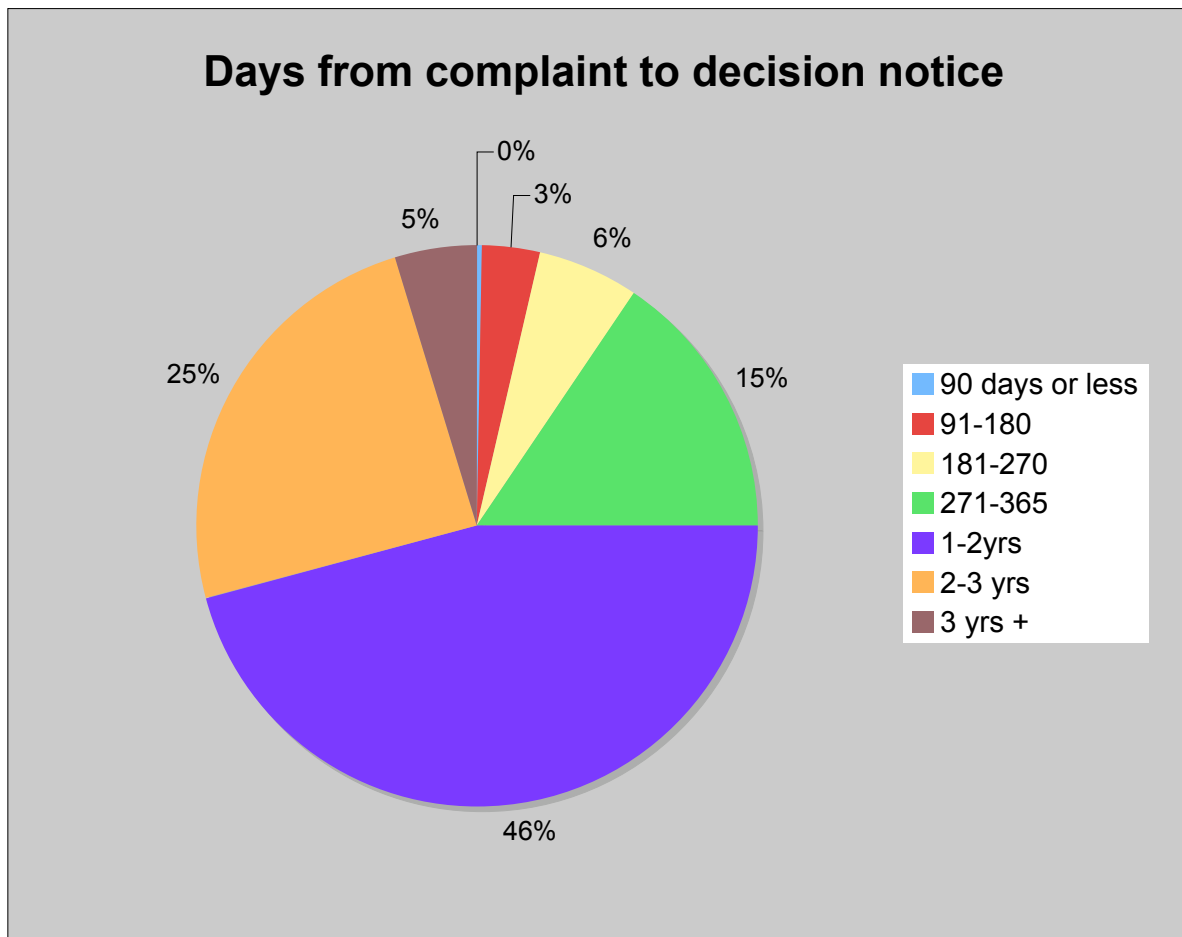
Some decision notices state when the investigation started. Where this was not done, the start was taken to be the date on which the ICO's office made its first substantive contact with the public authority over the case, for example, by asking it to comment on the case or to expand on its reasoning. (A contact which consisted solely of the ICO informing the authority that a complaint had been made

²⁸ The date of each complaint is shown in Column E of the Table in Appendix 3; the date of each decision notice is shown in Column G and the length of time between the complaint and the decision notice in calendar days is shown in Column I.

The date on which the ICO's investigation began is shown in Column F of the Table. The length of time between the complaint and the start of the investigation in calendar days is shown in Column H.

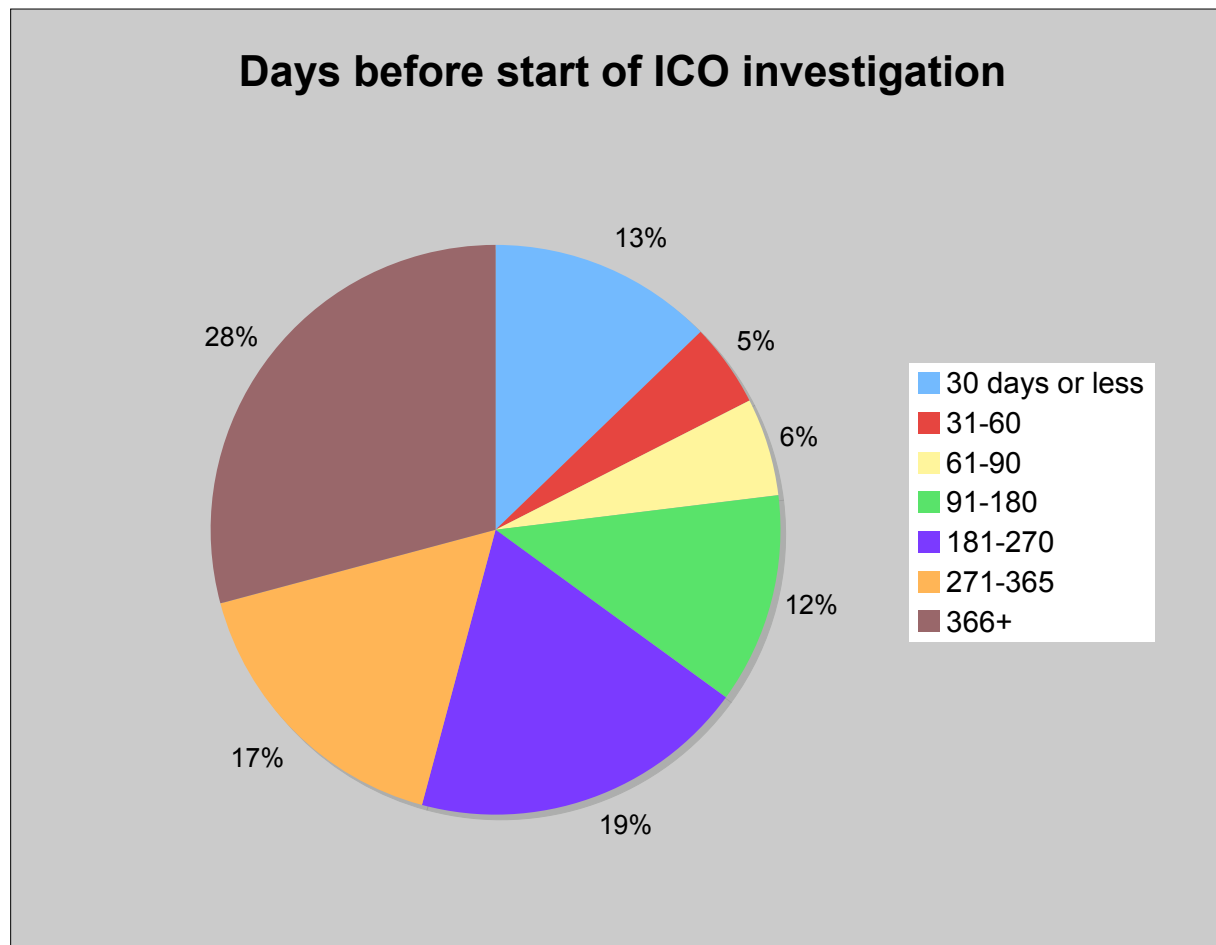
or asking it to supply the disputed information was not treated as the start of the investigation.) It was not possible to identify a date for the start of the investigation in 22 of the 493 decision notices studied.

Delay between receipt of complaint by the ICO and date of decision notice							
Calendar days	90 days or less	91-180	181-270	271-365	1-2yrs	2-3 yrs	3 yrs +
No. of complaints	1	17	29	76	226	121	23



Longest delay	1397 days
Shortest delay	32 days
Average	598 days

Delay between receipt of complaint by the ICO and start of ICO investigation							
Calendar days	30 days or less	31-60	61-90	91-180	181-270	271-365	366+
No. of complaints	60	22	26	57	90	78	138



Longest delay	658 days
Shortest delay	5 days
Average	253 days