

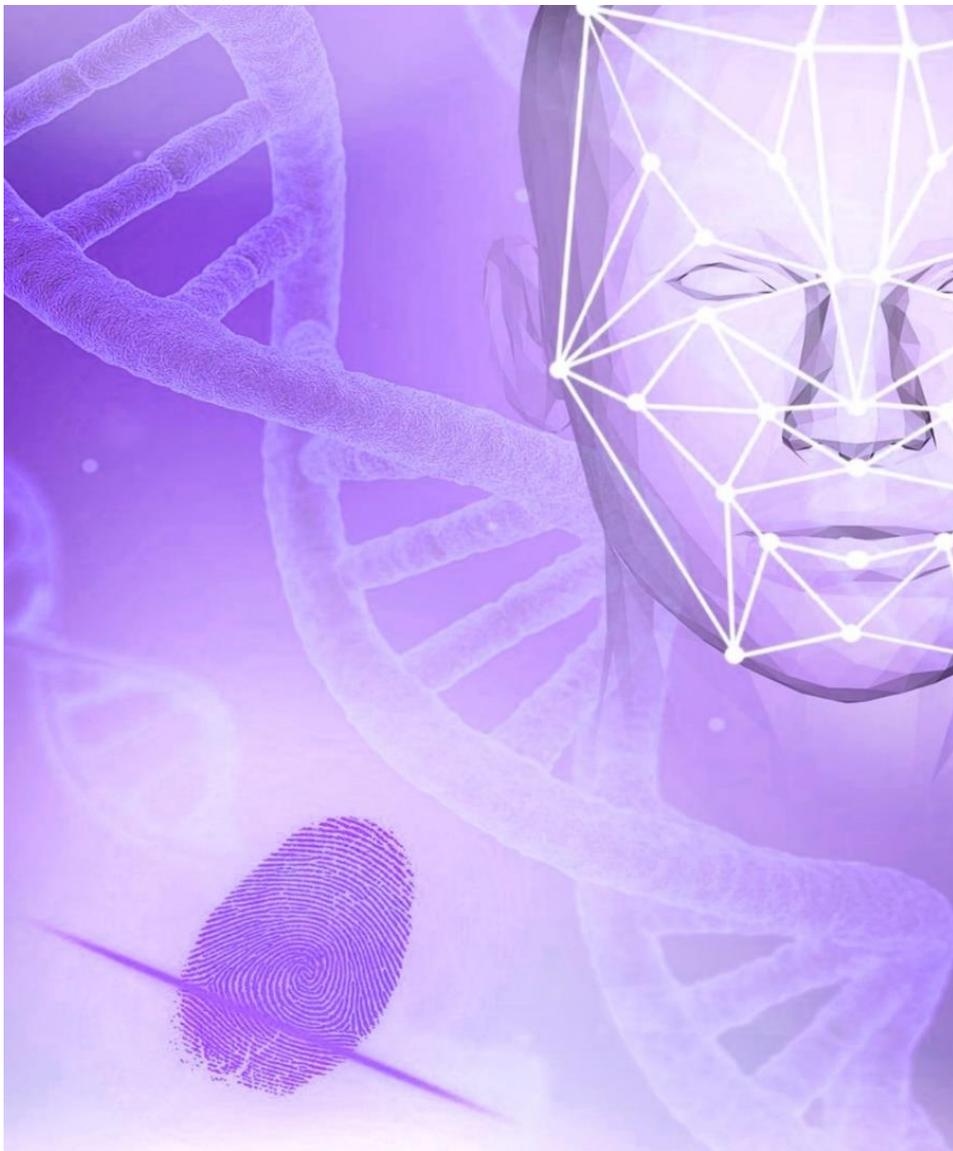


Scottish Biometrics
Commissioner
Coimiseanair
Biometrics na h-Alba

SCOTTISH BIOMETRICS COMMISSIONER

COMPLAINTS PROCEDURE FOR FAILURE TO COMPLY WITH THE CODE OF PRACTICE

(Prepared under Section 15 of the Scottish Biometrics Commissioner Act 2020)



Safeguarding our biometric future



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Introduction

This document outlines the complaints procedure established by the Scottish Biometrics Commissioner under the provisions of [Section 15](#) of the Scottish Biometrics Commissioner Act 2020 about failures to comply with the [Code of Practice](#) on the acquisition, retention, use and destruction of biometric data for criminal justice and policing purposes in Scotland by Police Scotland, the Scottish Police Authority (SPA), or the Police Investigations and Review Commissioner (PIRC). The procedure will receive publicity on our [website](#), and hard copies will be available to any person who requests it.¹

This procedure explains how and under what circumstances you may complain to us, how we will investigate your complaint, the juristic status of the Commissioner in relation to the investigation and determination of such matters, and the powers in relation to ensuring compliance with the Code of Practice.

This procedure is based on the seven principles of an effective complaints handling procedure:

- User-focussed
- Accessible
- Simple and timely .
- Thorough, proportionate, and consistent
- Objective, impartial and fair
- Seek early resolution
- Deliver improvement²

In accordance with the provisions of Section 15 (5) of the Scottish Biometrics Commissioner Act 2020, the Commissioner must keep the procedure under review, and must vary it whenever the Commissioner considers it appropriate to do so. When reviewing this procedure, the Commissioner must consult with the Scottish Public Sector Ombudsman (SPSO), the Information Commissioner's Office (ICO), the persons about whom a complaint may be made (Police Scotland, SPA, PIRC), and such other persons as the Commissioner considers appropriate.

Complaints to us about failures to comply with the Code of Practice

Section 15 of the Scottish Biometrics Commissioner Act 2020 requires that the Commissioner must provide for a procedure by which an individual, or someone acting on an individual's behalf, may make a complaint to the Commissioner that a person who is required by [Section 9 \(1\)](#) to comply with the Code of Practice has not done or is not doing so in relation to the individual's biometric data.

1. [Section 15 \(4\), Scottish Biometrics Commissioner Act 2020](#)

2. SPSO Statement of Complaints Handling Principles: Covering submission to Parliament, November, 2010:
https://www.spsos.org.uk/sites/spsos/files/communications_material/business_information/SPSO-Statementof-Complaints-Handling-Principles-covering-submission-November-2010.pdf



This means that that you can make a specific complaint to us, if Police Scotland, the Scottish Police Authority (SPA), or the Police Investigations and Review Commissioner (PIRC) hold your personal biometric data, and where you think that they are doing so in circumstances that may breach the Code of Practice produced by the Scottish Biometrics Commissioner. Both conditions should exist before we may consider your complaint.

Similarly, if you are acting on behalf of such an individual whose personal biometric data is held by a person required by Section 9 (1) to comply with the Code of Practice, and you think that they may be in breach of the Code of Practice you may complain to us on behalf of that individual providing that you have a letter of authority or mandate to do so. In such circumstances, we will require a copy of the letter or mandate from the data subject.

You or your representative may complain to us regardless of whether you have first complained to [Police Scotland](#), the [Scottish Police Authority](#), or the [Police Investigations and Review Commissioner](#). However, our preferred and recommended route is for you to afford those bodies the opportunity to resolve or explain the matter to your satisfaction. If you remain unsatisfied, this will provide an audit trail of decisions and require the body whom you are complaining about to demonstrate due diligence to the Scottish Biometrics Commissioner in considering your complaint.

In determining the process for individual complaints, the Commissioner will take a corporate approach to the investigation process. This means, for example, that when a complaint is made about non-compliance with the Code of Practice by Police Scotland (as a corporate entity), the Commissioner would seek information and evidence from Police Scotland (as a corporate entity) rather than from individual officers and / or staff members. Should Police Scotland find conduct issues as a product of our investigation, that is entirely an internal matter for Police Scotland.

We are committed to protecting your privacy. We use information given to us about you and your complaint for its intended purpose and in line with the [Data Protection Act 2018](#) and the Scottish Biometrics Commissioner Act 2020. Please note that we may need to collect and share information with a number of sources to carry out our investigation and we may do this orally, in hard copy or by email. We may report on the outcome of the investigation, for example to the Scottish Parliament. When we do so we will not name individuals. We may also use information we collect to compile statistics and undertake research and analysis. There may be public interest benefits in reusing information for these purposes. In this case, information will be completely anonymised.³

Action to take before you complain to us

Before making a complaint to us about a potential breach of the Code of Practice you should familiarise yourself with the content of the [Code of Practice](#) and the definition of 'biometric data' contained within [Section 34 \(1\)](#) the Scottish Biometrics Commissioner Act 2020:

3. To find out more about how we handle your information and your rights, view our [Privacy Notice](#) and [Publication Scheme](#) or ask us for a copy



“Biometric data” means information about an individual’s physical, biological, physiological, or behavioural characteristics which is capable of being used, on its own or in combination with other information (whether or not biometric data), to establish the identity of an individual.

For the purposes of subsection (1), “biometric data” may include:

- ***Physical data comprising or derived from a print or impression of or taken from an individual’s body,***
- ***A photograph or other recording of an individual’s body or any part of an individual’s body,***
- ***Samples of or taken from any part of an individual’s body from which information can be derived,***
and
- ***Information derived from such samples.***

You should satisfy yourself that the complaint relates to the holding of your personal biometric data (for example fingerprints, DNA, or a photograph) in such circumstances that you think there may be a breach of the Code of Practice. If your complaint is about another matter, for example a general complaint about being arrested, or about being arrested unlawfully, or about an act of criminality, then you should instead direct a complaint to the appropriate body. If in doubt, we can provide guidance to you on this matter.

Before complaining to us, please be aware that we can only consider complaints about a potential breach of the Code of Practice by Police Scotland, the Scottish Police Authority, or Police Investigations and Review Commissioner.

How long do I have to make a complaint?

Normally, you must make your complaint within three years of the event you want to complain about, or finding out that you have a reason to complain. In exceptional circumstances, we may be able to accept a complaint after this time limit. If you feel that the time limit should not apply to your complaint, please tell us why. We may accept a complaint outside this time limit if there are exceptional circumstances or a public interest reason. Exceptional circumstances include a serious medical condition, a significant time in hospital or seriousness of the allegations. Please note that as the Code of Practice took effect on 16 November 2022, we can only consider complaints arising from events after this date.

Areas we cannot investigate

We do not investigate criminal allegations, and we cannot investigate any issues which are currently in court or have already been heard by a court or tribunal. If a complaint is made to us of a criminal nature we will refer it to the appropriate body and suspend our investigation until the outcome of the criminal investigation is decided. For example, if it is a criminal complaint about Police Scotland or SPA we will refer it to PIRC for investigation. If it is about PIRC, we will notify Crown Office and Procurator Fiscal Service (COPFS) for investigation.

If you have been arrested in Scotland by the National Crime Agency (NCA), British Transport Police (BTP), or Ministry of Defence Police (MDP) we cannot investigate the holding of your biometric data by or on behalf of those bodies. Our statutory powers, and the provisions of the Code of Practice do not extend to UK-wide policing bodies operating in Scotland.



Please also note the section in the Code of Practice on excluded functions within the oversight remit of other UK Commissioners. This includes a complaint related to your biometric data if retained as part of a National Security Determination (NSD), which is made under [Section 18G](#) of the Criminal Procedure (Scotland) Act 1995 as part of a terrorism investigation, or where you suspect that your biometric data may have been captured covertly as part of an authorised surveillance operation. These are reserved functions within the remit of other UK Commissioners and are excluded from the statutory responsibilities of the Scottish Biometrics Commissioner and the Code of Practice.

If your complaint about your biometric data relates solely to a potential breach of the UK General Data Protection Regulations (GDPR) or Data Protection Act 2018, you should be aware that primary responsibility for enforcing UK data protection laws is a statutory function of the UK Information Commissioner Office (ICO). If someone has failed to protect your biometric data, then you should in the first instance direct your concerns to the [ICO](#). Please consider that the definition of biometric data under data protection law⁴ is different from Section 34 (1) the Scottish Biometrics Commissioner Act 2020. We will also consider complaints in circumstances where the ICO has found that your rights may have been infringed, or a controller has likely not complied with their obligations under data protection law.

We realise that the law in this area is complicated, and we are happy to be contacted for advice in the first instance if you are in any doubt as to whether your concern or complaint falls within our statutory areas of responsibility. We are here to help:

Call us: **0131 202 1043**

Email us: **contact@biometricscommissioner.scot**

Write to us:

Scottish Biometrics Commissioner

Bridgeside House

99 McDonald Road

Edinburgh

EH7 4NS

or visit our website at www.biometricscommissioner.scot

How do I complain?

You (or someone acting on your behalf) can complain to the Scottish Biometrics Commissioner if you think that the body holding your personal biometric data may be in breach of the Scottish Biometrics Commissioner's Code of Practice.

4. The UK GDPR defines biometric data in Article 4 (14): “‘biometric data’ means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data”.



You may complain to us in writing, by telephone, by email, or via the [complaints link](#) on our website. Our contact details are included above.

British Sign Language (BSL) users can contact us using **contactSCOTLAND-BSL**. We are committed to being accessible to all members of the community. In line with our statutory equality duties, we will always ensure that reasonable adjustments are made to help people with an interest in our functions. If you would like information in another language or format, or Braille, then please [contact](#) our office and we will arrange for this to happen.

Getting help to make your complaint

We understand that you may be unable, or reluctant, to make a complaint yourself. We will therefore accept complaints on your behalf by your representative. This could be a friend, relative, or an advocate, if you have given them your consent to complain on your behalf. In addition to completing the [complaints form](#), the 'Consent Form - Complaining for Someone Else' in **Appendix B** must also be submitted to assist you with your complaint. **Please note** – this Consent Form will be sent to you for signing once we receive your complaint.

You have the right to ask an organisation whether or not they are using or storing your personal information. You can also ask them for copies of your personal information, verbally or in writing.⁵

If you need further advice or guidance before considering making a complaint to us there are various bodies who may be able to assist:

Citizens Advice Scotland

Citizens Advice Scotland may be able to give you further advice and guidance. Please visit their [website](#) for further information.

Law Society of Scotland

The Law Society of Scotland may be able to help you find a solicitor. Please visit their [website](#) for further information or telephone 0131 226 7411.

Scottish Independent Advocacy Alliance

Please visit their [website](#) for further information or telephone 0131 510 9410.

What information must I provide when making a complaint?

To help us to consider your complaint, you should include the following information:

- Your full name, address, date of birth, and contact details.
- The name of the public body you think may be breaching the Code of Practice in respect of the holding of your personal biometric data (Police Scotland, the Scottish Police Authority, or the Police

⁵ You can find more information on the right to access and how to make a subject access request [here](#)



Investigations and Review Commissioner). If you are unsure which body holds your data, please give us as much information as possible.

- An explanation of **why** you think that body may be in breach of the Code of Practice. Please refer to the General Principles and Ethical Considerations in the [Code of Practice](#) if you are in doubt. Also an explanation of how you would like us to resolve the matter.

In accordance with the provisions of [Section 15 \(2\)](#) of the Scottish Biometrics Commissioner Act 2020, we can investigate your complaint regardless of whether you have complained directly to the body holding your biometric data.

What happens once I have complained?

On receipt of your complaint about the alleged failure of a body holding your personal biometric data to comply with the Scottish Biometrics Commissioner's Code of Practice we will adopt the following **three-stage** complaint handling process.

Stage 1

- We will acknowledge receipt of your complaint within three working days.
- We will record your complaint and initial assessment. Where appropriate, we will seek to discuss the complaint with you so that we have a full understanding of all relevant circumstances. If your complaint does not relate to our statutory area of responsibility, we will advise you immediately and conclude our involvement.⁶
- We will allocate your complaint for investigation and provide you with the name of the member of staff designated as 'investigating officer' who will be investigating your complaint. In most cases, we will seek to complete our investigation within thirty working days. If this is not possible, we will tell you, agree a revised timescale, and keep you updated on progress.
- We will contact the public body you think may be breaching the Code of Practice in respect of the holding of your personal biometric data and seek any information we require to investigate your complaint. We may contact you for further information. Following our investigation, the findings will be presented by the investigating officer to the Commissioner who will make a written determination on whether there has been a breach of the Code of Practice.
- A copy of this written determination will be provided to you explaining the decision. We will notify you in writing of the outcome of our investigation as soon as the Commissioner determines whether there has been a breach of the Code of Practice.
- If the Commissioner determines that there has been a breach of the Code of Practice, then in accordance with the provisions of [Section 20 \(1\)](#) of the Scottish Biometrics Commissioners Act 2020 the Commissioner must prepare and publish a report about that failure unless the Commissioner considers that it is sufficiently minor not to merit it. Any such report will identify any organisational learning but will not disclose the personal identity or details of the complainer.

⁶ For example, we do not have statutory powers to investigate criminal complaints. If a complaint is made to us of a criminal nature we will refer it to the appropriate public body.



- The Commissioner may also serve a compliance notice on the body concerned if considered appropriate.⁷ If necessary, any failure to subsequently comply with such a notice may be reported by the Commissioner to the Court of Session.

Stage 2

The Commissioner will be happy to meet with you in such circumstances to explain his determination in detail, and to discuss any residual concerns that you may have. Please note that the Scottish Biometrics Commissioner Act 2020 does not make specific provision for appeals against a finding or determination by the Commissioner on whether a listed body has breached the Code of Practice.⁸

Stage 3

If you remain unsatisfied with the Commissioner's finding or determination, you may wish to contact a solicitor to take further legal advice including the possibility of a judicial review, which is a procedure by which a court can review an administrative action by a public body.⁹ The power of judicial review of governmental and private bodies in Scotland is held by the Court of Session.

We have a separate complaints handling procedure for complaints made about us, for example if you are not satisfied with the way we are discharging our statutory functions.

A process map illustrating our complaint handling process for complaints made to us about a potential breach of the Code of Practice is provided in **Appendix A** to this procedure.

7. A compliance notice is a letter requiring the person to whom it is issued to take the steps set out in the notice in order to address the person's failure to comply with the Code of Practice

8. The Office of Scottish Biometrics Commissioner is a juristic position independent of Scottish Government and the Commissioner is appointed by Her Majesty the Queen on the nomination of the Scottish Parliament.

9. There are only a limited number of reasons that can form the basis of an application for judicial review. These include illegality, irrationality, and procedural impropriety.



Appendix A

Three stage handling process for complaints received from an individual with an allegation that Police Scotland, the Scottish Police Authority (SPA), or Police Investigations and Review Commissioner (PIRC) may be in breach of the Code of Practice in respect of the biometric data held pertaining to that individual.

STAGE 1

- We will acknowledge receipt of your complaint within three working days
- We will record your complaint and our initial assessment. If your complaint does not relate to our statutory function, we will tell you
- We will allocate your complaint for investigation and provide you with the name of our investigation officer. We aim to complete our investigation within 30 working days
- We will contact the public body you think may be breaching the Code of Practice in respect of the holding of your personal data and seek any information we require to investigate your complaint. We may contact you for further information
- The Commissioner will review the investigating officer's report. The Commissioner will make a written determination of his overall findings, including whether there has been a breach of the Code of Practice
- If a breach of the Code is established, the Commissioner will publish his findings in a report unless it is of a minor nature. A compliance notice may be served on the body concerned by the Scottish Biometrics Commissioner
- Once the Commissioner has made his determination, a letter will be sent to the complainer and body complained about with the outcome of the investigation. A copy of the Commissioner's written determination will be provided

STAGE 2

If you are not satisfied with the Commissioner's determination you can request a meeting with the Commissioner of the SBC's investigation officer.

STAGE 3

If you remain unsatisfied with the Commissioner's findings or determination, you may wish to contact a solicitor to take further legal advice



Appendix B – Consent Form

Complaining for someone else

Complainer's Name: _____

Representative's Name: _____

Representative's Address: _____

Representative's Contact information: _____

What is your relationship to the complainer? _____

We need the person affected by the complaint to sign the consent form below, if they can, to allow you to complain for them. If they are unable to sign for any reason, please tell us why.

Consent

I authorise the person or organisation named above to make my complaint to the Scottish Biometrics Commissioner for me.

I understand that the Scottish Biometrics Commissioner may access and review information held by the organisation I am complaining about. I understand that the Scottish Biometrics Commissioner may need to contact a third party about my complaint. The Scottish Biometrics Commissioner will usually let my representative(s) know about this.

I also understand that the Scottish Biometrics Commissioner may share information about me with my representative(s). Depending on the nature of the complaint, this may include sensitive personal information.

Signature: _____

Please Note: - If you have any questions or concerns, please contact the Scottish Biometrics Commissioner to discuss. By signing this form, you are agreeing that all communication with the Scottish Biometrics Commissioner on your complaint will be done via the person or organisation authorised to make the complaint on your behalf.