

Consultation: Our new approach to data protection concerns

Start date: Wednesday 18 December 2013

End date: Friday 31 January 2014

Introduction

Responses to this consultation must be submitted by close Friday 31 January 2014. You can submit your response in one of the following ways:

Complete sections 2 and 3 of this document and email to consultations@ico.org.uk

Complete sections 2 and 3 of this document and post to:

Corporate Governance
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you would like further information on the consultation please telephone 0303 123 1113 and ask to speak to Emma Dean or email consultations@ico.org.uk.

Privacy statement

Following the end of the consultation we shall publish a summary of responses received. Information people provide in response to our consultations, including personal information, may be disclosed in accordance with the Freedom of Information Act 2000 and the Data Protection Act 1998. If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality.

Section 1: Our new approach to data protection concerns

Using public concerns and self-reported incidents to improve information rights practice

Stakeholder consultation

Background

As part of the Information Commissioner's Office's (ICO's) commitment to deliver our regulatory responsibilities as efficiently and effectively as possible we are reviewing our approach to how we deal with the complaints and concerns the public raise with us under the Data Protection Act (DPA). We would like to hear the views of those we regulate on our specific plans in this area. As a responsible regulator we must make sure our limited resources are used in ways which add the most value. This means continuously challenging ourselves to find new efficiencies in our working practices and making sure we only investigate public concerns where to do so has a clear regulatory benefit. This means making sure our work is focused on improving information rights practice in a manner demonstrating clear value for money.

The number of customers asking us for advice or raising concerns with us increases year on year. As awareness of information rights amongst the UK population increases, we expect demand for our services to continue to grow. The changes we are making are intended to help us keep pace with this demand using our existing resources.

When we review our approach we always consider the impact on individuals (those who raise complaints and concerns with us) and on the organisations we deal with. We want to make it easier for individuals to be aware of and use their information rights and ensure organisations fulfil their legal obligations.

This consultation is aimed at the organisations we regulate. However, we also welcome views from the public and other interested parties more generally.

Our present approach

Last year we dealt with just over 40,000 enquiries and written concerns relating to data protection issues. We also answered

almost 214,000 phone calls from individuals wanting our help. Our aim is to provide an authoritative answer that helps the member of the public understand how the law applies to their own circumstances. When there is a specific concern about a particular organisation we can make an assessment of whether it is likely or unlikely the legislation has been contravened.

In only 35% of all the complaints we dealt with during 2012/13 did we assess that it was likely the legislation had been contravened.

We cannot award compensation to individuals in these cases. If we decide that there has been a serious failure to comply with the law we may take enforcement action against the organisation. This should help make sure they get things right in the future. We can also serve a monetary penalty of up to £500,000 in the most serious of cases.

For some our current approach achieves a positive regulatory outcome. However, our assessment often simply highlights that relations between organisations and their customers or clients have broken down. The data protection concern can be just one part of a broader problem or dispute.

We are often approached by customers that have not raised their concern with the organisation or by those that have not provided us with the organisation's response to the issues that have been raised

Almost half the complaints we receive are from individuals attempting to access information held by an organisation.

For more information about the profile of our work when dealing with public complaints and concerns please visit the about us section of our website

Why change?

We want to become more effective and efficient at using concerns raised with us to improve the wider information rights practice of organisations and to tackle systemic problems. Too often we are drawn into adjudicating on individual disputes between organisations and their customers or clients, particularly where the legislation we oversee may only be a peripheral part of the matter being disputed.

We want to focus on those who get things wrong repeatedly, and take action against those who commit serious contraventions of the legislation.

It is clear to us that when either an individual or an organisation is not sufficiently engaged with, or aware of, their respective information rights and obligations then a complaint or dispute is more likely. We want to support both parties to engage with one another clearly about what individuals can expect and what organisations should deliver. This will avoid unnecessary concerns being raised with us and make it much easier for us to identify opportunities to improve information rights practice.

So what are we proposing to do differently?

The changes are subtle, but significant. We want to take an approach which places improving how organisations deal with information at the centre of what we do. Good information rights practice is, of course, about complying with the law. But it goes further. It also includes the way organisations engage with the public and how clearly they explain their practices to them.

When someone has a concern about the information rights practice of an organisation we expect that concern to be brought to the attention of the organisation to give them the opportunity of addressing the issue before raising it with us as the regulator. We provide the public with tools and guidance to help them do this.

We are committed to ensuring that the public who raise concerns with organisations receive a clear and open response. We also provide tools and guidance, to help organisations ensure they understand their obligations, and expect that they explain their decisions appropriately.

When we receive a concern from a member of the public, complete with the organisation's response to it, we will retain a record of the concern and decide if we think there is an opportunity for information rights practice to be improved. That may be in the individual case or it may be to address a more systemic concern. We will improve our systems for capturing and analysing this information, which will enable us to quickly determine whether the concern is a one-off, or is evidence of a pattern of poor practice. We will then use this information to plan and coordinate our activity, either in isolation or through joint-activity with other regulators and trade bodies.

The approach we intend to take to deal with each concern will depend on whether we identify an opportunity to improve information rights practice. In most cases we will do this by considering the response provided by an organisation to the

individual's original concern. We will continue to ask organisations to explain their actions in potentially serious cases. We may make an assessment under section 42 of the DPA where we think this adds value or where the customer has asked us to do so. We may simply offer advice to both parties and ask the organisation to take ownership of their customer or client's concern. We will decide how we can best tackle each concern on a case by case basis.

If we think an organisation needs to improve its practices we will contact them to explain why we think that is the case. Where appropriate we may ask an organisation to commit to an action plan or undertaking, to be published on our website, explaining the work they are doing to improve their practices.

If appropriate we will consider further enforcement action.

We will publish regular reports highlighting:

- improvements made to information rights practice in the sectors we regulate;
- enforcement action we have taken; and
- further information to add context to the figures we publish.

We will have regular contact with the organisations that the public raise the most concerns about. There is always likely to be a link between the organisations processing the most information about the public and the number of concerns that the public raise about them. This does not mean that these organisations necessarily have worse information rights practice than those generating fewer concerns. However, they are the organisations with the greatest potential to cause general public concern so we want to maintain an ongoing dialogue with them. The information that we collect will enable us to identify threats, themes and trends, but more importantly identify opportunities for us to improve compliance.

Where these organisations have an established link with our Strategic Liaison Department, or one of our regional offices, we will expect issues and concerns raised by the public to be an ongoing feature of the engagement we already have with them.

If organisations want help to improve and assure their information rights practice we can offer advice and assistance. We can also provide an audit service to look at specific aspects of their data processing.

We still want the public to tell us about positive information rights activity. We also want organisations to let us know about the

initiatives they have in place to improve or maintain high standards of information rights practice. We are keen to see these published online too.

In line with our commitment to transparency, we plan to publish the number of concerns raised with us about organisations. This information is already disclosable under freedom of information legislation. Clearly some organisations are likely to generate more concerns than others. We still expect these organisations to work hard to explain their actions in connection with data protection complaints and avoid unnecessary concerns being brought to our attention. We will use our regular reports to add context to the statistics.

Of course when we identify serious contraventions of the legislation we regulate we have the power to take enforcement action. This review of our approach will, we believe, give us more capacity to take this kind of regulatory action when it is warranted.

So what does all this mean for those we regulate?

We will continue to expect the organisations we regulate to provide clear and full responses to information rights concerns raised with them by the public. It also means our contact with those we regulate will be proportionate to the concern we are dealing with. Rather than simply seeking to assess compliance in every case we will take a variety of approaches intended to enable an organisation to demonstrate good information rights practice to us and to work with us to improve things where necessary. The more serious or potentially systemic the concern the more evidence of good, or improving, information rights practices we will expect to see.

Our new approach also assumes a general level of commitment on the part of those we regulate to avoid the public needing to raise concerns with us as the regulator. We want to see organisations retaining ownership of the concerns the public raise with them. We are available to provide advice about how to address those concerns but we do not want to see the individual referred to us as a way of avoiding the need to resolve a local dispute.

What about the public? How will the changes affect them?

The ICO has no compensatory powers. When a member of the public refers a concern to us about an organisation they want us to do something to make sure that what happened to them doesn't

happen to anyone else¹. These changes are designed to build on that approach. We will use all the information we receive to inform our regulatory action.

We will always explain why we will not be taking an individual concern any further. We will retain the details for future reference so all concerns referred to us do have the potential to inform future action by the ICO if a systemic issue or a pattern of poor behaviour on the part of an organisation emerges. We will not engage in protracted correspondence once we have explained the position.

In summary

Concerns from the public are a welcome source of intelligence which help the ICO to understand the problems individuals are facing.

These concerns will be used to identify trends and emerging issues as well as systemic problems where the ICO can take regulatory action.

We will identify at an early stage cases that raise important points, and take relevant action.

When are we planning to change our approach?

We are planning to change our approach from 1 April 2014. The content on our website will be updated and the way we contact organisations will change in line with the above approach from this date.

So what would we like you to consider?

We would welcome any comments in response to this consultation from either data controllers or those who represent the interests of data subjects. However, we are particularly seeking responses to the following questions from businesses that are subject to the Data Protection Act:

- 1) Will the way in which we are proposing to address complaints and engage with businesses have a significant impact on your business?
- 2) If so what will this impact be? Will it be positive or negative for you?

¹ When presented with a list of 10 desirable outcomes, two thirds or more of respondents indicated that they wanted confirmation that action had been taken to make sure it doesn't happen again – source: Satisfaction with Complaint Handling survey September 2012

- 3) Are you able to quantify this likely increase or decrease in the burden of our activity on your business?
- 4) If you expect the burden to be increased can you suggest how we might keep this increase to a minimum?
- 5) If you expect the burden to be decreased can you suggest any steps we might take to decrease this burden even further?
- 6) Do you agree with our proposal to publish the number of concerns raised with us about each organisation? If not why not?

Responses should be provided by no later than 31 January 2014 using section 2 of this document. We will then consider all information received and publish our response before we launch any new service.

Section 2: Your views

1. Will the way in which we are proposing to address complaints and engage with businesses have a significant impact on your business?

Yes
Please explain why:

No
Please explain why:

2. If so what will this impact be? Will it be positive or negative for you?

Positive
Please explain why:

Negative
Please explain why:

3. Are you able to quantify this likely increase or decrease in the burden of our activity on your business?

Yes
Please explain what it is:

No
Please explain what it is:

4. If you expect the burden to be increased can you suggest how we might keep this increase to a minimum?

Yes
Please explain how:

No
Please explain why not:

5. If you expect the burden to be decreased can you suggest any steps we might take to decrease this burden even further?

Yes

Please explain how:

No

Please explain why not:

6. Do you agree with our proposal to publish the number of concerns raised with us about each organisation? If not why not?

Yes

Please explain why:

No

Please explain why:

7. Please provide any further comments or suggestions you may have.

Section 3: About you

1. Are you:

A member of the public who has used our service?	Y/N
A member of the public who has not used our service?	Y/N
A representative of a public sector organisation? Please specify:	Y/N
A representative of a private sector organisation? Please specify:	Y/N
A representative of a community, voluntary or charitable organisation, or of a trade body? Please specify:	Y/N
An ICO employee?	Y/N
Other? Please specify:	Y/N

Thank you for completing this consultation.
We value your input.