

Data Protection Bill, House of Lords second reading – Information Commissioner's briefing

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Introduction

1. The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA 98), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003, as amended (PECR). The Commissioner also provides a complaint handling function for the Re-use of Public Sector Information Regulations and the INSPIRE Regulations; and is the UK supervisory body for the Electronic Identification and Trust Services for Electronic Transactions (eIDAS) Regulations. She is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

Overview

2. The Commissioner welcomes the Data Protection Bill because it puts in place one of the final pieces of much needed data protection reform. It is vital that this Bill reaches the statute book because it introduces strong safeguards for protecting individuals' personal data. Effective, modern data protection laws with robust safeguards are central to securing the public's trust and confidence in the use of personal information within the digital economy, the delivery of public services and the fight against crime.
3. The Bill provides an essential legislative framework to deliver greater protections for the public and enhanced obligations for organisations. The Commissioner believes strong privacy legislation and an effective regulator can make a difference to the level of trust people have in what happens to their personal data and this is fundamental to them engaging in the digital economy.
4. It is important that the Bill is also seen in the context of European Union data protection reform. The General Data Protection Regulation (GDPR)¹ has direct effect and will be relevant to most processing of personal data. This means that for most organisations the Bill has to be read alongside the GDPR in order to understand the full legislative framework that applies to them.
5. The Bill also transposes into UK law another key element of the EU reform package - Directive 2016/680, known as the Law Enforcement Directive

¹ The GDPR replaces at EU level the 1995 directive on data protection [Directive 95/46/EC]. Its provisions will apply from 25 May 2018.

(LED).² It does not have direct effect and designated competent authorities involved in processing personal data for law enforcement purposes need to comply with those provisions in Part 3 of the Bill. Part 4 of the Bill also ensures that a data protection regime applies to the Intelligence Services. Including these provisions in a single piece of primary data protection legislation is welcome.

6. The Commissioner welcomes the Government's commitment in the Explanatory Notes that the Bill and the GDPR will substantively apply the same high standards to the majority of data processing in the UK, in order to create a clear and coherent data protection regime. She also supports the Government's aim to replicate provisions of the DPA where there is discretion to introduce derogations and national implementing measures. Many of these provisions and exemptions have stood the test of time and are well understood by data controllers but she also welcomes the refinements and improvements that have been made to modernise the legislation.
7. The Commissioner is engaged to ensure the UK data protection regulatory landscape is clear and will support all organisations committed to good practice. The GDPR regime represents a step change in data protection but the Bill provides a significant amount of continuity with DPA 98 and is an important evolution building on foundations already in place for the last 20 years.
8. With regard to the data protection reform package she will work to prepare stakeholders in all sectors for the transition to the new regulatory regime. This includes guidance for small businesses that process very little personal data. She will also work to ensure the public understand their rights and how to exercise them. The ICO has a dedicated section on its website which includes guidance on the GDPR and steps organisations can take to prepare for data protection reform³.
9. The Bill provides important powers for the Commissioner. Her approach will be to encourage and inspire good practice and compliance but will make proportionate and effective use of the regulatory sanctions provided in the Bill where unlawful practices need to be halted, rectified or exposed.
10. Whilst the Bill is not designed to address the UK's data protection regime post Brexit the Commissioner notes that passing the Bill will send an important signal about the UK's commitment to a high standard of data protection post Brexit. This in turn will play a role in ensuring uninterrupted data flows

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1506692783409&uri=CELEX:32016L0680>

³ICO website section on data protection reform <https://ico.org.uk/for-organisations/data-protection-reform/>

between the UK and the EU. The Commissioner also recognises the importance of the UK having a strong relationship with other EU data protection regulators post Brexit, including the European Data Protection Board, to enable cross border enforcement.

Derogations

11. Numerous articles of the GDPR give Member States the discretion to vary the law in a number of areas including Article 23 which allows member states to restrict rights and obligations for processing related to national security, defence public security and others. Some of these derogations relate to detailed, technical matters but others are central to the functioning of an effective data protection regime – for example those dealing with balancing fundamental rights like freedom of expression and privacy, or the modification of subject access rights in differing contexts.
12. The introduction of national derogations is a matter of key significance for the Commissioner and in her response to the Government’s call for views⁴ on the GDPR derogations, she advised that the national discretions available should be considered as part of a proportionate and risk based approach to individuals’ information rights. The Commissioner welcomes the engagement she and her staff have had with Government on matters relating to implementation of the GDPR and the transposition of the LED and is satisfied that the provisions in the Bill should ensure that an effective framework for the protection of individuals remains in place.
13. The Commissioner’s general approach to the derogations is to favour replicating existing exemptions and measures under the DPA 98 where experience shows that they work satisfactorily. This will minimise disruption and bring certainty and coherence to the data protection regulatory regime. She supports the introduction of new derogations only where she believes this to be necessary for the effective functioning of the GDPR or where there is a clear need.

⁴ <https://ico.org.uk/media/about-the-ico/consultation-responses/2017/2014036/ico-response-dcms-derogations-consultation-20170510.pdf>

Commissioner's part-by- part commentary on the Bill

Part one: Preliminary

14. The Commissioner recognises the complexity of the domestic legislation, which has resulted in the need to read across various provisions including between those within the Bill as well as between those in the GDPR. The Commissioner has made a number of recommendations to improve the Bill and is pleased that Government has responded positively towards many of these points. There may perhaps be further opportunities to make additional technical improvements in some areas by amendment.

Part two: General processing

Chapter two: The GDPR – Clause 8: Child's consent in relation to information society services

15. The Bill provides that the age of consent of children using information society services should be 13 years. Under the GDPR a child under the age of 16 cannot give valid consent to the processing of their personal data for the provision of the service, unless the law of their Member State provides a lower age (to be no lower than 13). The use of this discretion should be consistent with wider public policy in all parts of the UK on the autonomy of the child and the age when they can acquire and exercise rights for themselves.
16. The Commissioner's submission to the House of Lords Select Committee on Communications' Inquiry into Children⁵ and the Internet makes clear that, on balance, the Commissioner favours an approach where even quite young children can access appropriate online services without the consent of a parent or guardian, provided organisations have other safeguards.

Chapter three: Other general processing – Clause 24: National security and defence exemption

17. The existing similar exemption at section 28 of the DPA is confined to just national security. Clause 24 extends this parallel provision to defence. The Commissioner understands that "the purposes of defence" would not be a catch-all term covering everything the Ministry of Defence does, but is more narrowly focussed in its application. The Commissioner shall follow the debate

⁵ <https://ico.org.uk/media/about-the-ico/consultation-responses/2016/1625002/house-of-lords-children-and-the-internet-ico-response-20160901.pdf>

on this clause with interest so that she can continue to be reassured that the intent is clear and apparent.

Part three: Law enforcement processing

18. As mentioned in the Overview, the Commissioner supports the government's approach to transposing the LED into UK law through the Data Protection Bill as a single piece of primary legislation. This makes it more straightforward for those who may process personal data falling within the different parts of the Bill rather than having to consult multiple pieces of legislation.
19. The application of the Law Enforcement Directive to all law enforcement processing by competent authorities (or others who have statutory functions for any of the law enforcement purposes) also ensures consistent standards without making artificial technical distinctions between specific law enforcement activities.
20. A number of competent authorities will process personal data covered by the different parts of the Bill. The measures to ensure consistency with GDPR, for example on timeliness of responding to subject access requests, are welcome.

Clause 41: Overview and scope (of data subject rights)

21. The Bill provides for restrictions to data subject rights in relation to the processing of 'relevant personal data' contained in documents relating to criminal investigations or prosecution proceedings that are created by or on behalf of a court or other judicial authority. The Commissioner recognises there are other alternative routes to obtain information such as through the disclosure provisions in the Criminal Procedure and Investigations Act 1996. However the provision, as drafted, restricts not just access rights but the right to rectification, right to erasure and restriction of processing. The Commissioner would welcome greater clarification on the policy intent behind this restriction on individuals being able to approach the Information Commissioner to exercise their rights.

Part four: Intelligence service processing

22. The Commissioner welcomes the inclusion of the processing of personal data by the intelligence services and recognises that it was not strictly necessary to include provisions in the Bill because national security matters are outside the scope of EU law. Ensuring an effective data protection regime for such activities is important.

23. The provisions are based on internationally recognised data protection standards in the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data⁶ (Convention 108) that covers such intelligence processing activities. This convention dates back to 1981 and is currently being modernised. This revised version has yet to be agreed and it is important that all the modernisation elements are properly reflected to ensure that safeguards are commensurate with the risks.
24. There is the opportunity for the additional safeguards to be incorporated beyond those enshrined in a modernised Convention 108. Ensuring appropriate transparency, to the extent that this is possible, is important. The provisions at Part 4 include an exemption where required for safeguarding national security. There may be concerns that this provision will be widely used and much of the work of the intelligence services will be taken outside of these safeguards. Consideration could be given to requiring any minister issuing certificates under clause 109 to publish information about the issuing of such certificates, if only the numbers issued. Such an approach could be applied to the parallel provisions at clauses 25 and 77.

Part five: The Information Commissioner

25. The Bill provides welcome confirmation that there will continue to be an independent Information Commissioner responsible for regulating the GDPR and its domestic variant, and who will also be the supervisory authority in the UK for the law enforcement provisions set out in Part 3, and the designated authority for the UK under Convention 108. Part 5 of the Bill, along with Schedule 12, sets out important provisions for the Commissioner, including that she must be consulted on legislative and other measures that relates to personal data processing.
26. The provisions also include general functions under GDPR such as safeguards and powers in connection with the Commissioner's international role including co-operation and mutual assistance between supervisory authorities under the GDPR. It is important that the Commissioner continues to play a full part in EU data protection working groups and boards until the UK leaves the EU, and works closely with EU partners and institutions once the UK has left.

⁶ Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37>

27. In response to the DCMS call for views the Commissioner advised she should retain the investigatory, corrective, authorisation and advisory powers currently provided for under DPA 98 but also sought a power to co-operate with other supervisory authorities and enforcement bodies outside of the EEA and beyond those covered by Convention 108, in appropriate circumstances. The Commissioner therefore welcomes the provisions in clauses 116-118 on a further international role in relation to countries outside the European Union and with international organisations.
28. One of the Commissioner's key strategic priorities is to maintain and develop influence within the global information rights regulatory community. Data protection regulation has an increasingly international dimension. Effective protection of the UK public's personal data becomes increasingly complex and less visible as data flow across borders so the UK needs a regulator with global reach and influence.⁷

Part six: Enforcement

29. The Bill continues to provide the Commissioner with the powers to ensure personal data is properly protected. These powers are designed to promote compliance with the legislation and include criminal prosecution, financial penalties, non-criminal enforcement and, in some circumstances, audit. The Commissioner intends to continue to use her enforcement powers proportionately and judiciously. She will continue to adopt a targeted, risk-driven approach to regulatory action - not using her legal powers lightly or routinely, but taking a tough and purposeful approach on those occasions where that is necessary. Clause 153 of the Bill requires the Commissioner to provide guidance on how she proposes to take regulatory action.
30. The Commissioner is pleased that she will continue to be able to impose administrative fines rather than requiring such penalties to be imposed on her behalf by the competent national court. Issuing fines has always been and will continue to be a last resort and the Bill continues to provide her with a number of other regulatory tools including information and enforcement notices.
31. On occasions it is not the data controller that is responsible for data protection breaches; it is an individual acting in contravention of an organisation's policies and procedures, or an individual who obtains information from an organisation without their knowledge or consent. Previously the Commissioner has made strong calls for custodial sentences for Section 55 DPA 98 offences; however she recognises that such offences

⁷ ICO International Strategy 2017-2021 <https://ico.org.uk/media/about-the-ico/documents/2014356/international-strategy-03.pdf>

under the Bill will be treated as recordable offences. It is welcome that the offences will be recordable as serious criminal offences, which accords with the Commissioner's response to the DCMS call for views⁸.

32. The Bill introduces two new offences: the re-identification of de-identified data and alteration of personal data to prevent disclosure. The Commissioner welcomes these important safeguards for individuals.

Clause 162: Re-identification of de-identified personal data

33. In her evidence to Parliament during the passage of the Digital Economy Act 2017, the Commissioner recommended that Government consider stronger sanctions for deliberate and negligent re-identification of anonymised data. She is pleased that the government has included such an offence for knowingly or recklessly re-identifying de-identified personal data without the consent of the data controller. The rapid evolution of technology and growth in the digital economy has led to a vast increase in the availability and value of data. There is a clear need for extensive data processing to be accompanied by robust safeguards to guard against misuse and uphold the law.
34. The offence is accompanied by appropriate defences including that the re-identification was necessary for the purpose of preventing or detecting crime; was justified in the public interest in particular circumstances; or the person had the consent of the data controller. There are good reasons to have these defences - for example, for organisations testing security and anonymisation techniques. This would allow security testing and research to take place in appropriate circumstances.

Clause 140: Assessment notices

35. Assessment notice powers were granted to the Information Commissioner via the Coroners and Justice Act (2009)⁹, requiring certain bodies to submit to inspection of their data protection practices. The Commissioner is pleased that under clause 140, she may issue an assessment notice to any data controller or processor to require them to permit the Commissioner to carry out an assessment of whether they have complied with data protection legislation, with some appropriate restrictions set out in clause 141.

⁸ <https://ico.org.uk/media/about-the-ico/consultation-responses/2017/2014036/ico-response-dcms-derogations-consultation-20170510.pdf>

⁹ Coroners and Justice Act 2009 amended DPA to introduce s41a (Assessment Notices).

36. The ability to require organisations to submit to inspection of their data protection practices is, in her view, an appropriate, necessary and proportionate measure in order to ensure compliance with the regulation and to maintain the confidence of the general public. It is welcome that the provisions in the Bill are applicable to all organisations processing personal data, in contrast to the current overly restrictive approach under the DPA 98.

Clause 164: The Special Purposes

37. Under Article 85 of the GDPR Member States have to create exemptions in relation to the processing of personal data for journalistic purposes and for academic, artistic or literary expression. The Commissioner's general approach is that the key elements of the DPA 98 should remain but in response to the Government's call for views did request the government to make a relatively proportionate change to the ICO's ability to make a determination on the processing of personal data for individuals.

Part Seven: Supplementary and final provision

Clause 173: Representation of data subjects

38. The Commissioner welcomed the provisions in Article 80.1 of the GDPR that give greater ability for civil society and other representative bodies to act on behalf of citizens. She supports how these arrangements are now set out in clause 173 of the Bill.

39. The Commissioner is also in favour of 80.2 of the GDPR which enables Member States to allow such bodies to bring complaints to the ICO for consideration where they are not being instructed to act as the representative of a directly affected data subject. This is important because individuals increasingly do not know what is happening to their data. The ICO already has an open approach to complaints submitted by civil society bodies but understands that they may feel reassured by providing for a legal basis for pursuing matters independent of a particular individual.

Looking ahead

40. Further amendments will be tabled, including those from Government, during the passage of the Bill through Parliament. The Commissioner may amplify this commentary to provide her views on these as necessary. The Commissioner will be providing her own input as necessary during the legislative process.

A handwritten signature in black ink, appearing to be 'ED', with a long horizontal flourish extending to the right.

Elizabeth Denham
Information Commissioner
9 October 2017