

# Information Commissioner's Further Response to the Data Protection and Digital Information Bill (DPDI Bill)

## About the ICO

The Information Commissioner has responsibility for promoting and enforcing the UK General Data Protection Regulation (UK GDPR), the Data Protection Act 2018 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003 (PECR). He is independent from the 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 he can, and taking appropriate action where the law is broken.

## Introduction

The Data Protection and Digital Information (No 2) Bill (the DPDI Bill<sup>1</sup>) was introduced to Parliament on 8 March 2023. It is an important milestone in the evolution of the UK's data protection regime.

Responsibility for developing policy and for making changes to the legislative framework sits with government and Parliament. The Information Commissioner's Office (ICO) is independent from government and our role is to carry out the duties set out in the current, and any future, legislative framework.

When the DPDI Bill was introduced I welcomed it as a positive package of reforms that would allow us to continue to operate as a trusted, fair and independent regulator. I noted that the bill protected people's rights and freedoms, whilst also providing greater regulatory certainty for organisations and promoting growth and innovation in the UK economy. I also provided government with detailed technical comments on a number of areas in which I thought the bill could be improved. My views were

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<sup>1</sup> Since the DPDI (No 2) Bill was re-introduced to Parliament in the fourth session it has reverted to its original title (Data Protection and Digital Information Bill, dropping the reference to No. 2. Therefore for the remainder of this document we will refer to the current version as the DPDI Bill.

published in June 2023 in [the Information Commissioner's Response to the Data Protection and Digital Information No 2 Bill \(the DPDI no 2 Bill\)](#).

I am pleased to note that government made some changes at the House of Commons Committee Stage in response to my comments; namely the definition of vexatious requests to my office and the drafting of the changes to the safeguards for processing for research purposes. However, I note that the majority of my comments currently remain unaddressed, and I would particularly like to see government give further consideration to my views on defining high risk processing.

The DPDI Bill has now returned to Parliament for House of Commons Report Stage and government has introduced a significant number of new clauses. I have been consulted on these new clauses and have provided government with my views in line with the requirements of Article 36(4) of the UK General Data Protection Regulations (UK GDPR). I note, however, that some of these new clauses amount to substantive new policy that has not been the subject of wider public consultation and has not had the benefit of line-by-line scrutiny at the House of Commons committee stage. This means that scrutiny at the House of Lords will be of particular importance. I did not have prior sight of all the amendments made to existing clauses at report stage, though many of these appear to amount to minor or consequential amendments rather than substantive new proposals.

I am content with the majority government's substantive new proposals and welcome:

- Further changes to safeguard the independence of the ICO; namely removing the Secretary of State approval over statutory ICO codes of practice.
- Changes to allow my office to serve information, enforcement and penalty notices electronically.
- The provision that it is only processing that is '*necessary*' for the purposes of the assessment or collection of tax that can be assumed to be compatible by virtue of the new Schedule of 'processing to be treated as compatible with original purpose'.
- the amendment to clarify that, when responding to subject access requests, organisations need only conduct reasonable and proportionate searches which reflects the ICO's current position and guidance.
- The extension of the reporting period for personal data breaches under PECR from 24 to 72 hours, to align with UK GDPR, and

Overall the bill remains one which I support as improving the effectiveness of the data protection regime in the UK, upholding rights for individuals, providing regulatory certainty and clarity for organisations, and improving the way the ICO regulates. However, I do have some concerns about the proposed power to require information for social security purposes; in particular that the measure is currently insufficiently tightly drawn in the legislation to provide the appropriate safeguards. I set out more detail on this view below.

I have also provided some detailed technical comments on how I think the new clauses could be improved to provide further regulatory certainty and clarity at [Annex One](#), and some additional comments in relation to pre-report stage proposals at [Annex Two](#).

- **Gov NC34/NS1 - Power to require information for social security purposes**

Government introduced an amendment to social security legislation to give the Secretary of State (or for Northern Ireland, the Department for Communities) power to give an information notice to certain bodies (initially the financial sector) requiring them to provide information to identify relevant individuals where accounts in receipt of benefits match criteria set out in the notice, for example, exceeding a certain balance limit or being used abroad from an extended period of time. It is separate from the existing powers that allow the DWP to obtain information about accounts where there is a reasonable suspicion that fraud or error has occurred. However, it is intended to complement existing powers, allowing easier identification of individuals who may warrant further investigation.

The measure is looking to reduce fraud and overpayment, which Government states currently costs the Department for Work and Pensions (DWP) in excess of £8 billion a year.

Ultimately it is for Parliament to satisfy itself that this measure is necessary and proportionate as part of the legislative scrutiny process. However, the ICO has a role to provide a view about the proposal from a data protection perspective. This is particularly important given the significant intrusion that this measure allows. While I agree that the measure is a legitimate aim for government, given the level of fraud and overpayment cited, I have not yet seen sufficient evidence that the measure is proportionate. I would anticipate that this would include evidence from the assessment of the DWP pilot, which I would expect to address the impact on successfully tackling fraud and error and the number of accounts identified and shared where there is no fraud or error

detected. I am therefore unable, at this point, to provide my assurance to Parliament that this is a proportionate approach.

The law must be sufficiently clear to give individuals an adequate indication of the conditions and circumstances in which the authorities can use measures they are empowered to deploy which affect their rights, in this case issuing account information notices. It must also be subject to adequate safeguards to protect individuals against arbitrary interference with their rights. I am concerned that the bill is not currently sufficiently tightly drafted to satisfy these requirements and believe several changes are required along the following lines:

- To fulfil the data protection principles, the measure must be necessary and the data collected must be proportionate to the aims pursued. The existing drafting could be interpreted as requiring a wide range of information to be shared. This should be clarified to limit the scope of the power to only obtaining information that would **permit the identification** of accounts and individuals that warrant further investigation. I suggest that this could be achieved through amending Paragraph 2(1)(b) and (c) to make this limitation explicit.
- As drafted the power states that the Secretary of State '*may give an information notice to a person of a prescribed description*'. However, I have been unable to identify where such persons are prescribed and the provision itself is silent on the matter. It is therefore unclear which organisations will be in scope of the power, or how this will be determined. It is my view that there is a need to specify who can be served with a notice (or clarify where this will be prescribed, for example via separate regulations). I suggest that this should be specified more clearly in paragraph 1(1).
- I welcome the intention to place explicit restrictions on how any data gathered under the information notice provision may be used, but these are not currently clear enough in the legislation as drafted. The amendment states that the power may only be exercised for the purpose of assisting the Secretary of State in identifying cases which merit further consideration to establish whether relevant benefits are being paid or have been paid in accordance with the enactments and rules of law relating to those benefits.
- When seeking to limit how data received in response to a notice is used, the provision refers to the purpose of departmental functions as defined in the Welfare Reform Act 2012. Section 127(7) of that act defines departmental functions as functions relating to social security, employment or training, the investigation or prosecution of offences relating to tax credits or child support. These functions

appear to cover wider purposes than those stated above and I think the drafting should more clearly limit use to determining whether benefits have been paid in accordance with the law.

In the case of this amendment, Article 8 of the European Convention on Human Rights (ECHR) is engaged because these powers enable DWP to obtain financial details relating to claimants, which is an aspect of their private life.

Article 8 is a qualified right and interference with it is permitted only where justified. A fair balance needs to be struck between the interests of the individual and the interests of the community as a whole. In striking this balance it is necessary to determine whether the interference is in pursuit of a legitimate aim, necessary in a democratic society and in accordance with the law.

In my view, the DWP's intention to investigate and reduce fraud in the benefits system is likely to amount to a legitimate aim "in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or in morals, or for the protection of the rights and freedoms of others". The European Court of Human Rights has found both economic wellbeing and the protection of the rights and freedom of others to be the legitimate aim of certain large government projects.

Parliament will need to decide whether this measure is necessary and proportionate, given the level of fraud and error in relation to benefits and the predicted savings this intervention could produce. As noted above, I would expect government to be transparent about the evidence base for introducing this power and its efficacy as a tool for addressing fraud and error to support the legislative scrutiny. I also note that, once enacted, I would expect the power to only be exercised where there is evidence of potential fraud and error in relation to specified benefits.

On the basis of information provided by government to date, given the volume of data involved and plans to expand how the power is used in the future, there is the potential that processing as a result of an information notice constitutes automated decision making within the definition of Article 22 of the UK GDPR. Parliamentary scrutiny will be important to determine whether this is the case and, if so, to ensure that appropriate safeguards are put in place.

My understanding is that the power will seek information about individuals in receipt of a range of benefits, including those linked to health status, and therefore it seems likely that special category data will be processed. Further information is required to determine if that is the case but, if it is,

government will need to consider how the relevant additional processing conditions required for such information in the UK GDPR will be met.

The amendment enables the Secretary of State to develop a Code of Practice in connection with account information notices, which includes provision for complaints in connection with such notices. I would welcome further information as to the government's plans in this regard so that I can gain a better understanding of whether there are any potential implications for my office and how this will safeguard individuals.

# Annex One – Technical comments on government’s House of Commons Report Stage amendments

This annex sets out the Commissioner’s detailed technical comments on new proposals introduced to the DPDI Bill by government at the House of Commons Report stage.

## **Gov NC6 – Processing in reliance on relevant international law**

Whilst I would not, in principle, oppose allowing specified relevant international law to provide a legal basis for a public task, in my view the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Access to Electronic Data for the Purpose of Countering Serious Crime, signed on 3 October 2019 does not provide UK Communications Service Providers with any specific authority or powers that could be said to provide such legal basis. In any case I consider that it is not necessary to add this particular agreement to the schedule of relevant international law, as this processing can already take place under the legitimate interests lawful basis for processing.

## **Gov NC9 – Court procedure in connection with subject access requests**

Government's intention behind this new clause is to replicate section 15(2) of the Data Protection Act 1998. I do not believe this is necessary given the existing rules around court procedures but agree its insertion will help add assurance that the information in question should not be disclosed to the data subject until the court has made its determination regarding entitlement.

I consider that the inclusion of "as is available to the controller" in s.180A(2) narrows the current position of the courts and conflicts with court procedure rules. This drafting leaves the information that is 'available' to the controller open to interpretation and introduces the potential for controllers to further complicate the proceedings to determine the data subject’s right of access by raising arguments as to the availability of information for the court to deal with. In my view removing "as is available" and including alternative drafting which makes clear that the controller must provide the information the court requires to make their determination would simplify and clarify this clause.

I consider subsection (4) of this provision unnecessary and believe it should be removed. One of the effects of NC7 (searches in response to data subjects' requests) is to confirm that "the information" as referred to in s.180A(1) (and used throughout s.180A) refers only to such information as the controller is able to identify as a result of reasonable and proportionate searches. The inclusion of s.180A(4) is therefore unnecessary in that it simply serves to confirm the position arising as a result of both the current interpretation of the access provisions and of NC7. I consider this may add undue confusion and therefore suggest this subsection is removed.

### **Gov NC36 - Retention of biometric data and recordable offences**

This new clause enables a law enforcement authority to retain fingerprints and DNA profiles where a person has been convicted of an offence equivalent to a recordable offence in a jurisdiction outside England and Wales and Northern Ireland.

The amendment to s18E of the Counter Terrorism Act (CTA) proposes the insertion of a new subsection 5A. This would require a person outside England & Wales to be treated as having been convicted of an offence even though the relevant court in the other country or territory made a finding equivalent to finding that the person is not guilty by reason of insanity. In England & Wales a verdict of not guilty by reason of insanity may result in an order for absolute discharge (as opposed to a hospital or supervision order) so it would be helpful to understand why a similar finding of insanity in another jurisdiction would need to be treated as equivalent to a conviction in England & Wales.

### **Gov NC38 - Retention of biometric data from INTERPOL**

This new clause enables fingerprints and DNA profiles obtained as part of a request for assistance, or notification of a threat, from INTERPOL and held for national security purposes by a law enforcement authority to be retained until the authority is informed that the request or notification has been withdrawn or cancelled.

It is not clear whether the proposed new s18AA CTA will cover Diffusions<sup>2</sup> as it refers to 'requests for assistance' (rather than cooperation) and these are sent to the UK 'via INTERPOL's systems' rather than via the country's National Central Bureau. If it is not intended to cover Diffusions, it is not clear that they are intended to fall within the description of 'other international exchange routes'.

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<sup>2</sup> Member countries may request cooperation from each other through a mechanism known as a 'diffusion'. Diffusions are circulated directly by a member country's National Central Bureau to all or some other member countries. Diffusions must comply with INTERPOL's Constitution and the Rules on the Processing of Data.



The new s18AA CTA states at new s18AA(2) that the Law Enforcement Authority “may retain the material until the National Central Bureau informs the authority that the request or notification has been cancelled or withdrawn”. There is no reference in the new clause to any consideration of the necessity or proportionality of retaining that data, simply an alignment with the initial Notice/request. There does not appear to be any safety net to require, for example, that checks are made with Interpol or other overseas LE authorities that the notice or request is still ‘live’ and that it is appropriate on the grounds of necessity and proportionality to retain the biometric information.

### **Gov 208 - Disclosure for the purposes of archiving in the public interest**

This amendment enables further processing of personal data, for the purposes of archiving in the public interest, to be considered as compatible processing, even if the original processing was based on the consent of the data subject.

I have some reservations about diluting the concept of consent to allow this processing. This is because I consider that when people give their consent to their personal data being processed they have a reasonable expectation that they will retain control over how it is used, apart from in some very limited circumstances. However, I also appreciate the challenges faced by the archiving sector in this context. I welcome the limitation of the drafting to only address the specific problem advised by archivists (that of disclosures at the request of third party archiving bodies) and note the remaining need to satisfy the fairness principle. If possible it would be helpful to define what is meant by ‘generally recognised standards’ in the legislation, otherwise we will seek to address this in ICO guidance in consultation with the archiving sector.

# Annex Two – Additional comments on pre-report stage proposals

## **Information to be provided to data subjects**

This comment relates to clause 10 of the DPDI No 2 Bill as published on 09 June 2023. I have raised it with Government, but it wasn't included in the commentary I published in June 2023.

This clause applies when processing personal data which was collected directly from a data subject for research purposes. It exempts data controllers from the requirement to provide data subjects with privacy information if it would require disproportionate effort to do so.

These amendments do not include a requirement that data controllers claiming the disproportionate effort exemption will need to 'take appropriate measures to protect the data subject's rights, freedoms and legitimate interests, including by making the information available publicly.' This is in contrast to existing equivalent provisions which apply when personal data is not collected directly from a data subject.

Given the importance of transparency to trust and confidence in use of personal data for research purposes – in my view it is particularly important in the context of research to be explicit that if it is disproportionate for a controller to issue individual notices, then they must publish one on their website.

## **Codes of Conduct**

At the House of Commons Committee stage, government introduced an amendment to the provisions related to Code of Conduct under the UK GDPR and for Law Enforcement Processing. These were clauses 91 and 21 of the DPDI No 2 Bill as published on 09 June 2023.

Government replaced the requirement for expert public bodies to submit draft codes of conduct to my office for approval with a requirement for my office to encourage such bodies to do so.

I understand that Government's intention remains that Codes of Conduct should only qualify as such if they have been approved by my office, and if appropriate monitoring mechanisms are in place. In their view this is the effect of the legislative drafting, which requires the Commissioner to provide an opinion and decide whether to approve a code where one is submitted. The legislation also refers to the effect of codes of conduct

stating that 'adherence to a code of conduct approved under Regulation 32A may be used by a person as a means of demonstrating compliance'. For the avoidance of doubt, I call upon Government to make the intention clear and explicit in the Explanatory Notes to the legislation.