

The Information Commissioner's response to the Department for Business Innovation and Skills consultation on moving Land Registry operations to the private sector ('the consultation')

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 ("DPA"), the Freedom of Information Act 2000 ("FOIA"), the Environmental Information Regulations 2004 ("EIR") and the Privacy and Electronic Communications Regulations 2003 ("PECR"). He also deals with complaints under the Re-use of Public Sector Information Regulations 2015 ("RPSI") and the INSPIRE Regulations 2009. He is independent from 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.

The consultation sets out options to move Land Registry into the private sector. The Information Commissioner's Office (ICO) has a relevant interest across a number of information rights policy areas in this proposal.

The government's preferred option for the future status of Land Registry, namely privatisation with contract between government and private operator, is detailed in paragraph 68 on page 20 of the consultation:

Whilst the Registers (The Land Charges Register, The Bankruptcy Register, The Agricultural Credits Register) will remain with government, the rights to use the information held within the Registers; the existing employees; and agreed tangible assets of Land Registry would be transferred to a private sector operator (NewCo) in which the investor would buy shares (...) Government could choose to retain some level of ownership of NewCo, and/or pass some ownership to the workforce.

Paragraph 65 on page 19 of the consultation states:

(...) We are not, however, seeking to split up the existing Land Registry organisation. Almost all current core statutory and non-statutory additional functions would be transferred into NewCo to retain inter alia the integrity of the current organisation.

In this consultation response, we have concentrated our comments on the preferred option.

Data Protection

The Data Protection Act 1998 (DPA) covers the use of personal data. Personal data is defined in section 1 (1) of the DPA, and stated below:

Personal data means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Land Registry data includes personal data, and as such is covered by the DPA insofar as such personal data is involved. Some of this data could potentially be classified as sensitive personal data as defined in section 2 of the DPA – personal data of this type is subject to more stringent safeguards.

Section 1 (1) of the DPA also defines the role of data controller:

Data controller means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed.

And data processor:

Data processor, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller.

Paragraph 57 of the consultation states:

Statutory data collected through core statutory functions would continue to be owned by government. NewCo would be a data processor and would be required to comply with the Data Protection Act 1998.

Whilst it is useful to know that NewCo will be a data processor for personal data held in relation to core statutory functions, it is not entirely clear from the consultation alone who will act as data controller. We assume that since the data would continue to be owned by government, a

specific department of state will act as data controller. It will be important for the data controllership for such data to be made clear to individuals so that they may exercise their rights under the DPA.

We also note, based on the phrasing of paragraph 57, that the government may not have a data controllership role with regard to personal data held for any non-statutory functions carried out by NewCo. In that instance, it is likely that NewCo would be the data controller for any personal data held for non-statutory functions. Again, it will be important to make clear to individuals how far NewCo's data controllership responsibilities extend, and where the government's begin. It is possible that the government will require NewCo to administer information rights such as subject access requests on its behalf. If this is the case, the ICO's guidance on data protection¹ includes details of how this relationship should work – specifically where a data controller uses a data processor, the data controller needs to ensure that contractual arrangements are in place to guarantee that subject access requests are dealt with properly, irrespective of whether they are sent to the data controller or the data processor.

Whilst not a regulatory requirement, nor an impediment to government's decision on whether to privatise Land Registry, consideration should be given to public sentiment in relation to the change of data controllership. All information, including personal data, related to land registration in England and Wales has up to now been held by a single publicly-owned and controlled Land Registry. Under the preferred option, and all other options, this position will change. Where responsibility for personal data, in terms of controllership or processing, moves from a public body to a commercial entity, the public may be concerned as to whether the existing safeguards will be maintained – for example in relation to use of personal data for additional purposes and data security. Amongst the reasons provided in this consultation as rationale for privatisation, digital transformation and exploitation of the potential of the data held feature prominently. We acknowledge that where such possibilities are mentioned, it is clearly stated that this would be subject to the requirements of the DPA. However there is still a role for government to play in allaying any public fears over the privatisation and defining clear demarcation lines between the data controllership scope of NewCo and that of the designated government department.

Freedom of Information

The Freedom of Information Act 2000 (FOIA) provides public access to information held by public authorities. The FOIA covers any recorded

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/principle-6-rights/subject-access-request/>

information that is held by a public authority in England, Wales and Northern Ireland, and by UK-wide public authorities based in Scotland.

An organisation can be classified as a public authority under the FOIA by virtue of their ownership resting wholly in the Crown or wider public sector; by being named specifically in Schedule 1 of the FOIA; or by designation by the Secretary of State. As such, Land Registry in its current form is covered by FOIA.

There is no mention of maintaining an FOI, or FOI-like, regime for NewCo in this consultation. In 2014 the government issued a consultation on a new service delivery company for Land Registry. In its response to this consultation², the government stated:

Any service delivery company, at least in the performance of Land Registry functions, would also be subject to the FOI Act and would need to provide information in response to Freedom of Information Requests.

We recognise that the above statement regarding an earlier proposal for a service delivery company was likely based on the ownership status of the service delivery company remaining in the public sector. However if it was the government's intention to retain an FOI access regime for reasons of public interest, then it would be helpful to state if such an intention would also extend to NewCo, even to a limited extent, and whether this would be achieved by means of ministerial order under FOIA.

We note that there is no specific mention of FOIA in this 2016 consultation. However, some of the terminology in the consultation is open to interpretation in terms of how far information access rights may still be applicable – we note for example paragraph 44:

The Registers are owned by the Crown (...) We recognise this makes it important to the Registers remain in public ownership (...) Under these proposals this ownership of the Registers will not change (...) Even with a private sector function owning and controlling the processes and operations of the Land Registry the Crown continues to own and government manage the data provided through the existence of an up-to-date register.

And also paragraph 57:

Statutory data collected through core statutory functions would continue to be owned by government.

The above extracts, taken in tandem with the earlier statement that statutory and non-statutory functions would both be transferred to

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328872/bis_14_949_Introduction_of_a_Land_Registry_Service_Delivery_Company.pdf

NewCo, raise some uncertainty over whether an FOI request could in fact be sent to NewCo and treated as valid – dependent on the request only covering information held in relation to the registers which remain under public ownership.

Based on the preferred option outlined in the consultation, it is not clear whether NewCo would fulfil the ownership criteria to bring it under the scope of the FOIA. Therefore, without any further clarification on this issue being available in the consultation, it is not clear whether government would intend to designate NewCo for FOIA purposes. We note that commentators who have made public statements in relation to this consultation have generally made the assumption that it would not be the government's intention. If this is the case, Land Registry would cease to be covered by the FOIA once its functions transfer to NewCo. In previous instances where a public authority has moved out of the scope of the FOIA, e.g. Royal Mail following its privatisation, the ICO is aware that such public authorities continued to receive FOI requests. Where these requests were, rightly, not fulfilled by the former public authorities, some of these were referred to the ICO as complaints by the requestors.

It would be useful from an ICO perspective if prominent information notices were provided to those likely to exercise information access rights in respect of Land Registry post-privatisation. This should reduce the number of FOI requests being submitted to NewCo, and in turn reduce the aggravation and annoyance for individuals who were unaware that the change of ownership status would render FOI requests invalid.

In relation to the wider issue of transparency, the ICO have previously written³ on the subject of public sector outsourcing to private operators, and how this can have an indirect effect on transparency by diminishing the scope and coverage of the FOIA. Additionally, in our evidence to the Independent Commission on Freedom of Information, we said that the right to access public information must not be undermined by the increased use of private providers in delivering public services⁴. It is clear from this consultation that if privatisation to NewCo does go ahead as proposed, a large amount of information relating to the operation of land registration in England and Wales, likely including statutory functions, would fall outside the FOIA access regime. We are aware that this diminution of FOIA and wider transparency measures is a concern across multiple stakeholders in the UK; it is likely that such interested parties will make their concerns known in relation to this consultation.

³ <https://iconewsblog.wordpress.com/2014/03/05/ensuring-transparency-isnt-the-cost-of-outsourcing-05032014/>

⁴ <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560175/ico-response-independent-commission-on-freedom-of-information.pdf>

Access to environmental information

The Environmental Information Regulations 2004 (EIR) provide public access to environmental information held by public authorities. The EIR cover any recorded information held by public authorities in England, Wales and Northern Ireland. Section 2 (1) defines environmental information – the definition is wide and it is clear that significant amounts of information held by Land Registry, which would transfer to NewCo under the consultation proposals, would fall under this definition.

Section 2 (2) of the EIR defines a public authority covered under EIR. Based on our reading of the consultation, and especially the preferred option, it is likely that NewCo would continue to fall under this definition of a public authority.

Since the proposals envisage that NewCo will retain the staff and functions of Land Registry, it is likely that the expertise and procedural controls for dealing with EIR requests will already be in place. It will be important to publicise to users of Land Registry data that their rights under the EIR will continue to be exercisable post-privatisation, and that the ICO will continue to offer a complaint-handling function to uphold such rights.

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