

Digital Economy Bill, House of Lords Report – Information Commissioner's briefing

Introduction

1. The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003, as amended (PECR). 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.
2. This briefing updates the Commissioner's written evidence to the House of Commons Public Bill Committee¹ and the House of Lords Committee². It will focus on those aspects of the Bill that fall within her direct regulatory remit or have an impact on the privacy of individuals. These are: age verification for access to online pornography (Part 3); digital government (Part 5); the statutory direct marketing code (Part 6) and the funding of the ICO.

Overview

3. The Commissioner has made a number of recommendations to improve the Bill and is pleased the government has responded positively to these points. She welcomes the government's amendments to the Bill at Report Stage, particularly those which relate to:
 - references to her codes of practice on privacy impact assessments and privacy notices in relevant clauses relating to the sharing of personal data in Part 5 of the Bill (clauses 39, 42, 48, 56, 66, 71, 72, 73, 74);

¹Public Bill Committee on Digital Economy Bill – Information Commissioner's submission <https://ico.org.uk/media/about-the-ico/consultation-responses/2016/1625324/ic-evidence-public-bill-committee-on-digital-economy-bill.pdf>

²Lords Bill Committee on Digital Economy Bill – Information Commissioner's briefing <https://ico.org.uk/about-the-ico/consultations/lords-bill-committee-on-digital-economy-bill/>

- improvements to the data sharing provisions in Part 5 in response to the recommendations of the Lords Delegated Powers and Regulatory Reform Committee;
- regulations about charges payable to the Information Commissioner (new clauses after clause 92).

In addition, she welcomes the cooperation with the Government on providing draft guidance for the regulator on age verification to ensure appropriate regard to privacy including a privacy by design approach.

Part 5: Digital government

4. The Commissioner recognises the potential benefits of justified and proportionate data sharing but it is important that any provisions that increase data sharing inspire confidence in those individuals who will be affected. Her key objective is to improve public trust in the use of personal data and to encourage the public, private and third sectors to make transparency for citizens a priority for all organisations that collect and use personal data. She wants transparency and a progressive information rights regime to work together to build trust.
5. The Commissioner recommended there should be additional safeguards in Part 5 of the Digital Economy Bill and wanted to see references on the face of the Bill to her codes of practice on privacy impact assessments (PIAs) and privacy notices. She is pleased the government has accepted her recommendations. It is important that there are two strong layers of transparency for data sharing to ensure both effective delivery of key information to the public and to enable more active groups to scrutinise and hold public bodies to account for the data sharing.
6. The Commissioner welcomes the government's amendments to require public authorities to have regard to the ICO's codes of practice on privacy impact assessments and privacy notices when sharing data under the powers of Part 5 of the Bill. The amendments will reference the ICO codes in all the relevant clauses of Part 5 relating to the sharing of personal data (clauses 39, 42, 48, 56, 66, 71, 72, 73, 74).
7. The Bill also now makes it clear that the codes of practice established under Part 5 of the Bill should be consistent with the ICO's statutory Data Sharing

Code of Practice in relation to the sharing of personal data. This will help practitioners gain a clearer understanding of the legislative framework and lead to greater harmonisation and consistency between the legal provisions. It will also help put the consideration of the protection of privacy at the centre of any data sharing initiative. She also welcomes government amendments to Part 5 that address concerns expressed by the Lords Delegated Powers and Regulatory Reform Committee. These will strengthen Parliamentary scrutiny and government accountability, as well as narrowing the powers and specifying the objectives where appropriate.

8. The Commissioner recommended that the government undertake further work to develop consistency between the codes that accompany Part 5 of the Bill and align them more closely with her statutory data sharing code of practice. She is encouraged that government officials have continued to work closely with her office on the development of these codes. It is important the codes contain practical advice aimed at practitioners, taking them through the series of steps they need to take to decide on whether to share data and how to do so effectively. This approach should help build confidence in practitioners' ability to share data when justified and to improve standards so that it is done securely and proportionately. She looks forward to a public consultation in due course so that practitioners have an opportunity to comment.
9. The Commissioner supports a broader review of data sharing beyond those planned for fraud and debt, which could provide further assurance to the public, including whether it was achieving necessity and proportionality in practice. This is especially important in the context of sharing of bulk datasets related to the General Register Office provisions. She also believes it is important for Parliament to review all aspects of data sharing, not just the clauses relating to fraud and debt, after an appropriate time. This will allow for objective consideration of whether the data sharing is transparent, necessary and proportionate in practice. When she appeared before the Public Bill Committee she said it was her intention, using the powers in the Data Protection Act 1998, to review and to report back to Parliament two to three years into this data sharing regime, with particular regard to bulk data sharing.
10. She also remains committed to making the case for an additional offence for re-identifying anonymised personal information, as recently added to Australian law. She is pleased to note the Government's commitment in their

recently published Digital Strategy³ to review the data protection offences, and introduce stronger sanctions for deliberate and negligent re-identification of anonymised data. She would be keen for it to be covered in the Government's work on sanctions and penalties for General Data Protection Regulation (GDPR)⁴ implementation.

Part 3: Age verification for access to online pornography

11. The provisions on age verification for access to online pornography have been widely debated during the passage of the Bill through the Commons and the Lords. The Commissioner was clear in her evidence to the Public Bill Committee and her more detailed response to the DCMS consultation⁵, about the importance of a privacy by design approach in implementing any age verification system. She welcomes the cooperation with the Government and the proposed regulator on age verification to ensure that appropriate privacy safeguards are put in place.
12. The Commissioner considers that it is not privacy intrusive for an individual to be able to prove who they are in a secure and reliable way or to prove that they have a particular attribute (for example that they are of a particular age). Any solution used needs to find a balance between verifying the age of individuals and minimising the collection and retention of personal data. It also needs to address in a proportionate way the issue of confirming that it is an adult using a device, or sitting at terminal equipment. It is important that any implemented system must be compliant with the requirements of the Data Protection Act and the Privacy and Electronic Communications Regulations. The Commissioner has provided advice to both the Government and proposed regulator and is happy to continue to do so as the regulatory framework is developed.

Part 6: Statutory direct marketing code

13. The Commissioner welcomes the provision for a direct marketing code of practice which, while not legally binding, would be admissible in evidence and

³ Digital Strategy <https://www.gov.uk/government/news/digital-strategy-to-make-britain-the-best-place-in-the-world-to-start-and-grow-a-digital-business>

⁴ The GDPR replaces at EU level the 1995 directive on data protection [Directive 95/46/EC]. Its provisions enter into force on 25 May 2018.

⁵ ICO response to DCMS consultation on child safety online: age verification for pornography April 2016 <https://ico.org.uk/media/about-the-ico/consultation-responses/2016/1623936/ico-response-to-dcms-consultation-on-child-safety-online-age-verification-for-pornography-20160412.pdf>

would have to be taken into account by the Commissioner, tribunals and courts in relevant cases.

14. The Commissioner continues to receive a significant volume of reports from the public about nuisance marketing calls and texts. In each of the last four years more than 160,000 such concerns were reported to the ICO, and the projected figures for this year are similar. The public needs to be able to trust organisations who handle their data and they need to retain control over their data – both of these things are essential to build confidence and encourage participation in the digital economy. The Commissioner's current direct marketing guidance was published in 2013 to clarify the law and promote good practice in this area, but it has no formal status. Replacing the guidance with a statutory code of practice would give the guidance greater weight, enabling her to provide more certainty on key issues such as time limits and consent to marketing from specific third parties, and make it easier to take enforcement action against organisations who don't follow its provisions.
15. Placing the guidance on a statutory footing will also help to ensure that it sits at the top of a hierarchy of various industry codes, such as those produced by the Direct Marketing Association and the new Fundraising Regulator. It is important to recognise that a direct marketing code will not solve the nuisance of unwanted marketing on its own. However, it would be a useful tool in the Commissioner's continued work to ensure that organisations understand and comply with the marketing rules.

New Clauses after Clause 92 - Fee raising powers

16. The Commissioner welcomes government amendments on regulations about charges payable to the Information Commissioner (new clauses after clause 92). We are aware that the government is working towards a funding model for the ICO based on data controller fees. In May 2018 new laws come into force to better protect people's privacy in the digital age and ensure organisations who handle personal information get it right. That brings significant additional responsibilities for the ICO as the UK's data protection regulator.

Elizabeth Denham
Information Commissioner
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