

## **Information Commissioner's Response to the Law Commission's Protection of Official Data 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). She also deals with complaints under the Re-use of Public Sector Information Regulations 2015 (RPSI) and the INSPIRE Regulations 2009. She 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 she can, and taking appropriate action where the law is broken.

The Information Commissioner welcomes the opportunity to respond to this consultation. The DPA is concerned with the processing of personal data. As such, this response will focus on the sections within Chapter Four, 'Personal Information Disclosure Offences' and in particular, 'Section 55 of the Data Protection Act 1998'.<sup>1</sup>

### **Personal Information Disclosure Offences**

Consultation question 10 asks consultees for a view on whether a full review of personal information disclosure offences is needed.<sup>2</sup> The Commissioner recognises the scope for improvement to personal data disclosure offences and would expect to participate should the Law Commission decide to undertake a full review.

### **Section 55 of the Data Protection Act 1998**

The consultation paper points out that Section 55 of the DPA makes it an offence for a person to knowingly or recklessly, without the consent of the

---

<sup>1</sup> Paragraphs 4.20-4.84

<sup>2</sup> Paragraph 4.59

data controller, obtain, disclose or procure disclosure of personal data to another person. The offence does not apply in certain circumstances such as where the obtaining, disclosing or procuring was justified as being in the public interest or where the person acted with the belief that he had the right in law to do so.

The Information Commissioner has the power to prosecute for offences under Section 55. Since January 2014 the Commissioner has undertaken 33 prosecutions.

The consultation paper examines issues around 'misdescribing' the victim and the maximum sentence. The Law Commission considers both of these as problematic in relation to Section 55. The Commissioner has specific comments to make about both of these issues.

## **Misdescribing the Victim**

The consultation document accurately reflects the Information Commissioner's view that the Section 55 offence is drafted in such a way that the 'victim' is considered to be the data controller rather than the data subject. However, the Information Commissioner disagrees that the offence is in need of reformulation to reframe the data subject as the 'victim'.

Successive Information Commissioners have always been clear that protecting people's privacy is at the heart of data protection law. The Commissioner believes that the current structure of the offence does nothing to take away from this and does not lead to any difficulties in taking prosecutions. The Victim's Code has applied to the Information Commissioner since its revision in 2015. The definition of 'victim' in the Victim's Code and the Information Commissioner's Victims' Right to Review (VRR) Scheme<sup>3</sup> is a person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by a criminal offence. The Commissioner's VRR policy, in respect of the offence at Section 55, makes clear that the victim is likely to be the data controller, who may have suffered some financial or reputational damage as well as the data subject, who may have suffered damage or distress.

Furthermore, the structure of the offence at Section 55 does not affect the data subject's ability to apply for compensation. The Commissioner can ask the sentencing Court to consider awarding compensation to the data subject through a criminal compensation order if they have suffered

---

<sup>3</sup> <https://ico.org.uk/media/about-the-ico/policies-and-procedures/1560152/ico-right-to-review-scheme-for-victims-of-crime.pdf>

harm or loss. In addition, where the data controller has also breached one of the data protection principles<sup>4</sup>, for example by not having appropriate security for the data, the data subject is able to claim compensation for damage and distress through the civil courts.

## **Maximum Sentence**

The Information Commissioner welcomes the consultation document's examination and conclusions about the inadequacy of the current maximum sentence available for the offence in Section 55. It is the Information Commissioner's view that the lack of availability of a custodial sentence is more often than not neither adequate nor proportionate to the extent of criminality involved and does not provide a sufficient deterrent to those committing Section 55 offences.

As the consultation document correctly identifies, Section 77 of the Criminal Justice and Immigration Act 2008 gives the Secretary of State the power to introduce custodial sentences (up to a maximum of one year imprisonment on conviction in the magistrates court or two years imprisonment on conviction in the Crown Court). The Secretary of State has not yet exercised this power.

Since 2008, the compelling case for custodial sentencing powers has only grown stronger. The evidence of incidents where personal information has been unlawfully obtained and misused is rising and the threat is increasing, due in part to the technological advances and proliferation in the collection and use of personal data. Criminals are exploiting the vacuum of a serious deterrent and the risk of harm to individuals can be life threatening.

The number of public and private sector organisations that collect and manage personal data within the UK has increased. The ease of data sharing and disclosure between organisations across the world has also increased. Whilst organisations have a responsibility to protect the data from unlawful access and misuse, the measures available to them are not supported by an effective deterrent.

Most importantly, people need to be able to have trust and confidence that their data will be secure. Given the rapid technological advances, the proliferation of personal data and ease of access to it, the current legal deterrents have failed to keep pace with the widespread criminal activity associated with unauthorised obtaining, disclosure or sale of data.

Successive Information Commissioners along with parliamentary committees and public inquiries (see annex) have pressed for a wider range of sentencing options to be made available to the courts for

---

<sup>4</sup> Data Protection Act 1998, Schedule 1

offences under Section 55. In prosecution proceedings, it is common for the sentencing judge or magistrates to make comment at their surprise that their powers are limited to either a fine or discharge. As financial penalties are linked to means, most penalties are low level and do not appear to always reflect the seriousness of the matter.

In a case of particular concern, on conviction, a fine of £150 was issued to a probation officer who unlawfully disclosed a domestic abuse victim's details, including her new address, to the alleged perpetrator. The perpetrator subsequently visited her address. The victim feared for her safety and relocated, disengaging from the various domestic abuse agencies that were supporting her. The fine was so low because the defendant had been dismissed from her employment as a result of the offence, which is a common feature. The judge was invited to consider awarding compensation to the data subject for the distress, however as the defendant's financial position was poor the judge considered that any award for compensation would be so low that it would add insult to injury.

In another recent case, a former nurse employed by a health board was fined only £650 after accessing the sensitive medical records of over 3000 individuals, including hospital staff, without the consent of the data controller.

In a third example, a former employee of a car leasing company emailed the personal data of customers, relating to road traffic accidents, from his employer's computer system to his personal email address. He then sold the data to a third party as leads for personal injury claims. He received a fine of only £500.

As well as giving judges the option of a penalty appropriate to the severity of the crime, the Information Commissioner believes that a custodial maximum penalty would be a significant deterrent. This is not limited to the custodial sentence itself but being subject to the publicity as a result of arrest and other enduring effects. The offender will have a criminal record on the Police National Computer, potentially affecting future job prospects. Currently Section 55 is not a recordable offence. The wider range of sentences open to the court, such as community orders would also help ensure that these sentencing outcomes are proportionate whilst at the same time providing more of a deterrent effect than a modest fine.

The Information Commissioner also believes a custodial maximum penalty would have a deterrent effect on some of the types of offenders who are of otherwise good character and only become tempted to commit an offence as they do not see the offence as particularly serious. Some offenders also become tempted as the sometimes substantial financial benefits, particularly where large volumes of unlawfully obtained data can

be sold for significant sums of money, seem to outweigh the risk of a minimal fine.

## Review of Section 55

Consultation question 11 asks whether the offence in section 55 of the Data Protection Act 1998 ought to be reviewed to assess the extent to which it provides adequate protection for personal information.<sup>5</sup> The Commissioner supports the need to improve the current situation and there are ready opportunities to take this work forward.

The Government have committed in their Digital Strategy<sup>6</sup> to reviewing the data protection offences. They have noted, 'it is essential that the regulator has effective powers and that sanctions are a deterrent to the misuse of data.' The Government is working on the national implementing measures to give effect to the European Union's General Data Protection Regulation and Law Enforcement Directive by 25 May 2018. We continue to work closely with the Department for Culture, Media and Sport on their work in these areas.

Information Commissioner  
3 May 2017

---

<sup>5</sup> Paragraph 4.85

<sup>6</sup> <https://www.gov.uk/government/publications/uk-digital-strategy/7-data-unlocking-the-power-of-data-in-the-uk-economy-and-improving-public-confidence-in-its-use>

## **Annex – Parliamentary Committees and Public Inquiries Recommending Custodial Sentences for Section 55 Offence**

House of Commons, Culture, Media and Sport Committee, Self-regulation of the press, Seventh Report of Session 2006–07<sup>7</sup>

House of Commons, Culture, Media and Sport Committee, Press standards, privacy and libel, Second Report of Session 2009/10<sup>8</sup>

House of Commons Justice Select Committee - Referral fees and the theft of personal data, Ninth Report of Session 2010-2012<sup>9</sup>

House of Commons Home Affairs Committee , Private Investigators, Fourth Report of Session 2012-2013<sup>10</sup>

Joint Committee on the Draft Communications Data Bill, First Report of Session 2012-13, Draft Communications Data Bill, HL Paper 179, HC 479<sup>11</sup>

Leveson Report, Culture, Practices and Ethics of the Press (November 2012)<sup>12</sup>

---

7

<https://www.publications.parliament.uk/pa/cm200607/cmselect/cmcomeds/375/375.pdf>

8

<https://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomeds/362/362i.pdf>

9

<https://www.publications.parliament.uk/pa/cm201012/cmselect/cmjust/1473/147302.htm>

10

<https://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/100/10002.htm>

<sup>11</sup> <https://www.publications.parliament.uk/pa/jt201213/jtselect/jtdraftcomuni/79/79.pdf>

<sup>12</sup> <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0779/0779.pdf>

House of Commons Culture, Media and Sport Committee, Cyber Security: Protection of Personal Data Online, First Report of Session 2016-2017<sup>13</sup>

House of Commons Public Administration & Constitutional Affairs Committee's report on The 2015 Charity Fundraising Controversy: Lessons for Trustees, the Charity Commission, and regulators, Third Report of Session 2015-2016<sup>14</sup>

---

13

<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmcmds/148/148.pdf>

14

<https://www.publications.parliament.uk/pa/cm201516/cmselect/cmpubadm/431/431.pdf>