



Headlines this month:

- ICO update on regulatory reform
- Consultation on the ICO's approach to data protection concerns
- Access to criminal records, court records and police records
- Recent data breaches
- EU update

Commentary:

■ ICO update on regulatory reform

The ICO has made clear that they continue to believe reform is needed to reflect how personal information is used today. However, delays continue with the next step being for the European Council to agree its position further to agreement by the European Parliament and the European Commission about their position. The ICO remains hopeful that there will be a positive outcome in the first half of 2014.

Discussions are likely to increase when the Greek Presidency of the EU starts in January 2014. The ICO is keen for a swift adoption of data protection changes but is keen to ensure the final reform is future-proof.

The ICO has produced a brief analysis of the Parliament's key points and believes that this would deliver clarity for individuals and organisations. The ICO's analysis is summarised below:

The ICO are supportive of the following developments:

- Consistency in approach.
- Consent and legitimate interests - the ICO is supportive of an individual taking some form of positive action to give consent but recognise the need for alternatives e.g. legitimate interests where processing is low-risk.
- Risk-based approach and proportionality - there is an appetite for the duties placed upon businesses to balance the privacy risk associated with their processing practices.
- One-stop-shop - the ICO sees this as fundamental to reform.

Areas that the ICO feel need further consideration are:

- Personal data and pseudonymisation - there is concern about the introduction of a category of pseudonymous data because it could blur the boundary between personal and non-personal data.
- Transparency - a high degree of transparency towards individuals is supported but the ICO is not convinced that the way to achieve this is through longer and more detailed privacy notices as proposed by LIBE.
- Profiling - the ICO believes LIBE fails to recognise that there are different types of profiling presenting different privacy risks.
- Outcomes and compliance methods - the ICO continues to be concerned about a focus on process rather than outcomes for individuals.
- Standardised information policies - the ICO are positive about advising individuals about how their personal data will be used. However, they are concerned about LIBE's proposed system of icons favouring codes of practice instead.
- International transfers - the ICO believes there needs to be a range of ways for organisations to legitimise their personal data transfers without intervention of the Act.

■ Consultation on the ICO's approach to data protection concerns

The ICO is consulting on how they respond to complaints and engage with businesses in relation to data protection concerns. The consultation is focused primarily on organisations but it welcomes views from the public and other interested parties. Responses are requested no later than 31st January 2014 because changes are likely to be implemented on 1st April 2014.

The ICO is seeking responses in relation how its approach will impact upon how it engages with businesses; whether it is likely to increase or decrease the burden on organisations and, if increased, how this could be kept to a minimum.

The ICO dealt with over 40,000 enquiries and concerns relating to data protection issues last year. It answered nearly 214,000 phone calls from people seeking help. In 2012/2013 only 35% of complaints resulted in an assessment that legislation had been contravened. Currently the ICO often receive queries from individuals who have not already raised a query with the organisation in question.

It is seeking to become more efficient in using the concerns raised to tackle systemic issues rather than looking at cases in isolation. It is keen to focus on those organisation which get things wrong repeatedly and taken action against those committing serious contraventions of legislation. It also wants to support both organisations and individuals and find opportunities to improve information rights practice.

The proposed changes include:

- To ensure that concerns are raised to the attention of the organisation to which the complaint relates prior to being raised with the regulator giving them an opportunity to address the issue.
- To commit to ensuring that the public receive a clear and open response from organisations.
- When a complaint, together with an organisation's response, are provided to the ICO it will be retain a record of it and identify whether there is an opportunity to improve the information rights practice. This may be in the individual case or more generally.
- To improve systems for capturing and analysing information to allow the ICO to establish whether there is a trend or poor practice and the information will then be used to coordinate activity, in some cases, with other regulators and trade bodies.
- Regular reports will be published to show improvements made to information rights practice; enforcement action take; contextual information about the figures published.
- The number of concerns raised about organisations will be published.

■ Access to criminal records, court records and police records

The ICO has issued advice explaining how people can gain access to information held about them by the police and courts through making a subject access request. It makes clear that this is separate to a CRB check.

The advice reiterates the process for making a subject access request and advises that if CCTV footage is required a photo would be required in addition to other forms of ID.

Certain exemptions exist if, for example, providing the information may be likely to influence the 'prevention and detection of crime'.

■ Recent data protection breaches

First Financial

A £175,000 penalty has been issued against pay day loan company First Financial further to the ICO finding them responsible for sending millions of unlawful spam texts.

The ICO received 4,031 complaints relating to messages from numbers belonging to First Financial. The Privacy and Electronic Communications Regulations (PECR) requires organisations to have consent prior to sending marketing messages via text.

The ICO's Director of Operations, Simon Entwistle, stated:

"People are fed up with this menace and they are not willing to be bombarded with nuisance calls and text messages at all times of the day trying to get them to sign up to high interest loans. The fact that this individual tried to distance himself from the unlawful activities of his company shows the kind of individuals we are dealing with here."

"We will continue to target these companies that continue to blight the daily lives of people across the UK. We are also currently speaking with the government to get the legal bar lowered, allowing us to take action at a much earlier stage."

The company's sole director was fined in October 2013 after failing to notify the ICO that First Financial processed financial data.

Some of the texts purported to be from people known to the recipient. The Advertising Standards

Authority (ASA) has also taken separate regulatory action further to receipt of 13 complaints. First Financial were advised to change the content of texts making it clear that they were marketing texts and only sent where consent was obtained. ASA also required the company to cease to imply that payday loans were suitable for spending on a social life.

GP Surgery Manager

A former GP surgery manager was prosecuted by the ICO after accessing medical records unlawfully relating to 1,940 patients. The manager pleaded guilty to offences under Section 55 of the Data Protection Act. The majority of records related to women in their 20s or 30s.

The individual was fined £996 plus costs. The ICO continues to lobby for stronger sentences, including the threat of prison, for Section 55 offences.

London Borough of Islington

London Borough of Islington has agreed to pay compensation totalling £43,000 to 14 residents whose personal details (including mental health problems and sexual orientation) were leaked in data breaches in April 2012. The local authority has already been fined £70,000 by the Information Commissioner's Office.

■ EU update

The below provides an EU update from a Regulatory Strategies' partner, Newgate Public Relations, in Brussels, and provides an insight into the progress of the EU's draft data protection regulation:



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General Data Protection Reform

While the General Data Protection reform was on the discussion table of the EU Justice ministers, MEP Axel Voss (EPP/Germany) gave an insight into the substance of the reform: he replied to the queries of both citizens and undertakings by indicating that the purpose of this legislative initiative was to strike a balance between the public interest of having online privacy rules applied on the one hand and the business interest of not hampering the single market's functioning by overregulation on the other hand.

At the same time, Member States discussed the text in order to find an agreement but the path towards a compromise appears to be tough. The main issue remains the "one-stop-shop-principle." **Although an agreement was reached on this topic in October, Germany's opposition still lies in not wanting the EU law to be any weaker than the domestic one.** As the German Secretary of State, Ole Schröder, declared at the outset of the meeting:

"This proposal involves replacing all of the German consumer rights on data protection, which is around 100 pages, and we therefore have to be careful that our high standards remain."

When asked if he believed whether the regulation should be pushed through more quickly, he replied:

"Harmonisation, yes, but not at any price."

This German point of view was backed by the Czech, Danish and Hungarian delegations.

Moreover, the opposing Member States stated that the bill would end up in an overcomplicated system and they also expressed their wish to see additional powers being accorded to the European Data Protection Board.

The German's standpoint was far from being welcomed by the Parliament's rapporteur and father of the Data Protection's Report, Jan Philipp Albrecht (Greens/Germany), who heavily criticized his own government's pivotal declarations:

"It's just ridiculous. The German government has talked about data protection throughout the last months, Chancellor Merkel said it is a priority and then the German interior Minister is going to Luxembourg and Brussels and doing exactly the opposite."

The UK representative also disagreed with the current text. The UK has issues with the legal basis of the bill and would like to downgrade the Regulation, as actually proposed, into a Directive and thereby allowing Member States a greater flexibility in transposing the rule. The UK Minister nevertheless appeared to be alone in defending this point of view.

The industry however supports Commissioner Reding in her conviction to implement the "one-stop-shop" principle. As the Director General of the European Digital Media Association, Siada El Ramly, pointed out:

"We welcome Reding's reiteration of the importance of the One Stop Shop as a vital pillar of the Regulation and appreciate that the Council members continue their work on the details of the mechanism. We will continue to be a constructive partner to help achieve a positive outcome that will benefit citizens and industry alike."

It is predicted that negotiations will continue until a common approach is found but with delay tactics triggered by Germany, Sweden and Belgium, **the adoption is likely to take place by the end of 2014**, hence after the European Parliament elections.

While negotiations continue, businesses still have a chance to express its position and influence the decision making process in its favour.



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