

REVIEW TIME FOR UK DATA PROTECTION ACT

Eric Howe, the UK Data Protection Registrar, is considering radical changes in the way that the UK law defines companies' duties and data subjects' rights. These changes could include fundamental elements of the data protection legislation like the mass registration system, his enforcement powers, the rights of data subjects, and the exemptions.

The Registrar published the 68 page review document in May, six months after the UK Act fully came into force, and almost four years after it was enacted. The title, "What are Your Views: Monitoring and Assessment of the Data Protection Act 1984" reflects the Registrar's evident interest in the experience of data users and data subjects. Their views will help him frame his recommendations to Parliament and Ministers on amendments to the law. His timetable is to reach conclusions on the review by December.

Ian Walden's report focusses on the comments that the Registrar has received on the Act from business, and his response on the need for change.

Objectives

The Registrar's objectives are:

- to ensure that the rights and the protection given to individuals are properly and thoroughly established;
- to assess the value to be gained from directing effort towards the most sensitive uses of personal data;
- to minimize the complexity and cost of the legislation both for individuals and for data users.

The Data Protection Principles

There is wide support for the principles from individuals and data users. However it is suggested that if the duty to comply with the principles were extended to all data users, whether registered or not, it would allow the registration process to be simplified.

Comments have also been made on the eighth principle, concerning data security. Many data users have asked if the Act could offer more specific guidance on "appropriate security measures," especially against line tapping.

The law could be amended to provide additional safeguards for sensitive personal data relating to the racial origin of the data subject; his political opinions or other beliefs, his physical or mental health, his sexual life; or his criminal convictions. These categories correspond to the list in Article 6 of the Council of Europe Convention. This possibility was covered in the original Act (Section 2 (3)), and its reappearance may indicate that movement in this area can be expected in the near future.

The Registrar comments that the Codes of Practice that are currently being promoted among particular sectors of data users should not be

compulsory and legally enforceable. He believes that it would be impossible to produce "robust and workable" codes that could be "frozen" at any useful level of detail to be made statutory.

The Register and Registration

External comments fall into three major categories:

1. Scope of Registration

Registration has been the principal concern in these early years of the Act. Many organisations strongly argue that in the interest of both data users and good public administration, the system chosen should be the least burdensome and bureaucratic, consistent with the objectives to be achieved. Some of these suggestions have been:

1. "Non-controversial" users should not have to register.
2. Data which is intended to be used only within an organisation should not require registration.
3. Small firms, or those using small data sets, should not have to register.
4. Group Registration should be allowed for a group of companies, and registration should be combined with that for Value Added Tax or company registration.
5. Registration should be confined to specific purposes or users, such as credit reference agencies and public authorities.
6. "Registration is unnecessary, ineffective, bureaucratic and costly."

2. Mechanics of Registration

Comments on methods of registration include:

1. Registration should consist of name, address and purpose only.
2. Purposes do not always correspond to a data user's systems and it can be confusing to data users, data subjects and anyone reading the register.
3. Awareness of the need to register could be increased if hardware and software firms were to supply lists of purchasers to the Registrar and publicize the Act in sales literature or manuals.
4. Registration forms need to be simplified, especially Part B of the DPR 1 form, which is seen by some as too complicated.
5. Partnerships should be permitted simplified registration.

3. The Register

External comments about the Register suggest that its structure and organisation should be altered in order to make it simpler for the data subject to use. Many organisations considered that a sliding scale of fees should be used, based on an organization's size, or whether they hold "sensitive" data.

On the whole, the Registrar seems to favour limiting the number of registrations in order to achieve "more restricted objectives." An increase in the level of detail would be impracticable. However, there would have to be a means of enforcing the Act to include those data users not on the register but under a duty to comply with the principles.

The Registrar put forward two major alternatives to the present system of registration:

a) remove small, non-sensitive data users from the register. This would remove pressure to get such users onto the register, and direct resources towards solving a greater number of individual problems.

b) a system of near-universal registration at a very simple level of detail. In the case of sensitive data, additional information might be required.

Supervision and enforcement

This section concerns the form of penalties for breaching the Act, and the investigative powers of the Registrar.

The major external comment in this area was concerned with the fact that private individuals can be prosecuted for failure to comply with the Act, although government departments cannot. To help with the identification of offenders and possible enforcement action it was suggested that "individual operators and users of computers should be required to sign a declaration stating that they understand their responsibilities under the Act and accept responsibility for the data they process."

The Registrar notes that the present system has yet to be tested, but that better support for the current system would be provided if his own office had express powers of investigation. Currently, he merely has power to prosecute, seek warrants and consider complaints. The Registrar also makes it clear that data subjects should be given the same right of appeal to the data protection tribunal as is currently given to data users.

Rights of data subjects

Most of the suggested changes are for greater rights for data subjects, restrictions on the use of subject access exemptions and the need to reduce costs involved for individuals. Another cause for concern was that under the current law, subjects did not have the right to know from where information about them had been obtained or to whom it had been disclosed.

One comment of general interest to business came from professional advisors, like lawyers and accountants. They fear that information held by

them in the course of their work and originally supplied by their clients could be accessed by unauthorised individuals. In such cases, exemption from subject access should apply to the data rather than the user.

The Registrar's comments are concerned with ensuring that individuals have a real right of access to information held on them. He states that the level of subject access fee (a maximum of £10) can act as a significant deterrent. He also notes the potential problems that exist in disclosing information that might identify a third party individual. Currently, the Act does not provide any specific protection to a third party individual, leaving it up to the data user to decide what information is not released. The Registrar calls for future debate in this area.

Exemptions from Registration

External comments on exemptions include:

1. the accounts and payroll exemption should be widened to allow the exemption to remain even if the data is also used for mailing.
2. the most commonly expected cause of failing to satisfy the payroll and mailing list exemptions is disclosure to maintenance companies without data subjects' consent. This should become an exemption.
3. processing personal data with the data subject's consent should be exempt.
4. name, job title and addresses of employees should be exempt.

On the issue of existing exemptions to the Act, the Registrar states that: "The exemptions for personal data held only for payroll, accounts and mailing lists have caused considerable confusion. If registration can be generally simplified or the requirement to register relieved from some data users, particularly small users with non-sensitive applications, then it may be appropriate to remove these exemptions altogether."

The Registrar does agree that an exemption for information held with the full and informed consent of the individual would be "worth exploring", though perhaps with an arrangement for providing data subjects with periodic copies of the information held.

There are two exclusions from the legislation occurring in the definitions of "intentions" and "text processing" which have proved to be problems to both the Registrar and data users. It has not proved possible to find any meaningful rule to distinguish "opinions" (which are covered by the Act) from "intentions" which are not. In the second case, a very broad definition of the phrase "performed only for the purpose of preparing the text of documents" might conceivably be argued to take all data outside the Act. The Registrar doubts whether these exclusions as they are presently defined can be useful and wonders if alternative solutions can be found.

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