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Business Information Industry Association

DATA SHARING - THE DAWN OF A NEW ERA WHERE THE CONSUMER'S IN CHARGE?

Data sharing is a 'hot topic' at the moment. On 11 May 2011, the Information Commissioner issued the UK's first statutory code of practice 'designed to help businesses and public sector bodies share people's personal information appropriately' (ICO Press Release 11 May 2011).

And at the beginning of November last year the UK Government announced a 'ground-breaking' partnership with 26 organisations - including Lloyds, RBS and Callcredit - to deliver a new voluntary scheme, 'midata' which over time has the objective of giving consumers increased access to their personal data in a portable, electronic format. The Government (BIS) claim "Individuals will ... be able to use this data to gain insights into their own behaviour, make more informed choices about products and services, and manage their lives more efficiently."

And most recently the draft EU Data Protection regulations contain the new concept of a consumer's right to 'data portability', putting them in charge of their data.

In legal reality of course, the Data Protection Act is the umbrella under which last year's UK statutory code has been drafted and for organisations already operating within the letter and spirit of the legislation perhaps the code merely gives reassurance that they are doing things transparently and in a way that ensures public confidence.

So is this the end of the story? So long as the organisation is transparent and the uses of my information are reasonable and proportionate, including ensuring that any 'consent' is indeed consent in the true meaning of the word - freely given, specific and informed - does that mean that as an individual I can have total control of my information?

To me good privacy provides a framework of protection to give me the confidence to make informed decisions and lifestyle choices as to how I use and to whom I disclose my information for my benefit as a consumer; and ensures transparency over the legitimate uses and disclosures of my personal information in respect of my rights, obligations and protection as a citizen.

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So now both the Act and the clear guidance in the statutory code provide me as an individual with both freedom of choice and confidence. In other words we already have legislation which controls how my data can be shared, with whom and for what purpose. The code adds even more clarity to this and is written for the 'real world'.

But there is an interesting conundrum in UK law over data ownership. Indeed the legal concept of data ownership would justify a dissertation in its own right and has the potential to be as emotive as the current privacy law debate. Suffice to say that the Act gives me protection over how my personal information is used, and access to it, but conveys no ownership rights per se.

An interesting case study which shows the anomalies of this situation is something we are all very familiar with - getting a loan or any form of credit, even a bank overdraft. It touches the lives of virtually all UK citizens - or 'data subjects'.

Many countries operating under the Data Protection Directive across Europe do have specific legislation covering shared credit data as does the US and emerging markets such as India. Australia is also in the process of changing its credit reporting laws.

And having recently completed a credit bureau licence application for a client in the Caribbean, I can vouch for the increasing legislative hurdles involved.

In a former life lobbying in Brussels, I remember holding the UK out as a success story for self-regulation, underpinning a market accounting for over 30% EU household borrowings.

But now when lobbying foreign regulators to adopt a 'light touch' approach, they are surprised to hear that we have no credit data sharing legislation other than the Data Protection Act and a requirement for a Consumer Credit Act licence.

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Personally I feel that the credit data sharing framework in the UK has served the consumer, the industry and the macro economy well and has been a good fit alongside the UK's particular political, cultural and social characteristics. I would certainly not lay any of our banking travails at the door of credit bureaux or data sharing governance.

In the UK, credit data sharing is governed by the credit industry itself through a non-statutory code, the 'Principles of Reciprocity' overseen by the industry's Steering Committee on Reciprocity' (SCOR).

Effectively all lenders sign up contractually to these Principles through their contracts with the credit bureaux (or credit reference agencies 'CRAs'). At a very simple level the only purpose for which data may be shared is embedded in the Governing Principle, namely 'for the prevention of over-commitment, bad debt, fraud and money laundering, and to support debt recovery and debtor tracing, with the aim of promoting responsible lending'.

So when anyone applies for a loan or other credit facility, in the 'small print' (although in fairness it is more prominent than once was the case) the applicant is told how and for what purpose their data will be processed, including the fact that a credit search will be carried out and their loan repayment history available to lenders. Fundamentally this clause needs to satisfy both data protection fair processing requirements and the limited purposes of Governing Principle.

This may seem consistent in that a disproportionate fair obtaining clause expecting me to agree to uses of my data beyond that which are reasonable in the circumstances would fall foul of both the Act and the Principles.

So if things work, is there anything to concern us?

Where there is an anomaly is that as an individual I am unable to direct the information held by a credit bureau to any new purpose for which I would like my data to be used.

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I do not 'own' these data and the Principles dictate how a credit bureau and lenders can use this data.

But there is a way I can do this which is rather surprising.

Staying in the world of credit, today the lead-generator and broker markets, in particular through internet price comparison sites, are the typical route into finance for many consumers.

But because the broker is not a lender, the broker cannot use the shared credit data held by the credit bureau as the broker is not assessing creditworthiness or risk, but where best to place the loan - the broking decision. The credit bureau is not permitted to allow brokers to see this data as it would contravene the Principles to which they too are signatories.

However the broker can use the data once they have placed a loan with a lender when they are acting as its agent and applying the lender's underwriting criteria - the lending decision.

And quite rightly because as the name suggests, data sharing is based on 'reciprocity' and to see data when making a decision requires a lender to contribute data into the data-sharing pool. Brokers have no loan data to contribute - they are not lenders in their own right - and therefore are not part of the data sharing community.

It is therefore perhaps ironic that what could enable me to use my credit report - my credit history held by the credit bureau - is legislation aimed at protecting my personal information.

Under DPA s7 I have a right to be given a copy of my information - including my credit report - which has the potential to be turned into a contemporaneous transaction between me, the CRA and the party to whom I wish my information to be provided.

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So it would appear that an organisation precluded from a particular use of data under one set of non-statutory rules (to which the individual concerned is not a party), however beneficial to that individual, may have to resort to using section 7 to legitimise the processing of that data, even when the individual requested this use.

The fact that section 7 was never intended for this appears to be by the by so long as the enforced subject access issues of section 56 are avoided, as clearly they would be if as a consumer I am requesting the data and the circumstances of access were transparent.

On this basis in the broker example they could get my credit report for the purpose of finding the best deal if that's what I wanted - way beyond what the Principles allow with that same data.

To an outsider it must seem strange that I cannot go to a party holding my information and instruct them to use it in a way that I request because it conflicts with another set of rules concerning my personal data. And to then have to resort to invoking my subject access rights to get what I want seems even more bizarre.

So let's watch out for how things develop in this great revolution of 'data portability'. It almost amounts to turning the tables on credit bureaus - it could now be the consumer who instructs the bureau with whom to share their data - perhaps we'll see the dawn of consumer credit bureaus serving the consumer rather than the lender! And that will have some interesting commercial challenges.....

Mike Bradford is founder and director of Regulatory Strategies Ltd and BIIA;s expert advisor on Privacy and Regulatory Affairs.

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