



### Headlines this month:

- Handling data protection complaints
- Article 29 Data Protection Working Party
- SMEs compliance motivations
- Political parties warned to comply with marketing rules
- Recent data breaches
- EU update

### Commentary:

#### ■ Handling data protection complaints

The Information Commissioner's Office has issued new complaints guidance in relation to handling data protection complaints. The guidance places heavy emphasis on organisations resolving complaints themselves. The ICO is looking to reduce its caseload but individuals can refer complaints to them if they are dissatisfied with an organisations response. It stresses that its focus will be on complaints where it thinks it will have the most bearing on information rights or to address a systemic concern.

The guidance clearly lays out the ICO's expectations of organisations:

*"If a member of the public is concerned about your information rights practices, we believe that you, as the organisation responsible, should deal with it.*

*"We expect you to respond to any information rights concerns you receive, clarifying how you have processed the individual's personal information that case and explaining how you will put right anything that's gone wrong."*

As a rule, the ICO will not investigate information rights concerns unless an individual has first raised the issue with the organisation concerned.

Factors taken into consideration to help the ICO assess whether to take action against an organisation include:

- The severity of the potential data protection breach - the nature of the data, the number of people affected and the effect on those individuals
- How an organisation has deal with the complaint - whether the organisation has engaged with the complainant and whether attempts have been made to rectify the situation
- The context - consideration will be given to any other information held by the ICO, the organisation or its sector alongside its own regulatory priorities

## ■ Article 29 Data Protection Working party

A press release issued further to an April meeting of the Article 29 Data Protection Working Party gave opinion on Safe Harbor, draft EU regulation, and legitimate interest. The Article 29 Data Protection Working party is made up of representatives from each supervisory authority of each member state.

### Safe Harbor

The Working Group recognised the need to restore trust in EU-US data transfers by improving the safeguards provided by Safe Harbor. It feels that discussions between the EU Commission and US authorities is needed to improve protection for EU citizens and that, if improvements are not made, the Safe Harbor agreement should be suspended.

### One-stop shop

In response to the proposed EU Regulations introduction of a one-stop shop for organisations in handling data protection-relating issues, the Working Party has suggested a possible compromise. The Working Party aims to focus on the core elements of a one-stop shop to meet the needs of both businesses and citizens.

### Legitimate interest

The Working Party opinion is seeking to specify conditions that a data controller must satisfy when relying on legitimate interests while avoiding over-reliance on other legal grounds such as consent. The Working Party recommends inserting a recital into the draft EU data protection regulation to specify the criteria the controller should take into account when making an assessment through a 'balancing test'.

## ■ SMEs compliance motivations

A survey conducted by PDP (Privacy and Data Protection) showed why smaller organisations are concerned about data protection.

SMEs listed the top reasons why they complied with data protection law and 60% stated that it was because of concerns about receiving fines. A similar number stated that it was to avoid receiving adverse publicity. 80% said that they wanted to make public that they took compliance seriously.

## ■ Political parties warned to comply with marketing rules

The main UK political parties have been warned to comply with marketing rules and the need to follow data protection ahead of the European and local elections on 22nd May 2014. The Information Commissioner has written a letter following concerns about use of marketing surveys to gain political support.

While genuine research can be undertaken to help form party positioning and formulate policies, communications intended to canvass support but positioned as research are covered by the Privacy and Electronic Communications Regulations.

The Information Commissioner stated:

*"This is about the political parties demonstrating best practice and being open and upfront with voters about their marketing activities, explaining to people in a transparent way how their personal details will be used."*

*The rules apply to political parties, just as they do businesses and charities. In communicating with voters, the parties need to be clear about what their intentions are and why they are asking people for their information. We don't need election campaigns featuring nuisance calls, spam texts and canvassing under the guise of research."*

The ICO has produced guidance for campaign groups:

- Only those people who have consented to being contacted should be sent marketing emails, texts or automated calls
- The organisation should identify themselves and provide an easy way to opt-out of future direct marketing
- It should be clear whether market research is being carried out or political campaigning
- Care should be taken when using 'viral marketing' encouraging individuals to contact friends and family on an organisation's behalf

## ■ Recent data protection breaches

### ICU Investigations Ltd

A hearing at Isleworth Crown Court resulted in a private investigator running a company to pay a total of £20,000 in fines and prosecution costs plus a confiscation order for over £69,000 was issued. The company tricked organisations into revealing personal details about customers. The company was found guilty as a second defendant.

The ICO's Head of Enforcement stated:

*"This fine and confiscation order is not only a justified punishment ... but also a powerful deterrent to anyone thinking they can profit from illegally blagging personal data.*

*"People have the right to have their personal data kept securely. The Information Commissioner's Office will do everything in its power to bring unscrupulous private investigators, such as ICU Investigations Ltd, to justice, including pursuing confiscation where appropriate to remove the benefit made by offenders from their offering."*

Information was obtained by ICU Investigations on behalf of clients mainly for debt recovery purposes.

### Wokingham Borough Council

Wokingham Borough Council breached the Data Protection Act when sensitive social services records were lost relating to the cars of a young child. A family member had made a subject access request for information to the council and the response included details of their child's involvement with the social services department include details of neglect and abuse.

The information was lost after a delivery driver left the documents outside the requester's home. The driver was unaware of the sensitivity of the information and a suitable delivery time had not been arranged with the requester.

### Wirral Borough Council

Social services records containing sensitive personal information were sent to the wrong address by Wirral Borough Council which has been found in breach of the Data Protection Act. The information included details relating to two families and included details of a criminal offence committed by one individual.

No data protection training was in place for staff and there were inadequate checks to make sure records were being sent to the correct address.

The council has now made data protection training mandatory.

### Amber Windows

Amber Windows, a home improvement company, was issued with a £50,000 fine after making unsolicited marketing calls to people who had registered with the Telephone Preference Service (TPS). The ICO has also issued an Enforcement Notice ordering Amber Windows not to call those who have not consented for them to call or have registered with the TPS for the required to 28 days.

The ICO Director of Operations reinforced the ICO's ongoing approach to dealing with nuisance calls:

*"This fine shows companies running marketing campaigns cannot plague the lives of people who have expressly asked not to receive unsolicited calls. We wrote repeatedly to Amber Windows asking them to stop, they ignored us. Now they are facing a £50,000 penalty and a legally enforceable order to cease their unlawful practices."*

*"We will continue to target these companies that bombard households across the UK with nuisance calls and texts. We are also currently speaking with the government to get the legal bar lowered, allowing us to take action at a much earlier stage."*

## ■ 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:

This month has been extremely intense not only in the sphere of the data protection reform itself but also on the judicial side which had a significant impact on the data protection landscape.

### Data Protection Reform

After the vote on the data protection reform in the European Parliament last month, the Council of Ministers is now in charge of continuing the negotiations.

The previous Council discussions focused primarily on the territorial scope of the proposed Regulation, and the rules surrounding international transfers of data to third parties. The Ministers confirmed their support of the proposed territorial scope provisions, which aim to create a "level playing field" as to data privacy standards for all companies, regardless of their geographical establishment, by ensuring that non-European companies doing business within the Single Market would adhere to the same strict data privacy standards as European companies.

The next meeting of Justice Ministers on the data protection reform will take place in June so there is still room for manoeuvre for businesses willing to express their position and made their voice heard.

The process is not likely to go into the next stage of the so called "trialogue" negotiations until the moment the Council of Ministers has reached a common position on the legislative text. So far, the Council of Ministers has resisted moving to a quick agreement due to the underlying conflicting points of view between the Member States. The Council may appear to be taking a more pragmatic approach and limit itself to promoting the EU Digital Agenda and continued growth in the digital marketplace. It therefore has been voiced that the Council will refer to the conclusions of the European Summit to support its position.



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## Independence of Data Protection Authority in Hungary

In the meantime, the Court of Justice issued a ruling on the termination of the Hungarian Data Protection Commissioner's mandate as it found that the Hungarian government had acted in a way that infringes the independence of the national Data Protection Authority in breach of EU law. The Commission, which had already intervened three times with infringement cases against Member States to stop this kind of incursions, has brought this case to the Court in April 2012 on the basis of the still existing Data Protection Directive and was glad with the Court's decision:

*"The Court's judgment confirms the Commission's legal analysis: Hungary's decision to cut short the Data Protection Commissioner's term was against EU law. The independence of national data protection authorities is the very cornerstone of guaranteeing effective data protection rights for our citizens"; said Viviane Reding, the EU Commissioner for Justice.*

In terms of the way forward, it is now up to Hungary to inform the Commission of the steps it plans to take in order to remedy this situation.

## Data Retention Directive

This month the Court has also pronounced itself on an issue closely related to data protection, namely the Data Retention Directive, which was invalidated on 8 April by the ECJ's decision. This Directive contained the rules for EU countries to store citizens' communications data for 6 to 24 months as well as the possibility for police and security agencies to request access to details such as IP addresses and the times of every mail, phone call and text message sent or received. The EU's Supreme Court found these rules to be conflicting with the Union's legislation.

Although the Commission had released a report back in 2011 stating that data retention is useful in criminal investigations, it already pointed out that the text would be susceptible to heavy criticism due to the bad balance it struck between security and respect of the privacy of EU citizens.

As Cecilia Malmström, the Home Affairs Commissioner, said after the judgment:

*"It brings clarity and confirms the critical conclusions in terms of proportionality of the Commission's evaluation report of 2011 on the implementation of the data retention directive. The European Commission will take its work forward in light of the progress made in relation to the revision of the e-Privacy Directive and taking into account the negotiations on the data protection framework".*

A more critical stance towards the European Council was taken by Hannes Swoboda, the leader of the Socialist group in the European Parliament. He said that with this ruling, the ECJ had done more for citizens' privacy than the European Council, which, according to him, had consistently blocked efficient data-protection legislation at European level. He concluded by stating that mass collection of data, be it from governments, service providers or companies, cannot be accepted and police access to citizens' data must be targeted and authorised by a judge.

As we expect the Commission to take a fresh further look at this issue and take its work forward on the Data Retention Directive in light of this, this would represent an extremely timely opportunity for businesses to step in the debate at an early stage with the view to shaping and influencing it.



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