

Data protection reform proposals

We expect to see updates to data protection legislation following the Queen's Speech in May, which included a Data Reform Bill, which will affect SGBs. This is likely to be in the form of the Data Protection and Digital Information Bill which is currently progressing through Parliament.

The draft Bill would amend the existing legislation, the UK GDPR and Data Protection Act 2018, with the intention being to make data protection law clearer and easier to follow. It is hoped that by effecting these changes the administrative burden on SGBs will be reduced.

With this in mind, the draft Bill would make it optional, as opposed to a requirement, to consult the ICO where an Article 35 (UK GDPR) assessment deems the processing high risk in the absence of measures taken by the controller to mitigate the risk. Also proposed in the draft is changing 'data protection impact assessment' to 'assessment of high risk processing' along with amending the current Article 35 requirements.

The draft Bill also seeks to replace the role of 'Data Protection Officer' with 'senior responsible individual'. The senior responsible individual would require to be appointed where the controller is a public body or the processing is likely to result in high risk to individuals and it would be someone from the SGB's senior management.

The proposed changes will also affect record-keeping. Controllers and processors will be required to keep 'appropriate' records, with the criteria for determining 'appropriate' detailed in new additional provisions to the existing DPA 2018 and UK GDPR.

The law around data subject requests also looks likely to change if the proposed amendments to the DPA 2018 and UK GDPR are implemented. The new Bill would amend the threshold for charging a reasonable fee or refusing a request from 'manifestly unfounded or excessive' to 'vexatious or excessive'. The new threshold would apply to all requests under Articles 15 to 22 and 34 of the UK GDPR, therefore including SARs (Article 15) and requests for erasure (Article 17).

The intention behind this is to enable SGBs, as controllers, to refuse or charge a reasonable fee in relation to a broader category of requests than the current legislation allows.

This could prove an important change in respect of allocation of resources but it should be noted also that the burden of proof will lie with the SGB, as controller, in respect of evidencing that a request is indeed vexatious or excessive, particularly if questions are raised by the data subject or the ICO.

In relation to response times for answering requests by data subjects, the Bill would also codify some of the ICO's guidance. The Bill would insert a new provision into the UK GDPR to make law that where the SGB, as controller, cannot reasonably proceed without clarification from the requester on the information requested, the response time may be paused. It would also insert a new Article 12B into the UK GDPR which clarifies the different time periods applicable to responding to requests.

Further, in respect of responding to requests, the Bill would introduce a new exemption into the DPA 2018. The proposed section 45A of the DPA 2018 would explicitly exempt from disclosure all communications between a professional legal advisor and their clients. Authorities would also be able to issue a 'neither confirm nor deny' response in relation to such requests. This could be applied where revealing that the exemption was being relied upon would undermine a claim where confidentiality of communications could be maintained in legal proceedings, or would conflict with a duty of confidentiality owed by a professional legal adviser to their client.

Ultimately, the Government intends for the Bill to make data protection legislation clearer, easier to follow and more efficient and hopes that as a result the reforms will generate more than £1 billion in business savings over a ten year period