

## **National Developments in Information Governance - Briefing**

### **SUMMARY**

- 1.1 This report provides Members with a briefing on the key developments nationally that will have a future impact on the Council's information governance framework.

### **RECOMMENDATION**

- 2.1 To note the report.

### **REASONS FOR RECOMMENDATION**

- 3.1 The Audit and Accounts Committee is responsible for reviewing the council's governance arrangements.

### **SUPPORTING INFORMATION**

#### **Independent Commission on Freedom of Information**

- 4.1 The Independent Commission on Freedom of Information was established on 17 July 2015 to review the Freedom of Information Act 2000. It was set up to consider:
- whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection
  - whether the operation of the Act adequately recognises the need for a 'safe space' for policy development and implementation and frank advice
  - the balance between the need to maintain public access to information, the burden of the Act on public authorities and whether change is needed to moderate that while maintaining public access to information

The Commission's final report was published on 1 March 2016.

- 4.2 The Commission's report noted that Freedom of Information (FoI) had helped to "change the culture of the public sector" and the minister confirmed that there would be no wholesale changes to the Freedom of Information Act, including no legislation to increase ministers' powers to veto the release of information. The Commission said that FoI had "enhanced openness and transparency" and concluded that "there is no evidence that the act needs to be radically altered, or that the right of access to information needs to be restricted". The Commission did conclude that there were some areas where it had been persuaded that the right of access should be increased, whilst there were parts of the FoIA which were unclear. It made a number of recommendations intended to improve "clarity and certainty". These are shown in Appendix 2.

### **General Data Protection Regulation**

- 4.3 The European Commission put forward its EU Data Protection Reform in January 2012 to "make Europe fit for the digital age". On 15 December 2015, the European Parliament, the Council and the Commission reached agreement on the new data protection rules (the General Data Protection Regulation (GDPR)), establishing a "modern and harmonised data protection framework" across the EU. The Commission has stated that "once the Regulation and the Directive receive formal adoption from the European Parliament and Council, the official texts will be published in the Official Journal of the European Union in all official languages. The new rules will become applicable two years thereafter".

- 4.4 The key issues are summarised below:-

#### Higher fines:

Fines up to 4% of a company's worldwide turnover or €20,000,000 (whichever is higher) can be imposed following a breach of the GDPR. The maximum the Information Commissioner, the regulatory body responsible for data protection law in the UK, can currently impose is £500,000.

#### Mandatory notification:

It will be mandatory to report all breaches of data protection to the Information Commissioner without undue delay and within 72 hours of becoming aware of the breach, unless the breach is unlikely to result in a risk for the rights and freedoms of individuals. Currently, this procedure is voluntary. It will also be mandatory to report breaches likely to result in a high risk to the rights and freedoms of individuals to the data subjects concerned.

#### Sensitive personal data

Stricter rules apply to processing of sensitive personal data such as medical information. What constitutes sensitive personal data has also been widened and will now include genetic and biometric data (i.e. information which can identify who someone is).

## Consent

Obtaining consent will be harder. Silence or inactivity will not constitute consent. Consent must be freely given, specific, informed and unambiguous, provided by clear affirmative statement or action and which is able to be easily withdrawn. Businesses should not acquire consent by forcing a user to consent to one form of processing which is not necessary to the service the user is looking to receive. Parents will be required to provide their consent to the processing of children's personal data where those children are under a particular age (varying between 13 to 16 years old).

## Additional rights for data subjects

Individuals will be able to transfer their personal data from one electronic processing system to and into another, without being prevented from doing so by the data controller. In addition, the data must be provided by the controller in a structured and commonly used electronic format. There will also be a wider right to be forgotten than currently exists i.e. Individuals can require the erasure of their personal data without undue delay by the data controller in certain situations.

## Mandatory Data Protection Officers

Data controllers and processors whose core activities consist of processing sensitive personal data and/or regularly and systematically monitoring data subjects on a large scale (including monitoring consumer behaviour) and public authorities (other than courts acting in a judicial capacity) must appoint a data protection officer. A data protection officer's role will be to deal with data protection issues for the organisation.

## Data Processors

The DPA currently only regulates data controllers (except if a data processor was to engage in criminal activity). The GDPR seeks to impose certain direct legal obligations on data processors as well as data controllers too. For example, data processors will be required to notify data controllers where there has been a breach and to obtain consent from a data controller before using any sub-processors. More detailed data controller to data processor contracts will be required.

## **Government consultation into the sharing and use of data in public sector organisations**

4.5 The Cabinet Office has just launched a consultation into the sharing and use of data in public sector organisations, designed to examine how government can share data to:

- improve outcomes for the public “by ensuring public authorities have the data they need to deliver the right service to the right citizen at the right time, for example around running the Troubled Families programme”;
- support the administering of fuel poverty payments;

- enable access to civil registration data, for example births, deaths and marriages – “this prevents authorities sending letters to people who are deceased”;
- reduce the billions of pounds lost and cost to the taxpayer in preventing, detecting and dealing with fraud against the public sector;
- help citizens manage their debt more effectively and reduce the estimated £24.1 billion of overdue debt owed to government;
- enable the Office for National Statistics to access detailed administrative data from across government and businesses "to provide more accurate, frequent and timely statistics and to update how the census is managed, rather than using surveys"; and
- support accredited researchers to access and link data to carry out research for public benefit.

4.6 The Cabinet Office has stated that the consultation would seek to “improve data security across government whilst making citizens’ lives easier”. A range of data privacy and security measures will apply under the proposals. The Cabinet Office said its plans "are not about selling public or personal data, collecting new data from citizens or weakening the Data Protection Act".

4.7 Data sharing arrangements will be governed by two codes of practice that are to be created and laid before parliament. The Cabinet Office has said that public bodies that share or use data in a way that does not comply with the codes could be prevented from disclosing or receiving data under the new data sharing powers.

**OTHER OPTIONS CONSIDERED**

5.1 N/A

**This report has been approved by the following officers:**

<b>Legal officer</b>	N/A
<b>Financial officer</b>	N/A
<b>Human Resources officer</b>	N/A
<b>Estates/Property officer</b>	N/A
<b>Service Director(s)</b>	N/A
<b>Other(s)</b>	N/A

<b>For more information contact:</b>	Richard Boneham, Head of Governance and Assurance, 01332 643280 richard.boneham@derby.gov.uk
<b>Background papers:</b>	None
<b>List of appendices:</b>	Appendix 1 – Implications Appendix 2 – Independent Commission on FoI Report - Summary of recommendations

<b>IMPLICATIONS</b>
---------------------

**Financial and Value for Money**

1.1 None directly arising.

**Legal**

2.1 None directly arising

**Personnel**

3.1 None directly arising

**IT**

4.1 None directly arising

**Equalities Impact**

5.1 None directly arising

**Health and Safety**

6.1 None directly arising

**Environmental Sustainability**

7.1 None directly arising

**Property and Asset Management**

8.1 None directly arising

**Risk Management**

9.1 Information Governance risks are monitored through the strategic risk register.

**Corporate objectives and priorities for change**

10.1 The functions of the Committee have been established to support delivery of corporate objectives by enhancing scrutiny of various aspects of the Council's controls and governance arrangements.

## Summary of recommendations

**Recommendation 1:** That the government legislates to amend section 10(3) to abolish the public interest test extension to the time limit, and replace it instead with a time limit extension for requests where the public authority reasonably believes that it will be impracticable to respond to the request on time because of the complexity or volume of the requested information, or the need to consult third parties who may be affected by the release of the requested information. This time limit extension will be limited to an additional 20 working days only.

**Recommendation 2:** That the government legislates to impose a statutory time limit for internal reviews of 20 working days.

**Recommendation 3:** That the government legislates to make the offence at section 77 of the Act triable either-way.

**Recommendation 4:** That the government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish statistics on their compliance under the Act. The publication of these statistics should be co-ordinated by a central body, such as a department or the IC.

**Recommendation 5:** That the government legislates to impose a requirement on all public authorities who are subject to the Act and employ 100 or more full time equivalent employees to publish all requests and responses where they provide information to a requestor. This should be done as soon as the information is given out wherever practicable.

**Recommendation 6:** Public bodies should be required to publish in their annual statement of accounts a breakdown of the benefits in kind and expenses of senior employees by reference to clear categories.

**Recommendation 7:** The government should give the IC responsibility for monitoring and ensuring public authorities' compliance with their proactive publication obligations.

**Recommendation 8:** The government should legislate to replace section 35(1)(a) with an exemption which will protect information which would disclose internal communications that relate to government policy.

**Recommendation 9:** The government should legislate to expand section 35(1)(b) so that, as well as protecting inter-ministerial communications, it protects any information that relates to collective Cabinet decision-making, and repeal section 36(2)(a).

**Recommendation 10:** The government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35(1)(a), the

public interest in maintaining the exemption is not lessened merely because a decision has been taken in the matter.

**Recommendation 11:** The government should legislate to amend section 35 to make clear that, in making a public interest determination under section 35, regard shall be had to the particular public interest in the maintenance of the convention of the collective responsibility of Ministers of the Crown, and the need for the free and frank exchange of views or advice for the purposes of deliberation.

**Recommendation 12:** The government should legislate to amend section 36 to remove the requirement for the reasonable opinion of a qualified person.

**Recommendation 13:** The government should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act.

**Recommendation 14:** The government should legislate to make clear that the power to veto is to be exercised where the accountable person takes a different view of the public interest in disclosure. This should include the ability of the accountable person to form their own opinions as to all the facts and circumstances of the case, including the nature and extent of any potential benefits, damage and risks arising out of the communication of the information, and of the requirements of the public interest.

**Recommendation 15:** The government should legislate so that the executive veto is available only to overturn a decision of the IC where the accountable person takes a different view of the public interest in disclosure. Where a veto is exercised, appeal rights would fall away and a challenge to the exercise of the veto would be by way of judicial review to the High Court. The government should consider whether the amended veto should make clear that the fact that the government could choose to appeal instead of issuing a veto will not be a relevant factor in determining the lawfulness of an exercise of the veto. Until legislation can be enacted, the government should only exercise the veto to overturn a decision of the IC.

**Recommendation 16:** The government should legislate to allow the veto to also be exercised even where the IC upholds a decision of a public authority. This would mean that the right of appeal would fall away and challenge would be instead by way of judicial review.

**Recommendation 17:** That the government legislates to remove the right of appeal to the First-tier Tribunal against decisions of the IC made in respect of the Act. Where someone remained dissatisfied with the IC's decision, an appeal would still lie to the Upper Tribunal. The Upper Tribunal appeal is not intended to replicate the full-merits appeal that currently exists before the IC and First-tier Tribunal, but is limited to a point of law.

**Recommendation 18:** That the government legislates to clarify section 11(1)(a) and (c) of the Act so that it is clear that requestors can request information, or a digest or summary of information, be provided in a hard copy printed form, an electronic form, or orally. Where a requestor specifies a specific electronic document format, that request should be granted if the public authority already holds the information in that

format, or if it can readily convert it into that format. Where the information requested is a dataset, the requirements at section 11(1A) will apply. The legislation should make clear that the obligations on public authorities to provide information in a particular format extend no further than this.

**Recommendation 19:** That the government reviews section 45 of the Act to ensure that the range of issues on which guidance can be offered to public authorities under the Code is adequate. The government should also review and update the Code to take account of the ten years of operation of the Act's information access scheme.

**Recommendation 20:** That the government provides guidance, in a revised Code of Practice issued under section 45, encouraging public authorities to use section 14(1) in appropriate cases.

**Recommendation 21:** That the government reviews whether the amount of funding provided to the IC for delivering his functions under the Act is adequate, taking into account the recommendations in this report and the wider circumstances.