



Information Commissioner's Office

Response from the Information Commissioner's Office to the Access to Justice Review Northern Ireland ('the Report').

Introduction

The Information Commissioner ('the Commissioner') has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 ('DPA') and the Freedom of Information Act 2000 (FOIA). The Information Commissioner's Office ('ICO') is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Commissioner's response to this Access to Justice Review ('the consultation report') is based on his experience of advising upon and investigating complaints made under the legislation his office regulates.

The Commissioner welcomes the opportunity to input into this consultation report. Many of its proposals are outside the scope of the work carried out by the Commissioner. For the purposes of this response the Commissioner is focussing on those general themes running throughout the consultation report relevant to information sharing and information access; namely advice and assistance to help facilitate early resolution of issues and the promotion of Alternative Dispute Resolution ('ADR') mechanisms. He has therefore provided a general response rather highlighting specific issues.

Advice and Guidance – Access to information and transparency

The consultation report acknowledges that at an early stage advice and assistance can help facilitate negotiation and other possible resolution of issues. The Commissioner has noted one of the central considerations of the consultation report which states:

“However, in the administrative law field we lay emphasis on the importance of considering other forms of resolution before cases reach a court for judicial review, including, where appropriate, the ombudsman and complaints mechanisms. A number of those we consulted referred to a ‘whole systems’ approach on the part of public authorities:-encouraging quality decision-making processes; seeking early resolution of disputes; and learning the lessons of complaints and disputes to improve decision making and service delivery.”¹

Specifically the consultation report contains a recommendation (No 57) which states:

“We believe that the Department of Justice should be a member of the DSD led Government Advice and Information group. They should prepare guidance on the availability of sources of generalist and specialist advice for use by advice organisations and solicitors in considering whether to refer or signpost clients to other providers appropriate to their needs.”

The Commissioner would draw the consultation report’s attention to the existence of the recently launched document ‘Alternatives to Court in Northern Ireland’².authored by the NI Ombudsman, the Law Centre (NI) and Queen’s University Belfast and aimed at members of the public. It highlights other ways of dealing with many types of disputes other than by going to court and includes a directory of dispute resolution services available in Northern Ireland organised by specific types of disputes. This type of work should be developed and targeted to solicitors and those advice providers.

It may be helpful in developing such a publication to include more technical detail of the role of each organisation, the remit of their powers, the redress they can offer and what that specific information that body will need from the individual in order to progress their complaint amongst others. The Commissioner considers this should be a living document to be amended as the regulatory and complaints handling landscape changes, thus enabling advice providers to signpost more effectively and brief their clients/members of the public accordingly. In turn this should allow the individuals to determine which organisation/ complaints handling body is appropriate to handle their issue. It may also help them to manage the expectations of can be achieved and focus their thoughts on what they want as a realistic outcome to their dispute. It may be that they need to engage a number of complaints handling bodies in order to resolve their issue.

Access to information and transparency in the decision making process

The Commissioner considers that there should be a specific recommendation built into the consultation report seeking to increase the transparency and access to information mechanisms surrounding the proposals which are taken forward. He believes that key to encouraging a quality decision making process and seeking an early resolution to issues affecting individuals is the need to support those individuals in their efforts to participate in the judicial process and the wider justice agencies. This may be achieved through direct and indirect means. Of paramount importance is the need for timely notification of critical events and access to appropriate information which will keep the individual informed at all stages. It may be that there are appropriate mandatory updates for individuals built into the process or proposal. In the Commissioner's view, not making information available or unnecessary official secrecy can be problematic. The rationales for greater openness are now well established including increased accountability, deterrence against corruption, impropriety and maladministration as well as improving the quality of decision making. The Commissioner recently stated:

*"Information is the currency of democracy....Freedom of Information widens and informs public debate. It can contribute to the development and execution of policy generally, as well as in specific high priority areas such as health and safety or the environment. The right to know underpins the accountability of public servants. It exposes waste and drives efficiency. It opens up the possibilities for different approaches to service delivery. It's certainly a challenge, but then it's meant to be."*³

The Commissioner's work centres on ensuring that the public is afforded access to official information through FOIA as well as ensuring that individuals can access their own personal information⁴ and that it is handled in compliance with the DPA. The Commissioner notes a continuing demand on his services - in 2010/11 he received a 17 % increase in complaints made to him under FOIA and a 21% increase in complaints made under the DPA . He also dealt with almost 115,000 calls to his helplines across the UK.⁵ It is therefore important that transparency and responsible information handling are enshrined in the proposals being taken forward by this consultation report.

The Commissioner also ensures that public bodies operate publication schemes⁶ in compliance with section 19 of FOIA. All public authorities must adopt and maintain a publication scheme

setting out the classes of information a public authority will publish, explain the way they will publish the information and specify any charges for making certain information available. The Commissioner has developed model publication schemes setting out classes of information which he considers different public bodies should make available routinely. He is currently consulting on how his model publication schemes may be improved especially taking into account advances in transparency initiatives.⁷

Based on his regulatory and advice role, the Commissioner is aware that it is important to individuals that public authorities and other organisations are as open and transparent as possible, especially when organisations make decisions about individuals. He is aware from his experience of handling complaints that a failure by organisations to meet their statutory obligations or by not sufficiently engaging with an individual can lead not only to possible sanctions from his office but also to a breakdown in the relationship of trust with that individual. This in turn can escalate the dispute, perhaps even resulting in litigation, making an early resolution all the more difficult.

Alternative Dispute Resolution ('ADR')

The Commissioner notes that the consultation report makes a number of key recommendations in order to increase the use of ADR mechanisms for use in differing types of legal disputes. He recommends the early availability of information in order to aid this process and would value a specific recommendation pertaining to information exchange in this regard. Timescales for exchange of information, or development of pre-action protocols should not exceed those statutory time-scales set out under the FOIA or DPA. The DPA creates a statutory right of access for individuals to have their own personal information⁸ held by an organisation (public or private) provided to them within 40 calendar days. The FOIA provides for anyone seeking information held by a public authority to be informed within 20 working days that the information is held requested and, if that is the case, to have it communicated to him (unless an exemption within the FOIA applies).⁹

The Commissioner would like to draw attention to the provision in the DPA allowing for the disclosure of personal information when needed for legal proceedings or advice, including prospective proceedings. Section 35 of the DPA allows personal information to pass between parties when necessary for obtaining legal advice; or for establishing, exercising or defending legal rights. This exemption will allow (but not require) organisations to pass personal information to pass to a third party without having to comply with

all of the good information handling provisions (principles) that are normally required when personal information is shared (such as seeking consent). The organisation must be satisfied that the information is genuinely necessary for the proceedings or prospective proceedings in question before sharing it (e.g. CCTV footage taken by a camera operated by a local council which captures details of individuals involved in a road traffic collision could potentially be released on request from the council to the plaintiff/defendant's solicitors if it was necessary to settle a dispute or help to establish liability at an early stage).¹⁰

The requirements of data sharing

Further to his recommendation that information be available in a timely manner and in compliance with the access regimes his office regulates, the Commissioner would like to draw attention to the his Code of Practice on Data Sharing ('the Data Sharing Code') prepared and published under section 52 of the DPA¹¹. The Commissioner considers that this Code will not only be relevant to any proposals going forward relating to ADR, but also to any other recommendations from the consultation report which require personal information to be shared. It will be highly relevant to a number of agencies within the justice sector.

This Data Sharing Code covers data sharing in the context of the disclosure of personal data¹² from one or more organisations to another party organisation (or organisations), or the sharing of data between different departments of an organisation (such as between a claims department and complaint department) . Neither the DPA, nor the data sharing code, apply to sharing that does not involve personal data, for example anonymous statistics that cannot identify anyone.

The Code of Practice is a statutory code which means that it has been approved by the Secretary of State and laid before Parliament. Although it is not legally binding, it adds details and guidance around how to interpret the 'bare minimum requirements' of the DPA in this area. However the Code can be used in evidence in any legal proceedings, not just proceedings under the DPA. The approach suggested is therefore recommended practice but, if not followed, organisations are likely risk criticism and harsher sanctions if relevant to any DPA breach considered by the ICO or the courts¹³.

The Commissioner considers that any organisation involved in the sharing of personal data should use his data sharing code to help them adopt good practice. Following its good practice

recommendations will help to ensure that any sharing of personal information is undertaken in a manner that is fair, transparent and in line with the rights and expectations of the people whose information is being shared. A brief summary of the key features of the new data sharing code is outlined below.

The Commissioner advises that before sharing any personal data, organisations will need to consider all the legal implications of doing so. The ability to share information is subject to a number of legal constraints which go beyond the requirements of the DPA such as the common law test of confidentiality.¹⁴ If an organisation or individual wishes to share information with another person, whether by way of a one-off disclosure or as part of a large-scale data sharing arrangement, they will need to consider whether they have the legal power or ability to do so. The Commissioner's Data Sharing Code has further guidance on this point.

Factors to be taken into account before sharing personal information.

The Data Sharing Code lists those factors which should be considered before entering into a data sharing arrangement. To help identify data protection issues, the use of Privacy Impact Assessments is recommended. The Commissioner suggests organisations consider the following questions before sharing any personal information:

- What the sharing is meant to achieve?
- What information needs to be shared?
- Who requires access to the shared personal data?
- When should it be shared?
- How should it be shared?
- What checks can be carried out to ensure the data sharing is achieving its objectives?
- The risks posed by the data sharing.
- Whether objectives could be achieved without sharing the data or by disclosing only anonymous data.
- Whether the organisation will have to amend its data protection notification.

- Whether any of the data will be transferred outside of the EEA.

Data Sharing Agreements/protocols

In his Data Sharing Code, the Commissioner recommends that organisations enter into data sharing agreements or protocols in relation to those regular or systemic data sharing arrangements. This is likely to apply to agencies within the justice sectors carrying out substantial data sharing as part of fulfilling their core functions and to which this consultation report is most relevant. The Commissioner considers that a data sharing agreement should outline the following:

- the purpose of data sharing
- potential recipients or types of recipient of the personal data and the circumstances in which they will have access
- a description of the personal data to be shared
- provisions around data quality
- data security requirements
- how long shared data should be retained
- how individuals' rights will be met
- provision for a review of the effectiveness of the data sharing arrangements
- sanctions for failure to comply with the agreement

Conclusion

The Commissioner has welcomed the opportunity to respond to the report consultation and is happy to provide any clarification or further assistance on any of the issues he has raised in the above response.

¹ The Report page , Executive Summary, page 8 and 9

² 'Alternatives to Court, available at www.ni-ombudsman.org.uk,

³ Christopher Graham 'Transparency: Seeing it Through:' 28.09.11 International Right to Know Day. Speech available for download on www.ico.gov.uk

⁴ 4.1(1) DPA ' Personal data means data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come in to the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;”

⁵ Information Commissioner’s Annual Report (Summary page 19 and 21) available at www.ico.gov.uk

⁶ Section 19 FOIA, also see www.ico.gov.uk for further information

⁷ http://www.ico.gov.uk/about_us/consultations/our_consultations.aspx

⁸ Section 7 DPA 1998

⁹ FOIA Act 2000 s 1

¹⁰ For further information on the application of exemptions please see the ‘Guide to Data Protection’ available at www.ico.gov.uk

¹¹ ss. 52A – 52E DPA inserted by Coroners and Justice Act 2009.

¹² Ibid

¹³ S 52E ‘Effect of data-sharing code’

(1) A failure on the part of any person to act in accordance with any provision of the data-sharing code does not of itself render that person liable to any legal proceedings in any court or tribunal.

(2) The data-sharing code is admissible in evidence in any legal proceedings.

(3) If any provision of the data-sharing code appears to—

(a) the Tribunal or a court conducting any proceedings under this Act,

(b) a court or tribunal conducting any other legal proceedings, or

(c) the Commissioner carrying out any function under this Act,

to be relevant to any question arising in the proceedings, or in connection with the exercise of that jurisdiction or the carrying out of those functions, in relation to any time when it was in force, that provision of the code must be taken into account in determining that question.

(4) In this section “the data-sharing code” means the code issued under section 52B(5) (as altered or replaced from time to time).”

¹⁴ If a party is to be held liable for breach of confidence it must be shown that (1) the material communicated to him had the necessary quality of confidence; (2) it was communicated or became known to him in the circumstances entailing an obligation of confidence; and (3) there was an unauthorised use of that material – See *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41