

Open Consultation (DCMS)
Data: A New Direction
19 November 2021

Submitted to: DataReformConsultation@dcms.gov.uk

Submission from: Local Government Association

1. Introduction

- 1.1. The Local Government Association (LGA) welcomes the opportunity to reflect on and respond to the Government's proposed reforms to the UK's data protection regime.
- 1.2. Our response to the consultation is informed by the views of data professionals working in our member councils. We are aware of substantial responses being prepared by councils and information governance groups within local government to which we have contributed. We lend our voice of support to their submissions.
- 1.3. Our own short response is intended to set out those priority areas which we feel most significantly impacts the delivery of local services and the trust and relationship that we have with citizens.
- 1.4. Data plays a vital role in the work of councils and the sector is committed to protecting people's privacy. It is important that any legislative reforms enable councils to innovate, while also maintaining high data protection compliance standards that protect the public and also strengthen its trust in the use of data.
- 1.5. There are various proposed reforms for which we have reservations and would like to see reconsidered, as outlined below. We have chosen to focus on areas that are of particular interest to our members. The absence of a response to other areas should not be read as acceptance of other proposed reforms and we refer you to other more detailed responses provided by councils themselves.

2. About the Local Government Association

- 2.1. The LGA is the national voice of local government, and our members include councils and fire and rescue authorities. We work with our members to support, promote and improve local government.
- 2.2. We are a politically-led, cross-party organisation which works on behalf of councils to ensure local government has a strong, credible voice with national government. We aim to influence and set the political agenda on the issues that matter to councils, so they are able to deliver local solutions to national problems.

3. Proposal to remove the existing requirement to designate a data protection officer

- 3.1. We strongly disagree with this proposal. We believe the statutory role of Data Protection Officer (DPO) is vital to ensuring that data protection obligations are met. This includes protecting the rights of data subjects, ensuring the lawful and fair processing of data and delivering best value.
- 3.2. The introduction of DPOs has brought significant experience and professionalism to data protection compliance. It has raised the profile of information governance and, as a common approach, provides greater assurance for organisations working together.
- 3.3. DPOs in councils have told us they ‘act as the conscience of their organisation’ and, in turn, levels of trust have grown among residents with regards to their council’s use of personal data.
- 3.4. Removing the DPO role would degrade the important function performed by DPOs, weaken the positive culture it has created and will allow organisations to slip into non-compliant positions.

4. Proposal to remove the requirement for organisations to undertake data protection impact assessments

- 4.1. We strongly disagree with this proposal. Data Protection Impact Assessments (DPIAs) are an integral part of risk management. They are not a ‘tick box’ exercise but a process that enables and supports good governance; the parameters, and therefore the risks, of a given project are different each time.
- 4.2. We have heard from DPOs in councils that the DPIA stage of a proposed project is often the point at which flaws are identified. The process enables an organisation, often in a fast-changing landscape, to review potential risks within a system or process long before the publication of new guidance.
- 4.3. The DPOs we spoke to told us that DPIAs support rather than block innovation because they highlight risks, offer suggestions for mitigations and can save time and money. For large councils in particular, where a large quantity of data is processed across many business areas, the DPIA process brings together actors from across a council to the benefit of the project and residents.

5. Proposal to allow organisations to charge small nominal fees to respond to subject access requests

- 5.1. We somewhat disagree with this proposal. DPOs in councils have told us, while Subject Access Requests (SARs) can be costly and time consuming, they serve an important function. SARs are often related to health and social care and it is vital such information is provided to an individual, for example, such data may be the only record of a looked after child’s life.

- 5.2. If the Government progresses with this proposal, our position is that no fee should ever be applied in the case of a SAR relating to a person's health and social care records, whether a child or adult. The underlying principle of good health and care support is to involve the person in all decisions about their health and care. Charging for a SAR on health and social care data goes against the 'no decision about me, without me' approach.
- 5.3. We ask that appropriate Government funding is provided to councils to underwrite the costs of responding to SARs for health and care records. This is because the process can be costly and time consuming for councils, as records can run into tens of thousands of pages.
- 5.4. A significant issue for councils is that SARs are often received from the most disadvantaged in society, and councils tend to believe it is morally wrong to charge such individuals to receive their own data.
- 5.5. We did not hear from councils about large numbers of vexatious requesters. Repeated requests for data can be treated as 'top up' requests, with newer data being added to a previous request, if within a data retention period.
- 5.6. Moreover, we heard from councils that the cost of processing SARs could outweigh any financial benefits gained from applying a nominal fee to the process, as proposed in the consultation.

6. Proposal to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test

- 6.1. We somewhat agree with this proposal. The balancing test, within the application of legitimate interests, was not considered to be a difficult task by the DPOs to whom we spoke. Rather, it was seen as a valuable process that 'made them think' about whether or not an individual's interests overrode the legitimate interest.
- 6.2. We take the view that the proposal (rightly) is not to eradicate the requirement to perform the balancing test, instead, the Government will be responsible for conducting the test on behalf of organisations. If this is the case, the list of processing activities for which organisations will rely upon must provide the required certainty and be specific enough to avoid misinterpretation.
- 6.3. If the Government progresses with this proposal, our position is that the 'no decision about me, without me' approach should be applied with regards to decisions about health and social care, as this is the underlying principle of good health and care support.

7. Proposal to permit solely automated decision making where it meets a lawful ground and subject to compliance with the rest of the data protection legislation

- 7.1. We strongly disagree with this proposal. We recognise the potential benefits that Automated Decision Making (ADM) might bring to the local government sector, but we believe it is important that the decisions made by ADM systems are effectively scrutinised by humans with relevant skills and knowledge. We take the view that ADM systems are not sufficiently mature at this point in time to guarantee that decisions are made fairly and, more importantly, maintain public trust.
- 7.2. We are aware that some civil society organisations, and academics, have raised substantial concerns regarding moves within the public sector to widen its adoption of predictive analytics and artificial intelligence. The proposal to permit solely ADM without human involvement will compound these concerns and further compromise levels of trust in local government data practices among certain groups of society.
- 7.3. Rather than following through on this proposal, we would like the Government to support the publication of additional guidance on the use of ADM (particularly where personal data is involved) to support councils in their understanding of whether, how and when the use of ADM may be appropriate. It may be the case that ADM never can operate without some human involvement.

8. Proposal to clarify that public and private bodies may lawfully process health data when necessary for reasons of substantial public interest in relation to public health or other emergencies

- 8.1. We somewhat disagree with this proposal. We take the view that any processing of health data, even for reasons of substantial public interest during public health or other emergencies, should be overseen by relevant professionals or be undertaken under a duty of confidentiality.
- 8.2. We take the view that there should be oversight from the requisite bodies in an emergency. These bodies should be required to put in place practices, or update existing practices, for this to happen in cases of urgency. Where this is difficult in times of an emergency, any individual who processes sensitive data must at a minimum be obliged to do so under a duty of confidentiality.

9. Proposals to reform of the Information Commissioner's Office

- 9.1. We strongly disagree with any reforms that may adversely affect the independence of the Information Commissioner's Office (ICO); in particular, the proposal for the Chief Executive Officer Role to be appointed by the Secretary of State (via the Public Appointment process) and the proposal for the Secretary of State to approve ICO guidance before it becomes effective.

- 9.2. The independence of the ICO must be protected. Public trust remains critical to the country's use of its personal data. An independent ICO, fully familiar with the guidelines and regulations, remains essential as the unique arbiter for advice and direction.
- 9.3. We detect from DPOs in councils that the ICO is making a positive impact in the oversight of data practices within the country and is gaining the trust of both data processors and data subjects.
- 9.4. We have, however, detected frustration from DPOs in councils on the speed in which the ICO operates currently and a lack of consistency in the responses it provides. Requests for advice or clarification need authority and confidence, not different views from different ICO representatives or unclear statements that still leave next steps open to different interpretations.
- 9.5. We would encourage the provision of more resources into the running of the ICO in order that it can keep pace with the increasing demands being placed upon it and offer direction and oversight in a timelier manner.

10. Contact

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