



## Data Protection – Beware changes are afoot

On 6 April 2010 the potential risks surrounding the collection, management and use of individuals' personal data are set to increase. From that date the Information Commissioner's Office (ICO), the entity charged with overseeing and enforcing the Data Protection Act 1998 (the Act), will have the power to fine organisations up to £500,000 for serious contraventions of the Act.

The ICO has been pushing for these changes for some time and the Information Commissioner, Christopher Graham, has made it clear on numerous occasions that the ICO will not hesitate to use its new powers.

Therefore, any organisation that collects personal data about identifiable individuals such as its customers, suppliers or employees, would be advised to review its policies and procedures to ensure it is fully compliant with the Act. This includes:

- Where necessary, notifying the ICO that it is a data controller
- Conducting a risk assessment to demonstrate that it recognises the risks of handling personal data and has taken steps to address them
- Having good governance and/or audit arrangements in place to establish clear lines of responsibility to prevent contraventions, which includes having written agreements in place with any third parties that process data on its behalf
- Having appropriate policies, procedures, practices and processes in place, for example, policies regarding the encryption of data where employees carry personal data on laptops or removable media
- Complying with any codes of practice published by the ICO or others.

Historically, the ICO's powers have been limited. It has always had the right to bring criminal proceedings against organisations which have failed to notify the ICO that it is a data controller or have failed to keep their notification up to date but, other than that, the only action the ICO can take against a data controller that contravenes the Act is to serve an enforcement notice identifying the failures and requiring the data controller to comply. If the data controller subsequently breaches that enforcement notice it will be guilty of an offence and, upon conviction, may be liable to a fine of up to £5,000.

From 6 April 2010 the ICO will have the additional power to directly impose "Monetary Penalty Notices" where the ICO believes that a contravention of the Act is serious and is likely to cause substantial damage or distress and was either deliberate or reckless. That is the organisation knew or ought to have known that a contravention could take place that might cause substantial damage or distress but failed to take reasonable steps, such as those set out above, to prevent it.

The types of breach which tend to make the headlines usually involve the loss or theft of data but these powers can be used in relation to any contravention of the data protection principles including processing in a manner or for a purpose which the data controller does not have consent.

The ICO has issued guidance on what is likely to be considered "serious" or "substantial" and the type of "damage" and "distress" which will be of concern. It is clear from the guidance that it is not just financial loss but also injury to feelings, harm and anxiety suffered by the individual which will be taken into account. The guidance is available at the ICO's website:

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/ico\\_guidance\\_monetary\\_penalties.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/ico_guidance_monetary_penalties.pdf)

Where the ICO is satisfied that there has been a serious breach which is likely to cause substantial damage or distress then it will serve a "Notice of Intent" upon the organisation concerned setting out its intention to issue a Monetary Penalty Notice and the proposed amount. The organisation will then have the opportunity to make representations to justify its failure and/or in relation to the amount of the proposed penalty. The ICO is required to review any such representations and take them into account before finalising and issuing the Monetary Penalty Notice. If the ICO proceeds and issues a Monetary Penalty Notice the organisation will have the right to appeal to a tribunal.

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Other changes to the Act are also set to come into force this year, these include the introduction of:

- Custodial sentences of up to 2 years in respect of the existing offence of knowingly or recklessly obtaining, disclosing or procuring the disclosure of personal information, without the consent of the data controller
- Additional audit powers in relation to public sector bodies which allow the ICO to carry out detailed compliance audits and to interview staff (the ICO will no doubt continue pushing for equivalent audit powers in relation to private sector).

The potential liabilities that an organisation may incur as a result of improper handling and processing of personal data are set to increase substantially so all organisations would be well advised to put their house in order sooner rather than later.

Further information and advice on the collection of personal data is available by contacting:

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If you no longer wish to receive these updates please let us know by return e-mail to [helen.calvert@brabnerscs.com](mailto:helen.calvert@brabnerscs.com)

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