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Come Back 1984 Act: All Is Forgiven

Data Protection Act 1998 – Transitional Provisions

The Data Protection Act 1998 came into force on 1st March 2000. It implements the European Data Protection Directive. The Act will have a massive impact on the way all organisations including local authorities process data relating to individuals.

Changes introduced by the Act include, for the first time, an extension of data protection to certain manual records, the requirement to justify processing of personal data, increased protection for sensitive personal data and the prohibition on transferring data outside the European Economic Area. The Act will also increase the rights of individuals and give them a bigger say in the way their data is processed. They will, amongst other things, have the right to receive more information about the way their data is being processed, will be able to object to direct marketing and, in certain circumstances, will be able to prevent their data being processed where it is causing them damage or distress.

Gone are the days when the Data Protection Act was only mentioned once or twice a year when an organisation received a rare subject access request. The Data Protection Commissioner (previously known as the Registrar) has stated publicly that she will take greater steps to enforce the new Act and will help individuals who want to do so. A recent survey showed that 88% of people questioned would enforce their rights under the new Act. However nine out of ten businesses were unaware of the implications of the Act.

It is not the purpose of this article to discuss the substantive provisions of the new Act. David Pleiner (see SJ 26/2/99 page 187) has already done this very well. Whilst the Act came into force on 1st March 2000 there are various transitional provisions which if taken advantage of can lessen the burden for organisations and smooth the path of the new Act. Unfortunately these provisions are so complicated that it takes a magnifying glass and a few hours (if not days) to decipher their meaning. I hope to try and make some sense of these provisions with the help of the flow charts on the attached page. Please bear in mind that this article is meant to be a brief summary. It therefore cannot be expected to cover all the provisions and the exceptions to the exceptions and indeed I have sacrificed some of these for the sake of clarity.

Key Terms

It is important to understand the key terms and dates within the transitional provisions:
Data Controller – a person who determines the manner and purpose for which personal data is to be processed (usually the holder of the data)

First Transitional period – From 1st March 2000 till 23rd October 2001

Applies both to automated and manual data

Second Transitional Period – From 24th October 2001 till 23rd October 2007

Applies only to manual data

Relevant Filing System – any set of personal data which is structured by reference to individuals or criteria relating to individuals in such a way that specific information relating to a particular individual is readily accessible. The key word here is “structured”. The manual system has to be a highly organised one. A good example is records in a personnel system because they are usually kept by reference to surname and they are structured so that specific bits of information can be found easily.

The Transitional Provisions

The transitional provisions are contained primarily in Schedule 8 of the Act. There now follows a general statement, which will be helpful to remember when things get too complicated in the preceding paragraphs:

Where automated personal data is subject to processing already under way immediately before 24th October 1998 the Data Controller will have until 24th October 2001 to comply with all the provisions of the Act. Where the personal data is manual data it will be completely exempt from the new Act till October 2001 and will then be exempt from some parts of the Act till October 2007.

Processing already under way

The purpose of the transitional provisions is to facilitate a progressive move by Data Controllers to the new regime. They are encouraged to put systems in place now to ensure future compliance.

The first thing to understand is that only data the subject of processing already under way immediately before the 24th October 1998 can take advantage of the transitional provisions. This term needs defining but unfortunately the Act does not do this. Obviously if a system containing personal data existed prior to 24th October 1998 and no new processing is done then such data will be subject to processing under way. Therefore with most large organisation a lot of the systems which existed before 24th October 1998 will have transitional relief. Where processing is different but does not produce a new effect or result then it too is likely to be processing already under way. It is also important to note that where processing was already under way and then new records are added or deleted as long as the overall operation remains the same then transitional relief may be applied even though the content of the system has changed. This will change during the second transitional period (see later)

To take an example, if an organisation has a personnel records systems which existed prior to 24th October 1998 and the processing remains the same afterwards then it can take advantage of the transitional provisions. It does not matter that new personnel records are added or deleted after 24th October since the overall operation remains the same.

The First Transitional Period (see figure 1)

The type of transitional relief available depends on whether the data being processed is manual or automated. The first period lasts from 1st March 2000 until 23rd October 2001. It applies both to automated data and manual data. During this period any manual records forming part of a *relevant filing system*, if they are the subject of processing already under way will be exempt from all the provisions of the 1998 Act.

With regard to automated data, (essentially data automatically processed usually by computer) if it can fall into one of the exceptions below, it too has a complete exemption from the provisions of the 1998 Act until October 2001. These exceptions are the same as those in the 1984 Act i.e. where data is processed for back up purposes, is kept only for payroll and accounts purposes, to maintain a mailing list,

and or as membership details of an unincorporated club. Remember that these exemptions have strict conditions attached to them (see Schedule 8) and it would be surprising if any large organisation could talk advantage of them.

If the above exemptions cannot be relied upon then the records have to comply with the 1998 Act but only to the extent that it would be the same as the provisions of the 1984 Act. Therefore the Data Controller will have to comply with the provisions of the 1998 Act such as notification, the eight principles and subject access (except where the latter two differ from the 1984 Act). With regard to subject access, this must be given but not the new increased right of subject access only the old right to receive a copy of the data. New rights such as direct marketing and objecting to processing causing damage do not apply during this first transitional period.

The Second Transitional Period (see figure 2)

The second transitional period lasts from 24th October 2001 until 23rd October 2007. It applies only to manual data which is part of a *relevant filing system* (see key terms). Even this has to be subject to processing already underway. Furthermore it only applies to records which were actually in existence before 24th October 1998 and therefore the exemption will be very limited indeed. Any new records added to a system after October 1998 have to comply with the whole of the new Act.

The Commissioner advises that, for the purposes of being able to identify which manual data is eligible for transitional relief during the second period, Data Controllers should put in place audit procedures which enable them to identify which manual records were held by them immediately prior to 24th October 1998. Data which does fall into the above tight matrix will still have to comply with the new Act but will have exemptions in relation to certain aspects:

- The First Data Protection Principle but the part of the principle (known as the Fair Processing Code) which requires Data Controllers to give certain information to data subjects now applies.
- Principle 2 – 5 (inclusive) - These deal with the purpose for which data is processed and the quality of the data
- Section 14 - the provisions relating to rectification blocking and erasure of data.

So at the very least organisations will have to give subject access to manual records by 24th October 2001.

Thus in conclusion it can be seen that after October 2001 there will be very few records which will be able to take advantage of the transitional provisions. Even where they can, the fact that different regimes will apply to different records depending on when they came into existence and the very limited exemptions themselves make the job very difficult. Organisations effectively have 19 months to comply with the Act. This is a frightening thought especially when you consider that even after 15 years most organisations don't comply with the 1984 Act. Come back 1984 Act all is forgiven!

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