

Response to the Ministry of Justice Call for Evidence on the Current Data Protection Legislative Framework

October 2010

ABOUT THE ADVERTISING ASSOCIATION

The Advertising Association is the only organisation in the UK that represents all sides of the advertising and promotion industry: advertisers, agencies and the media. The list of our members is attached.

In the UK, the advertising industry employs nearly 250,000 people. In 2009, advertising expenditure was £14.5bn.

We promote and protect advertising. We communicate its commercial and consumer benefits and we seek the optimal regulatory environment for our industry.

Our goal is that advertising should enjoy responsibility from its practitioners, moderation from its regulators, and trust from its consumers.

SUMMARY

The Data Protection Act, and the Directive upon which it is based, has provided individuals with appropriate protections for their own personal data while also enabling businesses to have confidence when processing and transferring data for legitimate purposes. The Advertising Association believes that the Act is particularly effective in the way that it is sufficiently broad and technology-neutral so as to be valid and applicable to current technologies. We do not hold the view that there needs to be substantial legislative amendments to update the Act or the Directive - for the online environment, as the Act's current principles already provide a high level of consumer protection.

There has been considerable discussion about the distinction between personal and anonymised data. The Advertising Association supports the current definitions of these forms of data as set out in the Data Protection Act. Furthermore, we support maintaining the distinction between personal data, protected by the Data Protection Directive, and non-identifiable, anonymised data or statistical information that can be collected to help customize a website, for example. This type of activity is separately regulated through the E-Privacy Directive which is in the process of being implemented in Member States.

Essentially, we believe that the European data protection legislative framework should remain high level, with the Commission focussing on inconsistencies of application and enforcement across the EU. We believe that the UK implementation has been very effective in reflecting the British culture to data protection and privacy.

We would also encourage other Member States to develop self-regulatory solutions. In the UK, we have a long tradition and considerable experience at developing self-regulatory systems supported and complied with by industry and well-known and trusted by the public. In addition, the Information Commissioner's Office has recently published a Code on Online Personal Information setting out how the Data Protection Act applies to the collection and use of personal data online, and this also provides good practice advice for organisations doing business online.

Good practice guidance and self-regulation can be a useful complement to law and in some areas it can be a better alternative, because this combination is more quickly adaptable to changing circumstances, technologies and commercial practices.

General

Question 1. What are your views on the current Data Protection Act and the European Directive upon which it is based? Do you think they provide sufficient protection in the processing of personal data? Do you have evidence to support your views?

Comments: The Data Protection Act (the Act), and the Directive upon which it is based, provides a high level of protection to data subjects.

The Advertising Association believes it to be very important to protect data subjects when their personal data is breached and we believe that the Act is very effective in this regard. The Directive already sets out rules in Article 11 to provide people with information on the identity of the organization processing their personal data, and the purposes of this. Articles 12 and 14 provide a right of access and a right of objection. Individuals can require their personal data to be erased, blocked, changed or deleted.

Furthermore, the current Act provides a high level of protection to data subjects already. Data subjects have a right to know about the existence of a processing operation (recital 38), they have a right of access to their data (recital 41 and Article 12) and they can object to the processing of that data (Article 14).

The current Act sets reasonable parameters and controls on the appropriate use of personal data in the offline and online environment, and it would be very costly to require organisations to develop systems and adequate security to allow data portability. Instead the focus should be on developing clear terms and conditions to enhance consumer awareness about individuals rights. Furthermore, while consumers are increasingly aware of the risks of data management, we would encourage the Government to focus on increasing consumer education programmes to so that consumers understand how to protect their personal data.

Any additional requirements could create an undesirable cost to business, and instead more focus could be put on providing people with more information about their data rights and enforcing the current Directive more effectively. We do not hold the view that there needs to be substantial legislative amendments to update the Directive for the online environment, as the Directive's current principles already provide a high level of consumer protection.

Definitions

Question 2. What are your views of the definition of "personal data", as set out in the Directive and the DPA?

We support the definition of personal data as set out in the Directive. We believe that it is important to maintain the distinction between personal data, protected by the Data Protection Act, and non-identifiable, anonymised data or statistical information that can be collected to help customise a website, for example. This type of activity is separately regulated through the E-Privacy Directive which is in the process of being implemented in Member States.

It is critical to understand that companies process an array of data without any interest in knowing the who the individual users are, cookie usage is a good example in this respect.

The internet offers huge benefits to consumers and business and the growth of e-commerce in the UK has been a great success story for the UK. Any attempt to extend the rules applicable to personal data so as to include data that does not identify the individual, would severely undermine the commercial viability of the internet.

There is a danger that, through attempting to protect an individual's privacy by amending the definition of personal data, this would in fact negatively impact upon the consumer experience, while at the same time create unnecessary and costly barriers to legitimate activities . where the context poses no risk to the privacy of individuals.

Question 3. What evidence can you provide to suggest that this definition should be made broader or narrower?

Comments: We do not believe that the definition should be altered.

Question 7. Are there any other types of personal data that should be included? If so, please provide your reasons why they should be classed as "sensitive personal data"?

Comments: The necessary categories of sensitive data are already covered by Article 8 of the Directive, which deals with the processing of special categories of personal data, and we do not believe that there are any other types of personal data that should be classed as sensitive personal data. The Advertising Association sees that the Act is effective in prohibiting the processing of personal data revealing: racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of data concerning health or sex life, except under certain conditions (for example, where the data subject has given explicit consent) that are specified in Article 8.

Question 8. Do you have any evidence to suggest that the definitions of "data controller" and "data processor" as set out in the DPA and the Directive have led to confusion or misunderstandings over responsibilities?

Comments: There is some confusion with regard to these definitions which is caused by deviations in interpretations between member states when transposing the Directive.

Data Subjects' Rights

Question 16. What evidence is there that technology has assisted in complying with subject access requests within the time limit?

Comments: The UK Data Protection Act provides for a 40 day time limit for the controller to comply with requests for access to data by data subjects. Technology has undoubtedly assisted with improving compliance with this. However, we do not believe that the time limit should be altered.

Question 18. Is there evidence to suggest that the practice of charging fees for subject access requests should be abolished?

Comments:

It would seem reasonable to charge a small fee for such queries, in order to prevent vexatious access requests, and to provide an additional level of security.

Obligations of data controllers

Question 23. Is there any evidence to support a requirement to notify all or some data breaches to data subjects?

Comments: The Advertising Association would not support any proposals for mandatory breach notifications.

The Principles-based Approach

Question 32. Do you have evidence to suggest that the consent condition is not adequate?

Comments: Consent may be given in different ways (explicitly and implicitly). It is important that these differences are maintained. Any move to require users to provide explicate prior consent for all processing operations would be a negative step and a misjudgement of the commercial and technological realities.

Question 33. Should the definition of consent be limited to that in the EU Data Protection Directive i.e. freely given specific and informed?

Comments: The current wording of the Directive requiring unambiguous consent is clear, gives consumers the right to know what data is being processed and to consent to it, and the Directive does not need to be altered. Currently, unsolicited electronic mail marketing communications, including email and SMS, require explicit consent under the E-Privacy Directive, unless the existing customer exemption (soft opt-in) applies.

Changing any wording would place new and onerous burdens on business in both the offline and online environment that could have significant adverse economic implications, and also hamper the development of the internet and digital media.

Question 35. Do you have evidence to suggest that data subjects do or do not read fair processing notices?

Comments: We do not have specific evidence with regard to this but we are aware that consumers often do not read information provided when purchasing a product online and therefore it is likely that the fair processing notices are often unread. A 2007 National Consumer Council report highlighted how much of the vital information provided with products and services is never read because it is too long or too complicated. The UK ICO has given guidance in its recently-published online code of practice (page 14) that a privacy notice should have sufficient prominence for people to access it easily, and that it should be easy to understand and to read. The Advertising Association supports this move and we believe that this is an area where business and consumer awareness could be encouraged, and where trade associations could play a role in encouraging best practice.

Exemptions under the DPA

Question 37. Do you have evidence to suggest that the exemptions are not sufficient and need to be amended or improved?

Comments: Part IV (32) of the Act give exemptions or derogations for the processing of personal data carried out solely for journalistic purposes. We believe that these need to be strengthened to improve access to information for journalistic purposes and to safeguard freedom of expression.

International Transfers

Question 39. Do you have evidence to suggest that the current arrangements for transferring data internationally are effective or ineffective?

Comments: It is our view that the current cross-border transfer of data regime is not effective. There are significant legal costs which impact on businesses, and ultimately consumers, borne out of over-regulation and varying approaches to regulation which must be addressed in this area.

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