



# Getting to Grips with Data Protection Law post-Brexit

# Key Changes

For UK Data Controllers the following legislation applies:

- UK GDPR
- EU GDPR (extra territorial effect)
- Data Protection Act 2018
- Privacy and Electronic Regulations 2003

# Key Changes

- Appoint a representative in the EU if your UK based business regularly offers goods or services or monitors behaviour of data subjects in the EU (**Article 27 GDPR**).
- Representative can be a “natural person” or a “legal person” and you can have one representative for the whole of the EU.
- Fines if you do not appoint a representative.
- ICO Guidance on appointing a representative

<https://ico.org.uk/for-organisations/dp-at-the-end-of-the-transition-period/data-protection-and-the-eu-in-detail/the-uk-gdpr/european-representatives/>

# International Transfers

## UK Controllers

- **Where are you transferring the personal data to?**
  - EEA
  - Country with an Adequacy decision
  - Third Countries

# International Transfers

Personal data may only be transferred from the UK to a third country or to an international organisation (as defined in Article 4(26) of the UK GDPR), if the controller and the processor comply with the conditions set out in Chapter V of the GDPR (*Article 44, UK GDPR*).



# International Transfers

- **Adequacy Decision** – after assessment by Secretary of State for DCMS; or
- Controller and Processor have put in place **appropriate safeguards;**  
**or**
- **enforceable data subject rights and effective legal remedies for data subjects are available.**

# International Transfers – Appropriate Safeguards

Most common for use by companies are:

- Binding Corporate Rules
- Standard data protection clauses in the form of template transfer clauses adopted by the Information Commissioner.
- Consent (?)

# ICO Consultation

Closed 7<sup>th</sup> October 2021 and included consultation on draft:

- **International Transfer Agreements (ITAs) from UK to third countries**
- **Draft Guidance on ITAs**

Note: proposal on an Addendum to the new EU standard contractual clauses which apply from 4<sup>th</sup> June 2021 to assist organisations to which both GDPR and UK GDPR apply.





# International Transfers – Appropriate Safeguards

Until the new ITA is adopted:

- Review the contracts you have in place with third countries;
- The “old” European standard contractual clauses may be amended to demonstrate that there is contractual protection in place.
- If you are a UK data processor transferring data:
  - adapt the standard contractual clauses acting as agent for the controller.

# Top Tips Subject Access Requests (SARs)

- **What is a SAR?**
  - Time consuming, costly, challenging?
  - A 30 day time bomb!
  - Under the UK GDPR a data subject may make a subject access request for their personal data
- **Personal data?** “any information relating to an identified or identifiable living individual ('data subject')”

<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data>

# SAR – What is the right ?

- Is personal data being processed about them.
- Copy of their personal data together with the following information:
  - Purposes of the processing;
  - Categories of personal data;
  - Recipients or categories to whom data disclosed
  - Period which personal data will be retained
  - Information on the source of the data
  - Whether automated decision-making ( profiling) has been used
- Complaints and disputes: the right to complain to the ICO, request rectification or erasure of personal data, object to processing or to restrict that processing; and
- Where personal data is transferred to a third country /international organisation.

## Before you get a SAR?

- Have a plan/protocol
  - Understand how different data is held differently in each part of the business
  - Reduce the data you have
  - Get your systems in place – use tech?
  - Train your staff

# When you get a SAR?

- **Recognise it** - not always labelled SAR
- **Identify who from**
- **Diarise 30 days** - according to plan/protocol
- **Acknowledgment** - communication and tone
- **Narrow the scope of the request** – what do they want to achieve from this?
- **Grounds to refuse** – manifestly excessive or unfounded
- **Time extension?**

# The search?

- **What are you dealing with?** Data can take many forms: audio recordings, CCTV footage etc.
- ***Reasonable and proportionate search?*** hard copy, electronic filing systems, client / employee files, Outlook, data held by data processors etc.
- **Search terms/parameters** –employee's name (variation(s), key words and date ranges
- **Test search**

# What do you have to provide?

- Apply “**personal data**” test to results
- **Exemptions?** E.g. confidential references, management forecasting or planning, information about negotiations, legal professional privilege **NB** Take advice.
- **Third parties** – consent?
- **Redaction**

## After you get a SAR?

- **Send response** - (hard copy/ digital) securely
- **Audit trail / records** - show your workings
- **Review protocols and systems**
- **ICO Complaints /ICO approach**
- **Court** – remedy for infringement



## A new direction for SARs?

- “ambitious, pro-growth and innovation-friendly” data protection regime?
- September 2021, government consultation new legislative proposals:
  - re-introduction of nominal fee ;
  - **costs ceiling for SARs** - when costs exceed a certain limit, similar to FOI regime ; and
  - **threshold for responding** – right to enquire into purpose of request.

# Policies and Procedures to review and update:

- **Check** your international data transfer documentation
- **If you are a data processor of a EEA Data Controller**, note that controller will require you to enter into new clauses as the “old” standard contractual clauses expire **27<sup>th</sup> December 2022**.
- **Appoint a EU representative if necessary**
- **Annual audit**

# UK approach to Data Protection – what to expect next

- DCMS consulted on a number of proposed changes including:  
*Removing the requirement to consider whether the legitimate interests being pursued by an organisation or third party when processing data are outweighed by the impact on the fundamental rights and freedoms of individuals.*
- *Revising the approach to ensuring organisations are accountable and can demonstrate accountability.*
- *Removing or amending the requirement to appoint a Data Protection Officer (DPO).*

# ICO Response

- “Strong concerns” over some of the proposals.
- ICO engage closely with the Government
- Balance of improving the burden on organisations with data subjects rights
- Impact on EU Adequacy Decision
- EU GDPR- ongoing applicability

<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2021/10/response-to-dcms-consultation-foreword/>



# Get in touch!

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