# Commissioner's evidence to the House of Commons — analysis

***Bridget Treacy, Partner, and Anita Bapat, Associate, at Hunton & Williams, discuss key comments made by the UK Information Commissioner giving evidence to the House of Commons Justice Select Committee***

The UK Information Commissioner, Christopher Graham, gave evidence to the House of Commons Justice Select Committee ('the Committee') on 14th September 2011. The session covered a wide range of issues, from criticism of the private sector for their lack of data protection compliance, to the recent phone hacking scandal and the Leveson inquiry (related to the hacking). Christopher Graham also used his appearance to make known his "wish list" for further powers of enforcement, including a plea to commence custodial penalties under section 55 of the Data Protection Act 1998 ('DPA'), and for the Information Commissioner' Office ('ICO') to be given the power to conduct compulsory audits across all sectors. He also provided a useful update on the widely anticipated proposals for amending the European Data Protection Directive (95/46/EC) ('the Directive').

Further insights into key elements of the Commissioner's evidence are summarised below.

## Criticism of the private sector

The Commissioner, scathing in his criticism of the private sector, remarked that it "isn't as good as it thinks it is" when it comes to data protection compliance and that many of the compliance problems that arise originate in the private sector. Whilst acknowledging problems within the public sector (including the NHS and local authorities), the Commissioner singled out banks and other financial services companies in the private sector for particular criticism. Part of his frustration appears to stem from statistics which show that only one in five companies contacted by the ICO agreed to participate in free data protection audits offered by the ICO. This is in direct contrast to the 71% of public sector bodies that have agreed to be audited. The Commissioner queried why so few companies are prepared to submit to audit which, in his view, can be used to bolster consumer confidence in the organisation's data protection practices. If the ICO discovers shortcomings during such an audit, it works with the company to develop a work programme to rectify shortcomings. Commenting on the private sector's reluctance to submit to audits, the Commissioner stated that he very much regrets that companies are "so backward in coming forward".

## Call for general power of compulsory inspection

The Commissioner also used his appearance to highlight the ICO's lack of a "general power to conduct anything but a consensual audit" in all but a limited number of areas.

Section 41A of the DPA currently states that 'Assessment Notices' may only be served on public sector data controllers. Once served, these notices allow the ICO to enter and inspect a data controllers' premises. Currently this power does not extend to the private sector, although the Secretary of State is able to designate private sector data controllers to be subject to the power, by order.

From his speech to the Committee, it is clear that the Commissioner feels his power of inspection should be more wide ranging. He said he was frustrated by the need for the ICO to get a warrant to "break the door down" to gain access. He told the Committee that whilst he had negotiated his way into Google as part of the Undertaking Google following the company's admission that its Street View cars had collected Wi-Fi payload data in addition to location mapping information, his preference was for the ICO to have a power to inspect, whether or not invited, to check for data protection compliance. The Commissioner also added that he hoped to see such a power included in any new data protection legislation coming from Europe.

## Leveson inquiry and call for custodial sentences for section 55

The Commissioner reiterated his calls for the commencement of custodial penalties for offences committed under section 55 of the DPA.

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Section 55 offences typically cover what the ICO calls 'blagging' — the knowing or reckless obtaining, disclosing or procuring the disclosure of personal data, without the consent of the data controller. The commission of such an offence can result in a fine of up to £5000 on summary conviction and an unlimited fine on indictment. The Commissioner considered the current penalties to be ineffective and really "no deterrent at all". The Commissioner used a recent case involving the banking sector to illustrate this.

The case, which was heard in Brighton Magistrates Court on 12th September 2011, involved a bank cashier convicted under section 55, for using her position to access illegally the personal details of a sex attack victim in order to build a picture of the woman who had accused her husband (and who was convicted of the crime). The bank cashier was fined £800, ordered to pay costs of £400 plus a victims' surcharge of £15. The Commissioner commented that it "beggars belief" that the courts were unable to access the full range of potential sentences available for such breaches. He said such a case typified what was really going on and that it was now time for Parliament to commence the new penalty power.

The Commissioner also urged the Justice Committee to separate the section 55 offence, which in his opinion was something well within the ICO's remit and which has the "potential to wreck people's lives", from the wider inquiry into hacking (the Leveson inquiry), which is more focussed on press standards. He acknowledged that the commencement of custodial penalties had been put on hold due to press concerns over its potential chilling effect, but urged the Committee that Parliament should take action now rather than allowing the issue to become caught up in the Leveson inquiry and any future recommendations it may make.

Whilst clearly frustrated with the government's lack of action on commencing custodial penalties, the Commissioner acknowledged that the government was taking action in other areas, such as supporting the use of the Proceeds of Crime Act 2002 ('POCA') to recover profits made by perpetrators illegally trading in personal data. In July this year, the ICO successfully prosecuted two rogue T-mobile employees, and on applying to the court for what's known as a 'confiscation order' under POCA, was able to recover £73,700. Interestingly, the Commissioner also revealed that the government had approached the Sentencing Council and was also considering making the section 55 offence a recordable offence. The consequences of such government proposals, if implemented, would mean that section 55 offences would be recorded on the Police National Computer and the police would have the power to take fingerprint impressions, DNA samples and other descriptive details from suspected perpetrators. The Commissioner said he was in full support of such measures.

## Update on the review of the Directive

The Commissioner outlined the timetable for the revised Directive with a draft to be published by the European Commission in November or December this year. Negotiations with Member States would then follow, with the process possibly taking several years to conclude. However, the ICO has since stated that the new text is more likely to be published early next year, in February or March 2012.

The Commissioner continued to guard closely the question of whether the new data protection framework will be in the form of a directive or regulation. He said that, whatever form it took, he hoped that the new text would be principles-based, rather than specific, and emphasised that it should be "reasonably future proof". Such input from the Commissioner is welcome and is, indeed, a practical approach in order to guarantee the on-going relevance of the new legislation in light of constantly changing business practices and technologies.

Accountability was singled out as one of the key principles by the Commissioner. He described the concept in terms of the handing over of responsibility to a data controller to ensure compliance with the DPA, rather than entrusting such a role to the regulator. In what may be seen by some as implied criticism of his more "prescriptive" continental counterparts, the Commissioner showed his dislike for the approach taken by many other European regulators which is often characterised as a "tick box" exercise. He said that such an approach is not the way of the future. Instead he favours an approach whereby data controllers are kept up to standard by the regulator adopting a more risk-based strategy with its approach to enforcement. This is certainly in keeping with the ICO's current risk-based approach to data protection compliance more generally, demonstrated in its action in the enforcement sphere, where the ICO carefully considers the suitability of Undertakings ahead of imposing civil monetary penalties on data controllers found to be in breach of the DPA.

## Conclusion

The Commissioner used his evidence in front of the Committee to confirm the ICO's stance on a wide range of data protection issues. The Commissioner's comments regarding the new proposal for the Directive, in whatever form it may take, will be greatly welcomed, particularly in the private sector. The Commissioner's view that the principle of accountability should be at the heart of any revised Directive will also strike a chord with many.

Of concern to the private sector will be the Commissioner's calls for a general power of inspection, without the need for consent. It may be that such public demands by the Commissioner for wider ranging powers will force the private sector to reconsider their current reluctance to submit to the ICO for a free and consensual audit.

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