



House of Commons  
Justice Committee

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# The work of the Information Commissioner: appointment of a new Commissioner

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**Third Report of Session 2008–09**

*Report, together with formal minutes, oral and  
written evidence*

*Ordered by the House of Commons  
to be printed 3 February 2009*

## The Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

### Current membership

Rt Hon Sir Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chairman)  
David Heath MP (*Liberal Democrat, Somerton and Frome*)  
Siân James MP (*Labour, Swansea East*)  
Daniel Kawczynski MP (*Conservative, Shrewsbury and Atcham*)  
Jessica Morden MP (*Labour, Newport East*)  
Julie Morgan MP (*Labour, Cardiff North*)  
Rt Hon Alun Michael MP (*Labour Co-op, Cardiff South and Penarth*)  
Robert Neill MP (*Conservative, Bromley and Chislehurst*)  
Dr Nick Palmer MP (*Labour, Broxtowe*)  
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Virendra Sharma MP (*Labour, Ealing Southall*)  
Andrew Turner MP (*Conservative, Isle of Wight*)  
Andrew Tyrie MP (*Conservative, Chichester*)  
Dr Alan Whitehead MP (*Labour, Southampton Test*)

### Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via [www.parliament.uk](http://www.parliament.uk)

### Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the internet at [www.parliament.uk/justicecom](http://www.parliament.uk/justicecom)

### Committee staff

The current staff of the Committee are Fergus Reid (Clerk), Dr Rebecca Davies (Second Clerk), Ruth Friskney (Adviser (Sentencing Guidelines)), Hannah Stewart (Committee Legal Specialist), Ian Thomson (Group Manager/Senior Committee Assistant), Sonia Draper (Committee Assistant), Henry Ayi-Hyde (Committee Support Assistant), Gemma Buckland (Public Policy Specialist, Scrutiny Unit) and Jessica Bridges-Palmer (Committee Media Officer).

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# 1 Introduction

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## Pre-appointment hearings

1. Pre-appointment hearings were recommended in the Liaison's Committee's report *Shifting the Balance Sheet: Select Committees and the Executive* published in 2000.<sup>1</sup> Although the idea was initially rejected by the Government, the July 2007 *Governance of Britain* Green Paper contained a proposal for select committee scrutiny of prospective appointments in the following terms: "...the hearing would be non-binding, but in the light of the report from the [relevant select] committee the Minister would decide whether to proceed. The hearings would cover issues such as the candidate's suitability for the role, his or her key priorities, and the process used in selection..."

2. A list of posts proposed by the Government as suitable for pre-appointment scrutiny was published by the Liaison Committee in 2008.<sup>2</sup> A list of the appointments that come under the aegis of the Ministry of Justice and the Attorney-General's Office is annexed to this report (Annex A) and includes the Information Commissioner.

3. On 13 January 2009 the Ministry of Justice announced Mr Christopher Graham, Director-General of the Advertising Standards Authority, was its preferred candidate for the post of Information Commissioner and invited this Committee to report on his suitability for the role.<sup>3</sup> The Information Commissioner is the second such appointment within the remit of the Ministry of Justice that we have scrutinized in line with the Liaison Committee's interest in extending parliamentary oversight and accountability of key public appointments; the first was the Chair of the Office of Legal Complaints.<sup>4</sup>

4. In preparation, we took oral evidence from the current Information Commissioner, Mr Richard Thomas, on 13 January 2009; and subsequently conducted a pre-appointment hearing with Mr Graham on 27 January. This evidence, together with relevant memoranda, is published with this report.

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1 Liaison Committee, First Report of Session 2007-08, *Pre-appointment hearings by select committees*, HC 384

2 Letter dated 23 January 2008 from Rt Hon Ed Miliband MP to Rt Hon Alan Williams MP, Chair of the Liaison Committee; and see Liaison Committee, First Special Report of Session 2007-08, *Pre-appointment hearings by select committees: Government Response*, HC 594, Annex A)

3 Press Notice, Ministry of Justice, 13 January 2009

4 Justice Committee, Seventh Report of Session 2007-08, *Appointment of the Chair of the Office for Legal Complaints*, HC 1122

## 2 The role of the Information Commissioner

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### Background

5. The role of Information Commissioner was created in January 2001 following the passing of the Freedom of Information Act 2000. The Commissioner's role absorbed that of the Data Protection Registrar, which formerly undertook responsibilities arising out of the Data Protection Act 1998. In evidence to the Committee, Mr Richard Thomas, the current Information Commissioner (whose tenure spans both roles), described the additional responsibility as a “fundamental change” to the organisation.<sup>5</sup>

6. The Information Commissioner is a “corporation sole” with the powers, authority, duties and responsibilities of the role vested in one person and passing from one holder of that role to another.<sup>6</sup> The Information Commissioner's Office (ICO), which supports the Commissioner in his work, is a non-departmental public body sponsored by the Ministry of Justice (MoJ).<sup>7</sup> Although the Commissioner operates independently in the exercise of his statutory functions, some issues require the approval of the Secretary of State such as funding and the level of notification fees.

7. The new Information Commissioner will head an organisation employing 250 staff in Wilmslow, Northern Ireland, Scotland, Wales and London. The current Commissioner and the Ministry of Justice both predict that this number would grow. In 2008 the ICO handled over 26,000 data protection complaints, 2,600 freedom of information (FOI) complaints, 115,000 phone calls and 40,000 notifications from data controllers, in addition to 260,000 notification renewals.

8. The details of the job description and person specification as formulated for the selection process undertaken by the MoJ are annexed to this report (Annex B). The salary for the new Information Commissioner will be £140,000 a year.

### Appointment and tenure

9. HM the Queen appoints the Commissioner by Letters Patent, on advice from the Prime Minister (who is, in turn, advised by the Secretary of State for Justice following a selection process undertaken by his Department—validated by the Office of the Commissioner for Public Appointments—and scrutiny by this Committee). The appointment is for a five year term. Mr Thomas, the current Information Commissioner, steps down from the role at the end of his five year term in June 2009. The Information Commissioner may only be relieved of the post by Her Majesty at the Commissioner's own request or following an Address by both Houses of Parliament.

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5 Q 2

6 Other such 'corporations sole' in the UK are: the Crown, the Auditor General for Wales, the Chief Inspector of Criminal Justice, the Official Custodian for Charities, the Police Ombudsman for Northern Ireland, the Public Services Ombudsman for Wales, and the Traffic Director for London.

7 For the purposes of clarity we use the term 'role' to refer to the office of Information Commissioner and the term 'office' when referring to the Information Commissioner's supporting organisation.

10. This Committee has recommended in two reports that the Information Commissioner become directly responsible to, and funded by, Parliament to protect the independence of the role. This recommendation has been rejected by the Government.<sup>8</sup>

## Current responsibilities

11. The Information Commissioner enforces and oversees the Data Protection Act 1998, the Freedom of Information Act 2000, the Environmental Information Regulations 2004<sup>9</sup>, and the Privacy and Electronic Communications Regulations.<sup>10</sup> The Information Commissioner describes his main functions as: educating and influencing (promoting good practice and giving information and advice), resolving problems (resolving eligible complaints from people who think their rights have been breached) and enforcing (using legal sanctions against those who ignore or refuse to accept their obligations).<sup>11</sup>

## Data protection

12. The Data Protection Act 1998 allows individuals access to personal information held on them, by both public authorities and private organisations, and requires all organisations that process such data to comply with eight principles, making sure that personal information is:

- fairly and lawfully processed
- processed for limited purposes
- adequate, relevant and not excessive
- accurate and up to date
- not kept for longer than is necessary
- processed in line with your rights
- secure, and
- not transferred to other countries without adequate protection

13. All organisations which process such data are required to notify the Information Commissioner who enters their details on a public register. They are currently charged an annual fee of £35 which funds the Commissioner's data protection work. In the near future the flat-rate will change to a system of graduated fees relating to size of organisation, which will be designed to deliver increased funding for the regulation of data protection. Failure to notify is an offence and ignorance of the law is not a defence.

8 Cm 6937, October 2006

9 Environmental Information Regulations 2004 (S.I., 2004, No. 3391); and see Directive 2003/4/EC on public access to environmental information (O.J., No. L 41, 14 February 2003, p.26)

10 The Privacy and Electronic Communications (EC Directive) Regulations 2003 (S.I., 2003, No. 2426) and see Directive 2002/58/EC (which the Regulations implement) which is designed to 'particularise and complement' Directive 95/46/EC itself implemented by the Data Protection Act 1998.

11 [www.ico.gov.uk](http://www.ico.gov.uk)

14. The data protection powers of the Information Commissioner are:

- to conduct assessments to check organisations are complying with the Act;
- to serve information notices requiring organisations to provide the Information Commissioner's Office with specified information within a certain time period;
- to serve enforcement notices, including “stop now” orders where there has been a breach of the Act, requiring organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law;
- to prosecute those who commit criminal offences under the Act;
- to conduct audits to assess whether organisations processing of personal data follows good practice; and
- to report to Parliament on data protection issues of concern.<sup>12</sup>

15. The Criminal Justice and Immigration Act 2008 amended the Data Protection Act to grant the Information Commissioner powers to impose substantial fines on organisations which deliberately or recklessly breached data protection rules. These provisions have not yet been brought into force.

### ***Freedom of Information***

16. The Freedom of Information Act 2000 was implemented in January 2005. It gave people the general right of access to information held by over 100,000 “public authorities” in the UK. Once an application is made, the public authority has 20 working days to respond to the request or notify the individual making the request why the information required is exempt. The Act recognises that there will be valid reasons why some kinds of information may be withheld, such as if its release would prejudice national security or legitimate commercial confidentiality. Public authorities can also refuse an FOI request if the resources required to collate the information would be ‘disproportionate’.

17. All public authorities, and companies wholly owned by public authorities, have obligations under the Freedom of Information Act and the Information Commissioner is responsible for guidance on set procedures for responding to requests. The Commissioner receives complaints about public authorities’ conduct of their responsibilities. After investigation the Information Commissioner will make a final assessment as to whether or not the relevant public authority has complied with the Act. Enforcement action may be taken against public authorities that repeatedly fail to meet their responsibilities under the Act.

18. The Information Commissioner’s freedom of information activity is funded by grant-in-aid from the Ministry of Justice. Cross-subsidy between data protection and freedom of information is not allowed.

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<sup>12</sup> [www.ico.gov.uk](http://www.ico.gov.uk)

## Potential responsibilities

19. The Coroners and Justice Bill was introduced on 14 January 2009. It contains provisions creating new duties and responsibilities for the Information Commissioner in relation to data protection. Principal amongst these are:

- power to carry out an independent assessment to determine whether a public body has complied, or is complying, with data protection principles and issue an assessment notice which will require the relevant body to take remedial action if necessary;
- responsibility for issuing a code of practice covering the new process of assessment of compliance with data protection principles;
- responsibility for reporting on “information sharing orders” that the Bill enables Ministers to make which grant authority to a data controller to share information that consists of, or includes, personal data;
- responsibility for the Information Commissioner to issue a data-sharing code of practice containing guidance promoting good practice in the sharing of personal data, including, but not limited to, compliance with the requirements of the Data Protection Act 1998; and
- adding to the Information Commissioner’s existing powers of entrance, search, inspection, examination, operation and seizure, the ability to require persons on the premises to provide an explanation of any document or other material found there and to provide other information reasonably required for the purpose of determining compliance with data protection principles.

20. In a complementary development, the Government, following a recommendation by this Committee, has announced a commensurate increase in the Information Commissioner’s income stream from data controllers by moving from a flat-rate £35 per notification to a variable rate depending on size of organisation.<sup>13</sup>

## The candidate

21. Mr Christopher Graham has been the Director-General of the Advertising Standards Authority (ASA) since 2000. The ASA is an independent body established by the advertising industry to police the rules laid down in the advertising codes of practice drawn up by the industry to protect consumers and create a level playing field for advertisers. Most of the ASA’s work is in resolving complaints using the industry codes but persistent offenders can be referred to Ofcom, or the Office of Fair Trading, as appropriate. In 2007 the ASA received 24,192 complaints about 14,080 advertisements across all media; a 9 per cent. increase on 2006.

22. Previously Mr Graham was a BBC journalist, then an editor and producer in politics and news programming. He moved into BBC corporate governance in 1995, first as Deputy Secretary, and then Secretary, of the BBC Governors. Mr Graham is a non-

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<sup>13</sup> Ev 20 and see Justice Committee, Second Report of Session 2008-09, *Coroners and Justice Bill*, HC 185, paragraph 20

executive director of Electoral Reform Services Ltd, a not-for-profit supplier of independent nomination, balloting and other election-related services. He is also a lay representative on the Bar Standards Board, the body that regulates barristers in England and Wales in the public interest.

## 3 The pre-appointment hearing and outcome

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### Introduction

23. Our consideration of Mr Graham’s appointment was steered by guidance given by the Liaison Committee<sup>14</sup> and our own view of the demands of the role and of the short and long term priorities involved in the fields of data protection and freedom of information. We have referred to such demands in previous reports.<sup>15</sup> We were also assisted by the valedictory evidence given by the current Information Commissioner on 13 January 2009.<sup>16</sup>

### The hearing

24. Mr Graham’s background clearly provides him with a range of experience indicative of his suitability to be a candidate for the role of Information Commissioner, including familiarity with the regulatory landscape, the development of codes of practice, the potential for judicial review, customer service, assessing compliance, running a large organisation and managing change.<sup>17</sup> In view of the overall challenge facing a new Information Commissioner—an increase of an order of magnitude on what Mr Graham has previously dealt with—we welcomed the opportunity to question him on his view of the priorities and potential approach.

25. We took note of Mr Graham’s agreement with the incumbent, Mr Thomas, that there could only be “one Information Commissioner at a time”<sup>18</sup> and that the transfer of the post was set for June 2009.

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14 Liaison Committee, First Report of Session 2007-08, *Pre-appointment hearings by select committees* HC 384

15 Constitutional Affairs Committee, Seventh Report of Session 2005-06, *Freedom of Information—one year on*, HC 991 (Government reply, Cm 6937) and Fourth Report of Session 2006-07, *Freedom of Information: Government’s proposals for reform*, HC 415 (Government reply, Cm 7187); and Justice Committee, First Report of Session 2007-08, *Protection of Private Data*, HC 154 (Government reply, HC 406 of Session 2007-08) and Second Report of Session 2008-09, *Coroners and Justice Bill*, HC 185

16 Qq 1-22 and Ev 8-15

17 Q23

18 Q31

## The candidate's approach

### Constitution

26. As mentioned above, in paragraph 6, the Information Commissioner is a “corporation sole” which means that the powers and responsibilities of the role are vested in the office-holder as an individual. Clearly, however, the Information Commissioner is supported by an organisation, currently known as the ‘Information Commissioner’s Office’ (ICO), and we perceive at least the potential for confusion in the status of statements coming from the organisation and those issued explicitly by the Commissioner. Mr Thomas, the current Information Commissioner, stressed the importance of effective teamwork but told us: “the Commissioner...is ultimately responsible for everything done in his or her name”.<sup>19</sup>

27. We note the recommendation of the report of the Data Sharing Review—part-authored by Mr Thomas in a personal capacity—that the Information Commissioner’s role should be undertaken by a multi-member “Information Commission” to:

- strengthen the influence and authority of the ICO;
- de-personalise relations between regulator and key stakeholders;
- reduce risks of inappropriate pressure from such stakeholders and strengthen regulatory independence;
- reduce the risk of a maverick appointment; and
- draw in a diversity of backgrounds and skills.<sup>20</sup>

28. Mr Graham agreed with the Information Commissioner on the importance of teamwork and described the proposal for a multi-member commission as “a perfectly logical position to adopt”.<sup>21</sup> He pointed, however, to the current freedom of information case relating to Cabinet minutes on the decision to invade Iraq in 2003 and the process by which the Commissioner was tasked, personally, with reading the controversial material as part of his decision-making process. He told us “it seemed to me that that is work only one man can do”.<sup>22</sup> With regard to the issue of communicating decisions and expressing opinions from the “ICO”, he drew a distinction between the Information Commissioner per se and the overall regulatory “machine”, suggesting that “possibly it is a question of getting the branding right”.<sup>23</sup> **We are not persuaded by the case for changing from a commissioner to a commission. We welcome Mr Graham’s recognition that it is important that the branding of communications from the ICO leaves no room for confusion about the personal responsibility of the Commissioner. We view the personal responsibility of the Information Commissioner for the regulation of data protection**

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19 Q 3

20 *Op. cit.*, paragraph 8.74

21 Q 35

22 Q 35

23 Q 35

**and freedom of information as the main value of the way in which the role is constituted.**

29. In our previous form as the Constitutional Affairs Committee we recommended that the Information Commissioner should be directly responsible to, and funded by, Parliament.<sup>24</sup> The Government’s position has been that, in its view, the status quo provided for independent decision-making by the Commissioner while permitting the proper scrutiny of public resources.<sup>25</sup>

30. Mr Thomas, the current Commissioner, told us that direct funding from Parliament was “in principle ... the right approach” citing the position of the Scottish Commissioner who is funded by, and accountable to, the Scottish Parliament.<sup>26</sup> Mr Thomas emphasised the constructive relationship between his office and the Ministry of Justice (MoJ) but pointed to the potential for “perception issues” arising from the fact that his funding came from the MoJ’s Information Directorate, which also housed the team of officials providing advice to all government departments on freedom of information cases and issues. He described this as “a slightly uncomfortable situation”.<sup>27</sup> Mr Graham was cautious. While recognising that this Committee had made “the running” with this recommendation, he confined himself, at this early stage, to saying that the proposition seemed “logical” and that he “would not resist it”.<sup>28</sup>

### **Resources**

31. In addition to the issue of responsibility for the Information Commissioner’s resources, we have also been concerned about the level of available funding. Freedom of information and data protection are funded differently and there can be no cross-subsidy, or virement, between the two functions.

### **Data protection**

32. The implementation of the Information Commissioner’s data protection responsibilities is funded by notification fees paid by data controllers. At present, the fee is £35 whether the organisation is a small business or a huge Government department. We drew attention to the anomaly of a flat-rate fee for all sizes of organisation in January 2008 and recommended that a graduated scheme be introduced; this was echoed in the report of the Data Sharing Review in July 2008. The MoJ told us that work is still underway on the details of the scheme but said that the overall intention was to fund the estimated costs of the Information Commissioner’s revised data protection responsibilities—£16 million per year (assuming passage of the Coroners and Justice Bill)—through the new fee structure.

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24 Justice Committee, Second Report of Session 2008-09, *Coroners and Justice Bill*, HC 185, para 27

25 Cm 6937, October 2006

26 Q 9 and see [www.scottish.parliament.uk/s3/committees/rssb](http://www.scottish.parliament.uk/s3/committees/rssb) for details of a review of the support for the Scottish Information Commissioner by the Scottish Parliament.

27 Q 9

28 Q 30

33. We welcomed Mr Graham's recognition of the Information Commissioner's "considerable responsibility" for assessments of applications for authority to share personal data and the potential constraints of the 21-day period allowed on the face of the Coroners and Justice Bill for each such assessment to take place. We agree with his indication that departments contemplating such an application should be in "early dialogue" with the ICO.

### *Freedom of information (FOI)*

34. Mr Thomas told us that "freedom of information is done on quite a shoestring" and drew a compelling comparison between his 53 caseworkers, who had responsibility for often unfamiliar territory across the whole public sector, and the 28 staff employed by the Ministry of Justice just to deal with incoming FOI requests for that department and its associated public bodies.<sup>29</sup> Mr Graham was also of the opinion that this side of the business was "pretty tightly resourced" and made clear that tackling the "backlog" of outstanding cases would be his priority.<sup>30</sup> He pointed to his track record at the ASA, in equivalent circumstances, and we concur with his view that "unless you can demonstrate that you are an efficient organisation handling the business promptly, people will not take you seriously on anything else." He described the efficiency and effectiveness of the ICO as its "licence to practice".<sup>31</sup>

35. Mr Thomas wrote that "the ICO currently receives £5.5 million as grant-in-aid for FoI. We do not yet know our grant for 2009-10. Despite a 15% increase in complaints received, we have been told that an increase cannot be contemplated and that a cut is possible. This would be very serious."<sup>32</sup> In light of this, we asked Mr Graham whether he had opened negotiations with the MoJ on the availability of adequate resources to the Information Commissioner's Office in advance of a final commitment to taking on the role. Mr Graham was again cautious. Not having learned "the ways of the civil service" he said he was reluctant to "make it up" on the hoof in front of a select committee. However, when pressed he said: "If I form the conclusion that I have not got the resources to do the job, then there would not be any point in proceeding, but I have not had the discussion".<sup>33</sup>

**36. We recommend that the Ministry of Justice take the appropriate steps to ensure that there are sufficient resources available to the Information Commissioner to enable the backlog of freedom of information cases to be resolved within a reasonable timescale.**

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29 Q 7 and Q 9

30 Q 27

31 Q 24

32 Ev 10

33 Q 34

## Priorities

37. We were interested in Mr Graham's overall view of the priorities and challenges of the Information Commissioner's role. He identified the following:

- Good leadership and management of an effective and efficient operation to engender the respect of stakeholders and create the platform from which to contribute to the relevant public policy debates.
- Emphasis on education and the provision of guidance and information to reduce non-compliance—and associated reputational damage—while ensuring awareness that there are effective sanctions which would be deployed if necessary.
- The demonstration to all sides and stakeholders of the absolute independence and integrity of the office and its capacity to take rational decisions after due process, based on the evidence, and then to defend them.<sup>34</sup>

## Conclusion

**38. We endorse Mr Christopher Graham's suitability for appointment as Information Commissioner and his preliminary view of the priorities of the role and its supporting organisation. We look forward to a continuing dialogue on progress both in protecting people's personal information effectively and sensitively, and in securing implementation of the letter, and the spirit, of the Freedom of Information Act. The Information Commissioner needs to be an independent and fearless champion of both data protection and freedom of information, backed by a well-led and well-managed organisation. We wish Mr Graham success in this role.**

# Annex A

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## Posts identified by the Government as suitable for pre-appointment scrutiny (extract)

### *Attorney General's Office*

- HM Chief Inspector of the Crown Prosecution Service

### *Ministry of Justice*

- Chair of the Judicial Appointments Commission
- Chair of the Office for Legal Complaints  
*subject of a pre-appointment hearing report, 31 October 2008, HC 1122 of Session 2007-08*
- HM Chief Inspector of Prisons
- HM Chief Inspector of Probation
- Information Commissioner  
*subject of a pre-appointment hearing report, 6 February 2009, HC 146 of Session 2008-09*
- Prison and Probation Ombudsman

## Annex B

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### **Job description, person specification and terms for the role of Information Commissioner**

*(As formulated for the selection process undertaken by the Ministry of Justice)*

#### *Job Description*

The Information Commissioner is responsible for:

- the fulfilment of all the statutory responsibilities conferred upon the Commissioner
- providing leadership and strategic direction for the Commissioner's office
- building and maintaining excellent personal and organisational relationships with key stakeholders, including Ministers, Parliament, the media, public interest groups, business and international equivalents
- contributing to debates on the development of policy, nationally and internationally, on data protection and freedom of information issues, and
- acting as Accounting Officer for the Commissioner's office.

#### *Person Specification*

##### *Essential Criteria*

This is a demanding, politically sensitive and high profile post. The successful candidate must demonstrate the following:

##### *Leadership*

- Successful track record of credible and strategic leadership
- Substantial record of management, ideally within a statutory framework
- Sound and strong financial and performance management skills
- Ability to work with others to achieve change smoothly and effectively

##### *Communication*

- Evidence of the ability to influence effectively with staff, colleagues, stakeholders and across the public and private sectors
- Track record of excellent public speaking and media relations.

### *Intellect*

- Intellectual capability to move easily between significant detail and the bigger picture
- Demonstrated ability to influence policy
- Breadth of strategic vision

### *Judgement*

- Evidence of independence and impartiality gained at board-level or equivalent
- Excellent judgement, including the ability to identify and manage risk

### *Experience and Personal Qualities*

- Evidence of operating successfully in a legal or quasi-legal environment
- Evidence of demonstrating resilience and adaptability in taking on challenges in a complex environment
- Demonstrated ability to make personal impact and achieve personal credibility
- Flexibility, adaptability and resilience under pressure

### *Desirable Criteria*

- An awareness of and interest in information issues
- An interest in developments in information technology
- An understanding of Whitehall and the wider public sector
- An understanding of the key legislation
- Ability to master the requirements of central government financial and staff management policies and protocols
- Legal qualification and experience

### *Terms of Appointment*

#### *Location*

The Information Commissioner and most of his staff are based in Wilmslow, Cheshire, with small satellite offices in Belfast, Cardiff, Edinburgh and London. The location of the main office is currently under review and the new Commissioner will need to determine, in consultation with the Ministry of Justice, whether it will be in the best interests of the office to relocate.

Though based in Wilmslow, the role of the Information Commissioner requires frequent travel around the UK and abroad.

The organisation of the Information Commissioner's office is a matter for the Commissioner, but a Management Board, which includes non-executive Directors and an Executive team, assist the current Commissioner. The Commissioner works with the Management Board to set priorities and ensure their achievement and leads the Executive team to ensure that the office is run as a modern effective, efficient, influential and responsible organisation.

***Remuneration/benefits***

The remuneration to be offered for this full-time post is £140,000 per annum. The post is pensionable.

***Length of the appointment***

The appointment will be for a five year term.

## Conclusions and recommendations

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1. We are not persuaded by the case for changing from an Information Commissioner to an Information Commission. We welcome Mr Graham's recognition that it is important that the branding of communications from the ICO leaves no room for confusion about the personal responsibility of the Commissioner. We view the personal responsibility of the Information Commissioner for the regulation of data protection and freedom of information as the main value of the way in which the role is constituted. (Paragraph 28)
2. We recommend that the Ministry of Justice take the appropriate steps to ensure that there are sufficient resources available to the Information Commissioner to enable the backlog of freedom of information cases to be resolved within a reasonable timescale. (Paragraph 36)
3. We endorse Mr Christopher Graham's suitability for appointment as Information Commissioner and his preliminary view of the priorities of the role and its supporting organisation. We look forward to a continuing dialogue on progress both in protecting people's personal information effectively and sensitively, and in securing implementation of the letter, and the spirit, of the Freedom of Information Act. The Information Commissioner needs to be an independent and fearless champion of both data protection and freedom of information, backed by a well-led and well-managed organisation. We wish Mr Graham success in this role. (Paragraph 38)

# Formal Minutes

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**Tuesday 3 February 2009**

Members present:

Sir Alan Beith, in the Chair

Mr David Heath  
Julie Morgan  
Alun Michael  
Dr Nick Palmer

Mr Andrew Turner  
Mr Andrew Tyrie  
Dr Alan Whitehead

Draft Report (*The work of the Information Commissioner: appointment of a new Commissioner*), proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 38 read and agreed to.

Annexes agreed to.

*Resolved*, That the Report be the Third Report of the Committee to the House.

*Ordered*, That the Chairman make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 10 February at 4.00 pm.]

## Witnesses

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### Tuesday 13 January 2009

Page

**Richard Thomas**, Information Commissioner, **David Smith**, Deputy Commissioner, and **Simon Entwisle**, Chief Operating Officer, Office of the Information Commissioner

Ev 1

### Tuesday 27 January 2009

**Christopher Graham**, preferred candidate for the post of Information Commissioner

Ev 8

## List of written evidence

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1	Information Commissioner	Ev 12
2	Ministry of Justice	Ev 20

# Reports from the Justice (previously Constitutional Affairs) Committee since Session 2006-07

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## Session 2008-09

First Report	Crown Dependencies: evidence taken	HC 67
Second Report	Coroners and Justice Bill	HC 185

## Session 2007-08

First Report	Protection of Private Data	HC 154
	<i>Government response</i>	<i>HC 406</i>
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# Oral evidence

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## Taken before the Justice Committee

on Tuesday 13 January 2009

Members present

Sir Alan Beith, in the Chair

Mr David Heath  
Alun Michael  
Mr Andrew Turner

Mr Andrew Tyrie  
Dr Alan Whitehead

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*Witnesses:* **Richard Thomas**, Information Commissioner, **David Smith**, Deputy Commissioner, and **Simon Entwisle**, Chief Operating Officer, Office of the Information Commissioner, gave evidence.

**Q1 Chairman:** Mr Thomas, Mr Smith, Mr Entwisle, welcome, particularly welcome to Richard Thomas on his last appearance before us in his present capacity. Your intended successor has been named. We will interview said gentlemen in a few weeks' time and the session today will perhaps assist us in that process. I want to invite Mr Michael to start off by exploring some issues around the nature of the job itself, but is there anything you would like to say by way of introduction? You have provided us with a paper which we much appreciate.

**Richard Thomas:** I am sad that it is my last occasion before you in this capacity, but thank you very much for inviting me in. I prepared a memorandum which I sent to your Clerk at the end of last week. I hope that is helpful to the Committee in setting out a broad picture of what I see the work of the office to be and the challenges ahead. Thank you very much for the opportunity.

**Q2 Alun Michael:** There is one specific question I want to ask but first I think perhaps it would be useful if I could ask you to reflect generally on the role of the Information Commissioner. It has obviously changed during your period. There have been some very interesting events. Could you reflect first on where you see the role of the Information Commissioner being at the point of handover and what you see as the likely developments, either in terms of the way it might be forced by events or what you think, in the light of your experience, ought to be the key role of the Commissioner?

**Richard Thomas:** Thank you very much, Mr Michael. When I started the job was called Information Commissioner. It had originally been the Data Protection Registrar and then the Data Protection Commissioner. When I arrived the Freedom of Information Act had changed the title and so perhaps there has always been a bit of a problem in brand recognition and getting people to understand that it is all the same organisation. However, clearly, for me the major challenge was to inherit a data protection organisation which in two years' time was going to be taking on board the freedom of information responsibilities, and so for the four (out of six and a half) years that I have been Commissioner, freedom of information has been

live, as it were. That has made, I think, quite fundamental changes to the nature of the organisation. It is summed up in the mission which we have adopted, which is that we are "promoting public access to official information and protecting personal information". Sometimes people say, "Can you do both at once? How can you be concerned with freedom of information, which is all about greater openness, and data protection, which is more about secrecy and confidentiality?". In fact, I think they can be reconciled very easily indeed because one is about official information and one is about protecting personal information. There are some issues around the edges and there are some problems in dovetailing but I think it is absolutely right that the same Commissioner, the same public office, should regulate both areas. They are both about information rights, they are both a body of law which has to be applied in a consistent way, and I think they both involve a certain degree of cultural challenge for the organisations which are being regulated. I would not favour the approach in, say, Canada or the Republic of Ireland, Canada at federal level where there are two separate commissioners. In Australia now they are creating an Information Commissioner to bring the two strands together and that is the modern way forward. So I would argue very strongly that our experience bears out that the two should be in the same organisation. In terms of the challenges ahead, I said in my paper that it is a very lively position. I have been very privileged to lead the Information Commissioner's Office. There is a great team in place there, a very hard-working team. One of the features of the role is the sheer variety of subject matter. Both freedom of information and data protection have this very horizontal impact. Almost all areas of public life and commercial life one way or the other fall within one or both of the statutes, so part of it is always dealing with a very stimulating and wide range of subject matter, often with surprises coming day by day. You never quite know what is coming tomorrow or next week. However, we do have some clear, consistent approaches. I think we have tried very hard on the data protection and the freedom of information side to set out our strategic approach, the principles we adopt and our priorities. I have no

doubt that my successor will come in with some fresh thinking, some fresh ideas, and may want to change some of the priorities. But we try to be as clear as possible in what we are trying to do and how we are trying to do it. That has been the approach and I think that probably is in broad terms the approach which is right for any regulatory body. We subscribe strongly to the *Better Regulation Principles* and I think they have been very helpful in informing our work. I cannot predict exactly what the challenges are going to be. All I can say is that it will be a challenging job and I clearly wish my successor very good fortune in taking the role forward.

**Q3 Alun Michael:** You make it sound nearly as interesting and exciting as being a Member of Parliament. The second thing I want to explore you have introduced quite well by referring to “the office”, the organisation, and so on. It is the sort of question that one might equally address to the Ombudsman, for instance, which is, where is the relationship between the personal responsibility of the Commissioner and the role of the office? I frankly have become increasingly concerned about response statements coming from the Office of the Information Commissioner. I have rather felt that I want to know what the Information Commissioner’s answer is, not what the office thinks, because an office response can be anything from the deputy to the head person to the office cleaner putting out a statement. Has there not been a blurring of the personal responsibility of the Commissioner by this increasing anonymity by reference to an office and an organisation?

**Richard Thomas:** I understand very clearly the issue that you are raising. It is not easy. I am appointed as an individual, but I am the Information Commissioner and the law says I am a corporation sole. So I am like a company in relation to my statutory responsibilities. I have an office, the Information Commissioner’s Office, the staff of which the Commissioner is the employer, which has to deliver the results. Clearly no individual is ever going to be successful unless you can rely upon your team to deliver the results in a clear and consistent way, and that is what we have tried to do. At the same time the individual, the Commissioner, takes ultimate accountability, is ultimately responsible for everything done in his or her name. I take that very seriously. You have to delegate, you have to devolve, you have to trust your staff but you have to give clear signals and messages as to the way you would like to do things. I have tried to adopt a fairly corporate approach. I would not describe it as blurring, which you suggested; I do think it is right to have a corporate approach. One of the best things I did was to appoint a management board. The management board is the executive team, the full-time, senior executive staff, plus four non-executive board members. The statute does not provide for that but I felt it was the right thing to do, and that really gave me a great deal of support in some of the changes I thought right to introduce into the organisation, and more recently setting the overall strategic direction and providing the internal accountability

mechanism. Within that we work very hard at the executive team level and with internal communications and external communications to make sure that we give a consistent line to the outside world. So on occasions David Smith, who is my deputy on the data protection side, or Graham Smith, who is my deputy on the freedom of information side, will make public statements. At the end of the day we all take collective responsibility. My name can be there at the end of the day. I sign the annual report and the accounts. I have the ultimate responsibility, but I think it does have to be very much a shared, collegiate approach and that is the style we have tried to adopt.

**Q4 Alun Michael:** I would accept that, but, just very briefly, there is a big difference between somebody who is the senior officer making a particular pronouncement stating what the position is and something coming out anonymously as the statement from “the office”. You sounded more as if it was the team approach rather than the anonymous office that you favour.

**Richard Thomas:** It can be both. It’s depends on the subject matter. Often statements or decisions are made with a named individual, myself or deputies or sometimes an Assistant Commissioner or others. On other matters the right approach is a press release or whatever to say, “This is the view of the ICO”. But I would not drill down too deeply and say that there is any great difference. At the end of the day the Commissioner and carries responsibility, so we are not trying to draw any distinctions there. It is a matter of convenience; it is not a matter of principle at the end of the day. Yes, the Commissioner has the responsibility, but he or she can only work through team effort.

**Q5 Dr Whitehead:** When we previously spoke about resources for the Office of the Information Commissioner you firstly reflected that, as it were, the learning process within the organisation would make better use of resources as the role developed but also with the addition of some resources to remove an early backlog, which I think you reflected perhaps related to the introduction of the Act itself, but resources would then over a considerable period of time be adequate for the work of the office. Is that still your view?

**Richard Thomas:** Perhaps I can preface my remarks by painting the picture of resources. We have two quite separate revenue streams. Freedom of Information is funded by grant-in-aid from the Ministry of Justice. Data protection is now funded entirely by fees received from data controllers who notify us every year of their data processing. When I started all the notification fee income was remitted to the Ministry and then to the Treasury and we only got some of it back through grant-in-aid. I was able to change the arrangements so that we were entitled to keep the data protection money ourselves, which not least gave us a big incentive to go out and get more people notified who were not notified. Simon has some figures showing how the data protection numbers, the body of people registering, have gone

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up quite substantially since that happened over the last two or three years. What we cannot do by law, and I think it is probably right as a matter of policy, is cross-subsidise. We cannot subsidise freedom of information from data protection. Where we have got commercial organisations it would be wrong in principle and wrong in law for them to subsidise freedom of information, so we are dependent upon grant-in-aid. The position at the moment is that every year we have a discussion with the Ministry of Justice about the funding available for freedom of information. We were able to secure more for the current financial year, which goes through until the end of March. We currently have £5.5 million and that has enabled us to keep abreast of cases as they come in. We are now closing slightly more cases every year than we receive, which is where any complaint handling body would like to be. However, it is not as straightforward as that. Certainly we have a problem because of what I can call the backlog which built up in the first year. That first year was undoubtedly a very difficult year for all of those and created a backlog which we have not been able to eliminate. We have made inroads into it and reduced it somewhat, but it is still there. It does mean, as you will see from my paper, that the figures indicate that we close 50% of cases now inside 30 days, but, frankly, those are the more straightforward cases which we can close very easily. The majority of those cases which have to be investigated are now waiting typically six months before we can start the investigation process and I have said that that is unacceptable, that is disappointing, that is frustrating. We have made a lot of changes. We have built on the experience of team workers. We have changed the procedures. We have changed some of the structures. We are sending more of the work to Belfast and Cardiff when there is capacity to help out. We have got far more knowledge management over the internal intranet to give people lines to take, so we are getting through the cases far more. Unfortunately, the volumes go up. This year we have had a 15% increase in our projection, so, compared to the previous year, we are 15% ahead. Having said that, with that money we are still keeping abreast of cases, slightly more going out than coming in. This year we have established the good practice and enforcement team. When I came to see this Committee last time I shared with you my frustration at not being able to put out any guidance, and that was both inefficient and costly for the public sector, that they had to get advice from lawyers and others because we could not put guidance out. So within that budget we are now able to put out guidance. We have done a huge amount in the last year or so, but we still, I am afraid, do not know our budget from April 2009 onwards. We are still waiting to hear from the Ministry of Justice. I said in my paper that they have told us that despite an increase in cases we cannot expect to see a budget above £5.5 million. I think this Committee probably is aware that the MoJ does have very severe financial challenges which we are broadly aware of. We have been told that we cannot expect to get more than £5.5 million and there is still discussion going on to try and hang onto that.

**Q6 Dr Whitehead:** Having said that, you have reduced your target in the 2008–09 corporate plan for cases that would be closed within the year from 80% to 70%.

**Richard Thomas:** Yes. We have had, I am afraid, Dr Whitehead, to set realistic targets. We are meeting the targets. Perhaps Simon can say a bit more about how we have improved productivity over the last year but it is a lower target than the previous year; it is now 70% closed within the year.

**Q7 Dr Whitehead:** The thrust of my question there though is, does that reflect cutting the cloth to the funds available and therefore producing what might be determined as a success within constrained circumstances, or is that, as you suggested, a realistic appreciation of where you will be over the next two to three years and therefore a realistic yardstick of how you might be judged?

**Richard Thomas:** It is an honest and open and realistic target. We see no point in setting targets which we know we are not going to be able to deliver, so it was an adjustment of the target. We work extremely hard to achieve those targets. I have to say that I think generally freedom of information is done on quite a shoestring. £5.5 million was to employ 53 caseworkers. That is a very small number for the whole of the public sector and the teams are working extraordinarily hard. It is not cutting the cloth in the way you suggest. It is a realistic target. It is very frustrating that we do not have more staff. We do not have the ability to recruit more long term staff. The longer people stay with us the more we get better productivity. We have had new staff, we have had secondees from the Civil Service, but most new people take about six months to get up to speed by the time you have trained them and really got them into the swing of things. I am not proud of that situation but I have to be honest, and I am being honest in our annual report, in our corporate plans and with this Committee. That is the situation.

**Simon Entwisle:** Perhaps it is just worth my mentioning that as we close more of our older cases that percentage will look worse when actually we are doing better. It will appear that if we close 70% of our cases in less than a year what it means is that we are closing a lot of old cases, so in fact it looks worse but we are doing better. The converse applies when you are building a backlog up. By reducing that figure it shows that we are targeting older cases. When they close or go onto our statistics they will make us look as if we have done worse, but actually we will be getting rid of our old cases. That is what that means. I hope that makes sense.

**Q8 Dr Whitehead:** That is interesting, I would say, but surely under those circumstances there would then be a method of reflecting in the corporate programme precisely that distinction? I can understand the logic of that, whereby, if you are to some extent catching up from a poor position and reflecting that, because of the longevity of some cases, in your forward plan, that would be reflected in the way you describe. However, presumably in terms of your understanding of how the forward

plan is progressing, you would need to distinguish between that effect and what is happening with cases that arise as the forward plan itself progresses, so as to reflect whether you really are making a difference or not.

**Simon Entwisle:** And we do that in the annual report now. We also report on what happens to the cases that we have received in the year as well as what has happened to those cases that we carry forward from the year before. We did that deliberately in order to try and complete the picture for the person who is reading the report.

**Q9 Chairman:** Do you think that it would be better if you were in the position that exists in Scotland where the Commissioner is wholly a creature of Parliament, that is, it is bare rations and resources come from Parliament? I am not saying that there is any guarantee that you would get more money but, from the perception point of view, for your resources to depend on the department which has to promote freedom of information throughout Whitehall and has responsibility for that but which in its own turn has a rather worrying record in its own conduct in that it fails to deal with the large majority of requests on time, there is a suggestion that the poacher can afford to underpay the gamekeeper.

**Richard Thomas:** Chairman, I came to this Committee, I think, three or four years ago and made the point that I thought it would be desirable to have direct funding from Parliament. After controversies about MPs' expenses I am not so sure, but I still think in principle that that is the right approach if it could be done. I know that Kevin Dunion, the Scottish Commissioner, does receive direct funding. I think proportionally he is probably better funded than we are. We are funded by the Ministry of Justice. If I can just give some indication of comparisons, I mentioned our 53 staff. The MoJ itself has 28 staff dealing with FOI requests, just for the MoJ. It includes NOMS, the Prison Service, but they do not have to go nearly as deeply into unfamiliar territory as we have to, dealing with their own organisation. They do not have to give written decisions on the cases which have to be resolved, so I think we bear very good comparison to those sorts of figures, but it does mean that our funding comes out of the same budget. Our funding is a sub-part of the budget available to the Information Directorate of the Ministry of Justice. We have a good, constructive relationship with them. They are doing their best, I think, to give us the funding, but I think there are some perception issues, as the Chairman suggested. Within that directorate, what used to be called the Clearing House; it is now called the FOI Policy and Strategy Team. But they are giving advice on FOI across the rest of Whitehall. It is a slightly uncomfortable situation.

**Q10 Chairman:** Just on the FOI legislation itself, is it operating effectively? Does it give you sufficient powers? What explains the degree of increase in the FOI cases which come to you? Is it departments being unhelpful? Is it other bodies as well? Is it

greater public awareness of the availability of this remedy? Is this means of getting information relevant to their lives?

**Richard Thomas:** I think it is difficult to speculate. I hope that the Committee can recognise what I said in my paper, which is that I think Freedom of Information has now become part of the fabric of public life. I think all the surveys and the other indicators are that it has really struck home with the general public, with the political world, with the media world. I think there has been an enormous amount of interest in it. I was just looking at the sorts of disclosures made in the last week or so since Christmas. We have had FOI disclosures on mixed sex hospital wards, Tony Blair's meetings, Whitehall spending on Christmas parties, speed cameras, body organs sold abroad, the sale of Sellafield, deaths from knife stabbings, police call-out to schools. You will see the sheer variety and range of subject of matter. I think it has registered with the general public. 400,000 requests we estimate have been made in the first four years. I think that is a large number by any measure for brand-new legislation. We know from our surveys that the general public are increasingly aware of the Act and are also aware of the benefits of greater openness, and I think that has all contributed to perhaps the unsurprising rise and maintaining of the volume of requests. Of course, a proportion of those requests will come to us by way of complaints. In many ways it is surprising how few complaints compared to the total number of requests come to us. It is more than 10,000 over the four years out of the 400,000 that have come to us. That means that by and large people do not need to register a complaint with us. Perhaps it goes back to the delay issue which Dr Whitehead mentioned. We are flat out, I have to say, dealing with requests, but sometimes delays are caused not just because we are waiting to allocate cases; we do hit some resistance, some recalcitrance, in public authorities. It is still quite new legislation, it is still settling down, but sometimes people are not as fast at dealing with our investigations and casework as we would like them to be. We have increasingly over the last couple of years been using our formal powers to serve an information notice on the public authority which has been reluctant to show us the disputed information, and either the threat of that or sometimes the use of that does bring the material to our eyes a bit faster.

**Q11 Chairman:** Is there any pressing need to add to or modify your powers?

**Richard Thomas:** I do not think so on the freedom of information side, Chairman. Perhaps we will talk about data protection somewhere else. For FOI it is still a fairly new Act of Parliament and I certainly have not been calling for any changes in the basic structure of the legislation. I am not aware of others. There is a report due out fairly soon on the so-called 30-year rule, which I think will be looked at. The Prime Minister commissioned that about a year ago. I think that is coming out fairly soon now, which is about whether government materials could be released sooner than 30 years on a proactive basis.

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There is also a consultation by the MoJ about extending the legislation to bodies which are not currently inside the scope of freedom of information—some of the more recent bodies or some of the utility-type bodies or contractors. Should it be extended to them? A part of the Act which we have, I think, breathed some fresh life into, which was a bit of a Cinderella, is on the so-called publication schemes. That came into force before 2005, the obligation on every public body to have a publication scheme documenting what is going to be disclosed on a routine basis. As from January phase two has come into force and we have increased the expectations of public bodies. I think it is a win-win here because public bodies increasingly are seeing that the more they can routinely disclose information and move towards more of a culture of normal openness the less they will have difficult requests because they will be on the front foot in deciding what can and should be disclosed rather than responding to requests and complaints as they come in. I have been doing a round of meetings with permanent secretaries in Whitehall, I saw one this afternoon, and I think they understand that it is an attractive way forward. We have had a very positive response to the second round, phase two, of publication schemes.

**Q12 Mr Heath:** Mr Thomas, you have been critical in the past of the apparently insatiable demand from government for more and more information which they can accumulate or occasionally mislay on a larger amount of databases about more and more people. Indeed, I think I recall your comments that we were “sleepwalking into a surveillance society”, which is much quoted, not least by me. I wonder if you have a view about what further safeguards are needed if we are to maintain the privacy of the individual in the face of these more complex IT “solutions” to data storage.

**Richard Thomas:** Mr Heath, I understand your party has announced your chairmanship of its Privacy Commission today.

**Mr Heath:** You can be sure we will be co-operating with your Commission over the coming months.

**Q13 Alun Michael:** It was probably a secret though.

**Richard Thomas:** We are an open and transparent organisation. Mr Clegg has announced a commission.

**Q14 Mr Heath:** I sent it to the DWP and they circulated it.

**Richard Thomas:** I have tried to share with the Committee my view that data protection is now taken a great deal more seriously. I had some reservations and some anxieties when I started. I thought it had become somewhat marginalised, somewhat overly legalistic and (in my phrase) almost theological. I think it had become the domain of experts and bypassed almost everybody else, so the public and the media and politicians did not really understand the fundamental importance of it. I have worked very hard with the team to put a great deal more guidance out and to use plain language in

our advice. The fundamental message has been that we want to help the vast majority of organisations who want to get data protection right, but to be tougher on the minority who do not. That has been our theme, pushing that button very hard. We have raised issues along the way, particularly in relation to the large-scale collection of data by government and others. In my third week of office I was sharing a platform with David Blunkett, who was then Home Secretary, about identity cards and the debate about that was just starting. We have come a long way since then with other issues, e.g. in 2006 we hosted a major international conference, “The Surveillance Society?”. We published a three-volume report. We raised some concerns. I was very pleased that we had two parliamentary committees, the Home Affairs Committee in the Commons and the House of Lords Constitution Committee. It was quite unusual to have two committees looking at the same subject at the same time, and the Lords Committee I think is due to report quite soon. I feel pleased that we have got people taking the issue seriously. There are some very deep and difficult issues but they are not black and white. You cannot say all collection of data is bad, all data protection is good. It is all about getting the right balance. We have tried to take a very responsible approach to this at the general level of anxieties about excessive surveillance. I think it has resonated, if you like, across the spectrum. At one end you have had *The Guardian*, at the other end the *Daily Mail*, both very much focused on the risks of excessive surveillance, but we are not against proper law enforcement, we are not against improving public services. We are not Luddite in this area. We want to get the balance right. Individual issues come forward—the children’s database, the communications database, which the Home Office is going to be consulting on. We raised concerns about those. I do think as Commissioner, and this goes back to the general point, that you have to speak out on particular occasions but you have to choose your ground carefully. You cannot be a rent-a-quote. You cannot come out every time there is an issue and express a view. You have to have a principled approach rooted in the law and the principles of data protection and express—and I have always tried to express—a responsible line and have constructive engagement and discussion with those concerned. David can say a little bit more about what we have done on this front because I think it has changed very dramatically the attitudes towards data protection.

**David Smith:** In terms of looking for safeguards, the safeguards tend to fall into three areas: legal safeguards built into the law, technical safeguards built into the systems, and procedural safeguards. On legal safeguards Richard has initiated work looking at the European directive which sits behind the UK Data Protection Act and whether that really provides a modern-day framework for protecting people’s rights. The idea is simply that if you want access to your data there is a law that says you apply in writing and you wait 40 days and you send £10, whereas actually it is done online now so should that right not be modernised? That is part of it and

Richard has promoted that debate. In the technical area we have done a lot of work on Privacy Impact Assessment and Privacy by Design: you can build this into systems in the first place so the systems can provide a lot of protections. On the procedural, we know about data breaches and how these reveal the absence of procedures, the lack of data protection being taken seriously, the lack of accountability, which is an area which again we have put a lot of attention on. It is within those areas that we need to focus.

**Q15 Mr Heath:** Can I ask you about that last area? There has been a whole succession of breaches of data protection, sometimes quite extraordinary in their scale. Are government departments learning the lessons? Are you confident that the procedures that are now in place are better than that which was in place just a few months ago?

**David Smith:** I am confident that government are doing the right things. I think the house is out on whether that will actually make a huge difference. Yes, there are unacceptable data breaches; you are absolutely right. A lot of work has been done to address changing culture, changing procedures and so on. As for whether that is entirely effective, I hesitate to say this. But ask us in a year's time and we will look and see what has happened. They are moving in the right direction.

**Richard Thomas:** We did announce in, I think, November that in the previous year since the first major HMRC incident we had been notified of 277 data breaches and we published a breakdown—central government, local government, Health Service, private sector—and different types of breach. It is a large number and some are fairly minor, some are very serious. We indicated that we were investigating 30 of them because we have a system of prioritisation. We have been serving enforcement notices, for example, against HMRC and MoD. We are seeking undertakings from other bodies, so we are trying to keep them on their toes. My judgement is that, certainly with the plethora of reports and recommendations and changes coming from the centre in Whitehall, a lot of effort has gone in the last 12 months into improving practice. I think some of the reports exposed some really quite unacceptable practices before but I think things are improving. One of the concerns I want to share with the Committee is that it is not just about data security. That is perhaps the most visible and the easiest part of data protection going wrong. Data minimisation is collecting no more information than you need in the first place, not keeping it longer than you need, being aware that there are risks—mistakes, positive or negative mismatches, inaccuracies, out-of-date information. We have taken action, for example, against police forces for retaining minor conviction data, often relating to young people, far longer than we think appropriate. The tribunal upheld us on that particular approach although the police are appealing that to the Court of Appeal later this year. It is not just about security. That is the bit which I think people find easier to understand, but we have taken a risk-based approach and we think others

should see that data protection really is enlightened self-interest. There are reputational risks. If you like, it is glorified risk assessment, and in the name of enlightened self-interest they should be addressing these issues and not collecting or using more information than they really need for a particular purpose.

**Q16 Mr Heath:** That is very interesting. Do I hear from what you are saying then that in large databases where there is known to be a larger cost of deletion, where inevitably a breach causes more loss, more breaches of data protection rules, you believe it is intrinsic that they are more vulnerable and therefore it should be in the interests of data protection that databases should be as small, as clearly targeted and as regularly cleaned, as it were, as possible? Is that a reasonable synopsis of what you are saying?

**Richard Thomas:** As a broad proposition I think you have elaborated this concept of data minimisation. Technology is immensely powerful. I think people have the technology in place without always understanding its power and its scope. It is not just “Large databases bad”; the more you collect, the greater the risk. With a well-run organisation, if it knows what it is doing and it has got the right paperwork, the right technology, the right training, the right awareness for its staff, it should not have any problems. But it does need to take this holistic approach. I have called for this to be addressed at board level. It cannot be left to the IT department or the lawyers or the compliance team. You have to look at the paperwork, the technology and the people in order to get it right. I have said that one of the challenges on data protection is this whole area of improving governance and accountability.

**Q17 Mr Heath:** Can the technology safeguard match the rapidly developing technology of data accumulation and capture?

**Richard Thomas:** I think probably, as David said, the jury is still a bit out on that. What is interesting is that there are a lot of technological solutions now coming on stream. We hosted a conference in Manchester and published a report in November, *Privacy by Design*, looking at privacy-enhancing technologies and other approaches, as David said, to minimise the risks from the outset. It is no good bolting things on. It is very expensive to bolt them on later. If you get it right at the architectural stage you have a far better chance of keeping costs down and producing the right results.

**Q18 Alun Michael:** I would like to explore a little further this issue of whether we can get the right balance into play. My starting point is that I agree entirely with what you said earlier about the protection of private data and the availability of public information needing to be regulated in the same place. In terms of the public debate, it is the case, is it not, that we swing after an event like Soham to saying that everything should be stored immediately and instantly to a data loss which leads some people to say—and I would not call it a Heath

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doctrine—that you cannot trust government with large amounts of information? Can I ask you where you think we are on that voyage of discovery?

**Richard Thomas:** I think it is a voyage and it is ongoing and will probably go on for many years to come. You are absolutely right that public opinion can swing from one extreme to the other—not enough data being collected, too much data being collected. I was responsible for the Review on Data Sharing, which was outside my official role as Commissioner, but the Prime Minister and the Justice Secretary asked me and Sir Mark Walport to do a report looking at where data is either being shared inappropriately or is not being shared where it should be shared. We took a measured approach in this report. We addressed a number of issues. We set out some criteria. Clarity of purpose and proportionality are hugely important considerations. It is difficult to generalise. You could take a hypothetical example: everybody would be outraged if congestion cameras in London were to be used to track erring husbands or wives. At the other extreme there is a protocol in place now for the Metropolitan Police to have access to those cameras under our jurisdiction where there is serious terrorist activity. One has to look at each case on its merits. It is desperately difficult to generalise.

**Q19 Alun Michael:** Would you agree therefore, on this point of data sharing and data not being shared when it should be, that the tendency sometimes of legal advisers or data protection officers within organisations to say, “If in doubt do not share”, is as dangerous as, “If in doubt always share”, and that there is a responsibility on each occasion where there is either a request for data to be shared or the possibility of it being considered within an organisation to say that we actually have to look clinically at the balance of responsibilities?

**Richard Thomas:** We have heard both sets of accusations made quite regularly. It has been said over many years that we need to review it. Legislation I think is imminent in this area. My office already has a statutory code of practice on information sharing setting out principles of Do’s and Don’ts as to how you can make a measured judgement in this area. We recommended, and I am delighted that the Government has accepted, that that code should be made a statutory code. My office, if the Bill goes through, will be required to give a formal opinion on the acceptability or otherwise of a proposed data sharing initiative which will go through secondary legislation to be enacted. So I welcome the fact that we are going to have a stronger role with statutory underpinning to say what is acceptable in a particular case of data sharing and what is not acceptable.

**Q20 Alun Michael:** Yes, but one of my concerns is that classically in an area of difficulty more and more regulation guidance comes out to the point where people are unable to cope with reading all the guides. Does it not at the end of the day come down to mature and responsible judgements being made?

**Richard Thomas:** To a large extent, but I do think you need a framework of guidance. Up until now I think there has almost been too much guidance. There have been examples of fragmented guidance drawn up with the best intentions in the world but it gets put into a drawer and does not get looked at by anybody. The broad approach we have been adopting for the last two years with our non-statutory code, and that will be converted into a statutory one, is to have authoritative guidance, a single set of principles with the authority of the Information Commissioner’s Office so that people can then use the judgement and the intelligence to make their approach in line with some authoritative guidance. I think that would be a better way to move forward.

**Q21 Alun Michael:** At the end of the day it does come down to people not being able to escape the responsibility within that guidance to make a proper judgment.

**Richard Thomas:** Absolutely, yes, because you cannot legislate for every situation. What you can do is put the ground rules in place for every scheme, every initiative, and then on a micro basis make sure it is being followed in practice.

**Q22 Chairman:** Mr Thomas, Mr Smith, Mr Entwisle, thank you very much indeed, Mr Thomas in particular. It must have been very exciting to embark on the job you did at a time when freedom of information was being introduced. This Committee have worked closely with you, and indeed we both reported before freedom of information came in and afterwards and I think it is one of the success stories of recent government. It must have been exciting to do that. I think we owe you a debt of gratitude for the effort that you have put into it and the contribution you have made to making freedom of information and established part of our public life.

**Richard Thomas:** Thank you very much; that is very kind of you, Chairman. I said at the end of my written submission that it has been a great privilege to hold this position. I still have five months to go, so it is business as usual for the next five months, but I do lead a great team and I do think I can put my hand on my heart and say that we are a modernised and more confident organisation. We have had a lot of demand upon us, life is never dull, but it has been a great privilege and I am most grateful for the support of this Committee over the last six years. Thank you very much.

**Chairman:** Thank you.

**Tuesday 27 January 2009**

Members present:

Sir Alan Beith, Chairman

Mr David Heath  
Alun Michael  
Julie Morgan  
Dr Nick Palmer

Mrs Linda Riordan  
Mr Andrew Turner  
Mr Andrew Tyrie  
Dr Alan Whitehead

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*Witness:* **Christopher Graham**, preferred candidate for the post of Information Commissioner, gave evidence.

**Q23 Chairman:** Mr Graham, welcome. This is the second appointment hearing that this Committee has held. We are glad that in good time an appointment has been made for a very important post of Information Commissioner. The present holder of the post has appeared regularly before the Committee. I wonder if you could just tell us in a few words what features in your own background and experience you think will actually help equip you to do this job.

**Christopher Graham:** Good afternoon, Chairman. I come from a regulatory background. Since April 2000 I have been running the Advertising Standards Authority, which deals with 26,000 complaints about advertising each year. It is an industry self-regulatory body, but since November 2004 we have contracted out responsibility from Ofcom to deal with TV and radio advertising as well as the non-broadcast advertising which traditionally we have been dealing with since the organisation was established in 1962. In that role I have to deal with codes, with the possibility of being judicially reviewed, with the need to provide a proper customer service and the need to get compliance. I think it has given me, particularly with my two years as Chairman of the European Advertising Standards Alliance, a familiarity with the regulatory landscape. It has also given me the experience of running a large organisation, the experience of managing change, developing a customer service culture and so on. Chairman, before that I was a BBC lifer. I joined as a journalist and I ended up as the Corporation's Secretary. For three years I was making sure that the Director-General and the Governors of the BBC were carrying out the terms of the Royal Charter and so on and so on. That was not an easy row to hoe either. I think I am broadly familiar with the challenges of this job. It is very exciting. Only today we have seen stories of a significant leak of personal information from one of the job recruitment websites, possibly the biggest leak of personal information since the loss of all those child benefit records recently. We have had a decision from the Information Tribunal this afternoon supporting the Information Commissioner's ruling on the release of the 2003 Cabinet records. I followed with great interest the debate in the House of Commons yesterday on the Second Reading of the Coroners and Justice Bill. There is a lot going on. I am very humbled but

excited to be asked to take on this responsibility subject to the approval of your Committee and some other procedures. I think I am equipped through my skills and experience to bring something to this role.

**Q24 Alun Michael:** Could you say something about your philosophy and your approach to the role? This role started off in data protection and has moved to a much more sophisticated and therefore more challenging brief over recent years. Having seen the way that has been developed, particularly in the incumbency of the current Information Commissioner, how do you see yourself taking that forward? What is your attitude to the issue of information, data management, sharing and retention?

**Christopher Graham:** My first reaction is that a challenging job is getting even more challenging. There are new powers and duties, some already have been granted and some that are in the Bill that you are considering. In the course of 2009–10 the Information Commissioner is going to have significant new powers, particularly on the data protection side and one hopes the resources to use those powers effectively. You ask what my overall approach is. First of all, that the organisation should be well led and well managed, that it should be effective and efficient. I think that is the *sine qua non*, it is the licence to practice. The Information Commissioner has got to demonstrate that he is delivering a service across the responsibilities of data protection and freedom of information and so on, that we can tackle the backlog of delays on the freedom of information side, for example, and win the respect of all stakeholders, which I think then gives the Information Commissioner the platform on which to contribute to public policy debates around data protection and freedom of information and so on. I would emphasise very much the importance of the education and information side with the enforcement and the sanctions as the big stick in the cupboard. It is important that everyone knows it is there and will be got out if necessary. There is the huge task of education and helping people to comply, which has always been my approach with the Advertising Standards Authority. I am not particularly interested in waiting around the corner saying, "Aha, we've got you," but that is necessary from time to time. It is much more important to put the resources in to making sure that

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public authorities and commercial organisations decide what their responsibilities are and that they get on with it, but they have got to believe that if they get things wrong the Information Commissioner will be effective and will be prompt and, in addition to the reputational damage which necessarily arises from getting things wrong, there will be sanctions visited upon miscreants. And finally, my approach would very much be the need to convince the authorities and stakeholders in general of the absolute independence and integrity of the Information Commissioner. I think we achieve that by being absolutely evidence based, cool, calm, determined to defend decisions that are being properly arrived at, brave when necessary, but the first thing to do is to win the respect of all those who are interested in this area by manifestly running an effective operation at a time of great challenge and great change.

**Q25 Alun Michael:** There is sometimes a tendency when there is regulation and when there is quite tough regulation to look for ways of playing safe. There have sometimes been swings in public mood, on the one hand, to say that everything needs to be shared, an example was of the Soham murders, which was actually a technical problem but led to that sort of public reaction, and, on the other hand, saying nothing should be shared or you should keep everything to the minimum. Where do you stand on that spectrum?

**Christopher Graham:** It is a bit like health and safety in that it can often be given as an excuse for not doing something and perhaps the excuse is given by those who do not quite understand what the rules are. Again, there is a challenge to the Information Commissioner's office to make it very clear how we do data protection and how we do freedom of information. A point that was made by Richard Thomas' study with Sir Mark Walport about data sharing was that the current rules were rather imperfectly understood. I am not going to go further down this road because it is a matter that is absolutely for debate with the Coroners and Justice Bill. I saw there was a difference of view in the Second Reading debate last night. It will be very interesting to see how it pans out. At the moment within the Bill there is a very considerable responsibility laid on the Information Commissioner to take a view about individual departmental applications for data sharing. I would take that very seriously. Let us see how the legislation ends up. All I would say specifically on that is that I note it all has to be turned round in 21 days. I hope very much that departments that are contemplating this sort of thing are going to be in early dialogue with the Information Commissioner's office because if everyone is trying to do it 21 days ain't long to turn it round.

**Q26 Chairman:** You have got the problem, which you mentioned, of a substantial backlog on the freedom of information side. You said that it was a priority to deal with that backlog. I am not quite sure whether you have had any promises made to you of

better resources or you have got an understanding with the Ministry of Justice about this. When you take on board new responsibilities on the data protection side, which data sharing itself generates, it is going to be pretty challenging, is it not, to deliver in this organisation?

**Christopher Graham:** It is very challenging. To answer to your question, I have not had any discussions with the Ministry of Justice about resources. I have not had many discussions beyond the job application. I think the fun now starts. On the data protection side, there is, as I understand it, given the proposals in the Bill, the possibility of some, should one say, elasticity in resourcing, and resourcing on the data protection side is likely to be very considerably increased because of the graduated fee structure.

**Q27 Chairman:** This committee recommended that.

**Christopher Graham:** That is very good news, and to an outsider that looks to be fine, but I also know, from those who have explained to me the mysteries of the Public Accounts Committee and managing public money, that there cannot be virement between the two sides of the business and so one cannot make a profit on the data protection side in order to subsidise the freedom of information side. The freedom of information side looks to me, but I have not been to Wilmslow, I have not spoken to anyone, to be pretty tightly resourced. I think there was an extra half million or so voted this year in order to assist in clearing up the backlog, but it is a backlog that has been there pretty much from day one, and I thought, reading Richard Thomas' evidence in a session you had a fortnight ago, it was very compelling when he said words to the effect that the level of applications to the Information Commissioner on freedom of information matters is up 15% this year. So it will be interesting to see how we can deal with that increase and clear up the backlog unless there are significant resources made available. But I would also say that this is a problem that is not unfamiliar to me. When I arrived at the Advertising Standards Authority in 2000, I made a priority the turn round of complaints within a reasonable period of time, because I said justice delayed is justice denied and unless you can demonstrate that you are an efficient organisation handling the business promptly, people will not take you seriously on anything else. We did manage to make a considerable impact through introducing a number of things that would actually not be new at the Information Commissioner's Office. I am not pretending I have got a magic bullet. Key performance indicators, regular reporting, proper triage, and so on—I think all those are in place. I would merely say that I regard it as a priority, it is very important, to make progress on that backlog, and the reason is this: a deterrent only works if people fear it. People have to have a reasonable expectation that there is going to be a result pretty quickly that will either be welcome or unwelcome, and so that suggests that there is a considerable benefit in turning round cases promptly which has a

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wider benefit than just doing the job you are there to do but has a resonance about effectiveness that runs right through the work.

**Q28 Mr Heath:** A lot of the work of the Information Commissioner, as has already been suggested in this session, is dealing with the applications, the complaints side effectively. Part of the job, surely, must be, however, to prevent those applications and complaints ever reaching the Office of the Information Commissioner by instilling a proper culture within the organisations over which you have an interest, and I think one of the concerns that is often expressed is that those officers who are dealing with data protection, dealing with freedom of information are at too low a status within the organisation and that it is not being sufficiently considered at chief executive level, at board level. How would you set about changing that culture and reminding organisations that actually it is a core responsibility to make sure that the organisation understands FOI and understands data protection?

**Christopher Graham:** It could be that they will have to learn the hard way. There is tremendous reputational fallout, both for departments of state, public authorities, but also commercial organisations, when things go wrong, and it may be that the delays in a decision being made have the unfortunate effect of somehow making it seem it does not really matter. If you remember, Dr Johnson said that the prospect being hanged tomorrow concentrates the mind wonderfully; the prospect of being hanged in about three or four years' time is probably less effective—that is point one. But I very much respond to the suggestion, which I know is shared by the current Information Commissioner, that information needs to be regarded as a risk to be managed at main board level. In the same way that you have financial risks, there are also huge risks to reputation, to effectiveness, to the business, by people being careless with people's personal information or by people appearing to be shifty because they do not want to let the public know what is going on. There is a virtuous circle where efficiency in the office contributes to the organisation being feared, in the sense of being properly respected. I absolutely support Richard Thomas's suggestion that information is something that should be a main board responsibility, and he spoke, I thought, very compellingly at your last meeting about the threat of toxic information. We have heard about toxic assets. Companies are sitting on information which is sometimes badly managed, not properly safeguarded, and the fallout for the company is absolutely huge. I would not like to be in the position of the people at the Monster recruitment agency who have just managed to lose absolutely everyone's details apparently; that is not good for business.

**Q29 Mr Heath:** One of the problems (and perhaps you have just touched on it) is the ever increasing size of databases and also the ever increasing complexity of the IT systems that underpin them, to the point where possibly the people who operate them cannot aspire to really understand entirely what they are

doing, but certainly your office is going to have more and more difficulty, are they not, in keeping pace with the technology that you are policing?

**Christopher Graham:** In any modern organisation you have got to keep pace with technology. We were discussing it at our ASA directors' meeting this morning and one of the pieces of information I picked up is that a small organisation like the Advertising Standards Authority, with 100 staff and a budget of about eight million pounds, dealing with 26,000 complaints, has got 52 servers—some of them are virtual servers, but 52 servers—we are very IT dependent. I will not say we are paperless, but we are paper less—less than we were. Anyone who is running a modern organisation these days has not to try to run the IT themselves but to have a good IT department and to keep abreast of the issues. I am on the receiving end of the data protection side of this issue in a number of ways. We deal with database practice in the marketing business. It is a breach of the British Code of Advertising Sales, Promotion and Direct Marketing to do direct marketing using databases in the wrong way. So this is very much the currency of what we deal with, but also for an organisation like the Advertising Standards Authority, which presumes to tell everyone how they ought to behave and goes on about standards, to be caught out with a big data leak or promoting ourselves inappropriately under the rules, and so on, would be a disaster: that is why we were talking about it this morning. These are issues that I am familiar with in a general way. I do not kid myself that I do not have to do an awful lot of preparation before I take over, if I am asked to do that, at the end of June.

**Q30 Dr Whitehead:** When Mr Thomas gave evidence to the committee he commented quite strongly on the principle of the source of funding for the Information Commissioner and felt that, in principle, the funding of the Information Commissioner might be transferred to Parliament. Is that your view and, if you do proceed to become the Information Commissioner, would you actively pursue that as a future model for the funding arrangements for the Information Commissioner's Office?

**Christopher Graham:** I cannot pretend that I have got views on every subject under the sun. I have applied for a job, I have been given a provisional okay, and there is a lot of work I now need, as one would in any job, to see how one would approach things, so I do not want to make rash promises. It would be a popular one to make here, because I think that most of the running on this issue has been made by this committee. Perhaps I should just confine myself to saying it seems logical, it is the way they do things in Scotland; I would not resist it.

**Q31 Mr Tyrrie:** Did I hear you right when you said that you had not clarified with the department the level of resources that you would have to do your job?

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**Christopher Graham:** I know what is in the three-year strategy; I know what is in the public expenditure plans. I have agreed with the existing Information Commissioner that there can only be one Information Commissioner at a time. He is conducting the usual negotiations with the Ministry, and if this committee concludes that I am a fit and proper person and if the rest of the process goes through, then I will be in a position, over the period before I take up the position on 29 June, to get into a further level of granularity, but I have never been in a position where I have applied for a job where I have been negotiating on next year's business plan before I have been appointed.

**Q32 Mr Tyrie:** But once you have been appointed, your leverage is somewhat less, is it not? Would you not want to be clear what you are going to have available to you to do the job, bearing in mind that if you do not have the resources it is your head on the line if, as a consequence of inadequate resources, people blame you for not doing the job well?

**Christopher Graham:** Assuming this process runs to plan, I believe that I will be in a position to have further discussions with the Ministry by the end of February, and I am not scheduled to take up the position until the end of June.

**Q33 Mr Tyrie:** So you are going to have a negotiation about the resources before accepting the job?

**Christopher Graham:** I am going to have to talk about lots of things, but I have yet to learn the ways in the Civil Service, and I had probably better not make it up before a select committee.

**Q34 Mr Tyrie:** Let us just have one more go. Are you going to make sure you have got the resources to do this job before you finally say "yes" to the Government?

**Christopher Graham:** If I form the conclusion that I have not got the resources to do the job, then there would not be any point in proceeding, but I have not had the discussion, so I do not know what the outcome will be.

**Q35 Alun Michael:** If you do work out the ways of the Civil Service, perhaps you could come back and let us know! The phrase that was used when we asked the current Information Commissioner about his role was that it is as an individual who is a corporation sole, which is unusual. We took evidence, as you will have seen, and it was referred to in the evidence that we took from him. I must say, I am a little bit puzzled about the relationship. We are seeing the phrase "Information Commissioner's Office" coming to the fore more, but the responsibilities lie with the Information Commissioner. Do you have any insight into how you are likely to refer to your role and the role of those who will be supporting you?

**Christopher Graham:** I notice that you raised this point with Richard Thomas at the last session, and it

is interesting. My experience of corporations: I have only had experience of one, and that was the BBC. There were 12 governors and they were the corporation. They were issued with a charter and they just happened to employ the Director-General and a whole load of people to make television and radio programmes. So I knew what that was about. I have not encountered a corporation sole before. I notice that Richard Thomas made the point that, as the responsibilities of, first, data protection and, then, freedom of information expanded, he has got quite a considerable operation in Wilmslow, about 300 staff overall. There is a big management job to be done and bringing everybody forward in the pursuit of effective strategy, you do not get very far if it is all for the greater glory of one individual. He has very much emphasised team work, and I can understand why he has done that, but at the same time I think in the report he did with Sir Mark Walport one of the recommendations talks about reconstituting the Information Commissioner operation as a multi-member commission on the lines of the Office of Fair Trading and many of the other regulators, and that is a perfectly logical position to adopt. I must say, reading the decision notice on the Iraq Cabinet minutes from 2003, I could not imagine that being tackled in the way we take decisions about advertising standards, where the Advertising Standards Authority Council considers something and sometimes there is a vote. On that occasion the Information Commissioner, according to the decision notice, had gone to Downing Street, had read the minutes, had read the bits that were too secret to be mentioned, and so on. It seemed to me that that is work that only one man can do. There is, of course, the Information Tribunal, which has uttered today on this, and there I think there was a majority vote, but this seems to me a job where an awful lot of responsibility rests on one individual, and perhaps it is just a question of clarifying when this is a decision of the Information Commissioner, no doubt supported and advised by a cast of several, and when you are talking about "the machine" advising companies on how they ought to comply, and so on, and possibly it is a question of getting the branding right.

**Q36 Alun Michael:** I think that is a very good point to make, if only from ministerial experience. It has always seemed to me odd, if decisions are placed in the name of the minister, if they have not been taken by the minister. They may be in the powers of the minister, but actually making clear that distinction is probably quite important. I am glad that you picked up on the point of the responsibility lying with the Commissioner. In the current arrangement that does seem to be very much the focus of the arrangements. In that context you referred to your experience of managing systems within your current and previous arrangements, but increasing the decisions of the Information Commissioner and, indeed, the team are going to have to depend on an understanding of the systems that are being used. Do you have a great

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deal of experience of IT systems? Are you familiar with the sort of technicalities that would be used by many of the organisations to which you will be the regulator, and to what extent do you think that is an issue?

**Christopher Graham:** I think it is important that one should understand the language; I think it is important that one should know what questions to ask. I do not claim to be an IT nerd. I employ a number of IT professionals. We have been very ambitious with the IT developments at the Advertising Standards Authority. I was the director general who said everything has to be done online, I was the director general who said all adjudications have to be published online, searchable, we will do it weekly, instead of monthly in a little telephone directory, and so on. So I am a great advocate of the potential of IT to make organisations more efficient, to open up to the public, and so on, but I do not claim to be an IT whiz who can do it all himself. I think in this role it is very important and one should have around one colleagues in whom one can trust, whether it is managing the IT, or managing human resources or, indeed, giving very good legal advice. It is important to be able to draw on various expertise, not to pretend that one knows it all.

**Q37 Chairman:** How are you going to deal with the Ministry of Justice, bearing in mind that unless we get it our way it is going to be responsible for your pay and rations? It is a body that you will want to scrutinise in its role promoting freedom of information across government—that is part of its duty—and it is a department which actually has a rather weak record in its own management of freedom of information.

**Christopher Graham:** I am sure that the committee is a very effective terrier snapping at the heels of the Ministry, and perhaps it is a two-pronged fork with the committee keeping up the pressure and the Information Commissioner doing what the Information Commissioner does, but I would not have thought that megaphone negotiations before the select committee are going to get me very far.

**Q38 Chairman:** So you do not propose to start any today?

**Christopher Graham:** No.

**Chairman:** Christopher Graham, thank you very much indeed for what has been an interesting session for us. Can I ask the committee members to stay behind; we have some private business to do. Thank you very much.

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### Memorandum submitted by the Information Commissioner

#### THE WORK OF THE INFORMATION COMMISSIONER

##### 1. INTRODUCTION

I understand that the Justice Select Committee would like to me to share my views on developments and changes to the role of Information Commissioner during my tenure and to discuss key issues facing my successor.

I have been the Information Commissioner since November 2002 and will be standing down at the end my second term of office on my 60th birthday in June 2009. The last six years have seen substantial change—both external and internal. Technological developments have been a major driver of an information revolution with benefits in terms of greater openness and risks in terms of excessive intrusion. Since 2002, few individuals are beyond the reach of Google and other search engines, the internet has made a reality of globalisation, the costs of computing and storing data have tumbled, intelligence-led policing has become the norm and government has embarked on an ambitious programme of IT-driven transformation of public services.

In 2002, the Information Commissioner's Office (ICO) had a single email-enabled PC, an extremely basic website, paper files for all casework and an intranet was not even on the agenda. The governance and business planning arrangements were no longer adequate for an enlarged role and policies, procedures, structure and training all needed attention.

Since 2002, a Management Board has been introduced with four highly-valued non-executive members to steer strategic direction. The size of the office has nearly doubled and is set to expand further. Regional offices have been established in Belfast, Cardiff, Edinburgh and London and the standing and profile of the ICO have changed beyond recognition. Our Annual Reports have documented progress—the latest can be found here<sup>1</sup>.

I hope that it can be said above all that the ICO has been effective, and has made a difference. The staff of the ICO are committed, well-motivated and hard-working. There is plenty of work in progress and plenty of unfinished business, but I am proud of what has been achieved. Three headlines are highlighted in this Evidence:

— A modernised and confident ICO punching above its weight.

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<sup>1</sup> [http://www.ico.gov.uk/upload/documents/library/corporate/detailed\\_specialist\\_guides/annual\\_report\\_2007\\_08.pdf](http://www.ico.gov.uk/upload/documents/library/corporate/detailed_specialist_guides/annual_report_2007_08.pdf)

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- Freedom of Information established as part of the fabric of public life.
  - Data Protection taken seriously at last.

## 2. A MODERNISED AND CONFIDENT ICO

The role of Information Commissioner—an individual who is a “corporation sole”—is unusual. Effectively acting as both Chairman and Chief Executive, I have sought to provide leadership to the ICO, treating our independence, integrity and reputation as fundamental. We take seriously, and value, our accountability to Parliament. We enjoy a constructive, but arm’s-length, relationship with the Ministry of Justice. The ICO must be, and must be seen to be, independent of government and the wider public sector and of data controllers. This has not been threatened, even where our activities have caused discomfort. The challenge is formidable but we believe that we have earned respect as an authoritative, but accessible, regulator of over 115,000 public bodies and 315,000 data controllers. The diversity of subject-matter affected by information rights is astonishing—covering virtually all governmental and commercial activity and ranging from nuclear power safety to credit reference agencies, from abortion statistics to the role of ministerial special advisers.

### 2.1 *A Strategic Regulator*

Successive Corporate Plans have set out our approach. The latest, covering the three years 2008–11 can be found here<sup>2</sup>. These Plans have spelt out our direction in fulfilling our fundamental mission of “Promoting public access to official information and protecting your personal information”. We have taken a strategic approach—“selective to be effective”—to be quite clear what we are seeking to achieve, and how and when. This has involved significant re-structuring projects, with policy and procedural changes to differentiate and sharpen focus on the three main types of statutory function which span both data protection and freedom of information:

- Educating and influencing, especially to promote good practice.
- Ruling on complaints and resolving problems.
- Taking appropriate enforcement action when the law is broken.

For each of these areas of the Corporate Plan, we have identified our priorities to establish a “golden thread” of business plans and personal objectives. We are clear about the importance of setting measurable targets wherever possible to secure short and medium term results and build the long term vision. We have developed powerful Communications and Human Resource Strategies. Our stance has been to be influential, responsible, robust and practical. We have set long-term goals in terms of changed cultures where “open government” is widely seen as normal and natural and where organisations use personal information properly and securely, routinely recognising and addressing privacy concerns and avoiding the dangers of excessive surveillance.

### 2.2 *Internal change*

The ICO has undergone a thorough and rigorous internal improvement programme to help us meet our challenges. A sharper ICO culture has developed, with well-defined mission, values, competencies and behaviours. With a new corporate governance structure, we have clearer decision making and recording processes.

A complete overhaul of the human resource function has yielded many benefits. There has been extensive leadership and senior management training. The staff headcount has increased from 170 in 2002 to 302 in January 2009—a full time equivalent of 283. We have invested heavily in new training initiatives. With new programmes, the average number of sick days has reduced from 12.75 in 2005 to 7.2 in 2008—well below central government and public service averages. A Diversity and Equality Strategy has been implemented. Internal communications have improved and a staff engagement programme devised.

We have re-procured our IT service provision and an extensive modernisation programme is underway in line with our IT strategy. We produce and use substantially more management information. We have overhauled our Operations activity thoroughly to meet rising workloads and now place high emphasis on taking a much more customer-focused approach.

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<sup>2</sup> [http://www.ico.gov.uk/upload/documents/corporate\\_plan\\_html/corpplan/index.html](http://www.ico.gov.uk/upload/documents/corporate_plan_html/corpplan/index.html)

### 2.3 *Communicating*

Some specific results for freedom of information and data protection are set out below. Across the ICO as whole, our profile, status and influence have all increased substantially. We have given written and oral evidence to Select Committees of both Houses frequently. We are now regularly mentioned in debates and in PQs. We are now routinely invited to meet ministers, permanent secretaries, chief executives and other senior personnel. We have a heavy speaking programme, encouraging staff at many levels to deliver our messages, and we organise several events of our own each year.

In 2002, the ICO did not have a press office. Now our work features in the national media on a daily basis—often front-page. There have been several favourable editorials and TV programmes inspired by our work. In 2007–08, we generated 52% more media cuttings than in the previous year, and more than doubled our audience reach. In the second quarter of this year, media coverage was the most positive since reports began: 97.5% of items were positive towards the ICO (compared with just 75% in the same quarter two years ago). We distribute around 240,000 publications a year, we have 6,000 subscribers to our e-Newsletter and our re-vamped website now receives around 1.6 million visits a year. In our 2008 survey of stakeholder perceptions, 71% of respondents found the ICO's performance to be excellent or very good in terms of advice, dealings with us and overall relationship.

## 3. FREEDOM OF INFORMATION ESTABLISHED AS PART OF THE FABRIC OF PUBLIC LIFE

Freedom of Information came fully into force in January 2005. There had been polarised predictions. Some had forecast that, despite a presumption of disclosure, a law with numerous exemptions was bound to be a complete damp squib. Others were confident that the government would shred all significant records. Others claimed in effect that secrecy was so important that good government would be imperilled. In fact, all such predictions were wrong. The truth has turned out somewhere in between.

Four years on, the national media reports disclosures made under the Freedom of Information Act (or the companion Environmental Information Regulations) almost every day. Much more is disclosed at local level. Details of EU farm subsidies, heart surgery survival rates and schools performance are now routinely available. The surprise is no longer the nature and extent of disclosure. What is astonishing is how much was previously treated as secret. Freedom of Information is thus fast becoming part of the fabric of public life. It has been difficult; there has been a steep learning curve for all concerned; it has been a very challenging and difficult law. There has been a great deal of testing of boundaries on all sides. But my assessment is that—with some pockets of recalcitrance or reluctance—public authorities have responded well. It has not always been comfortable for the government, but it has taken the law seriously. I pay tribute to the way that the British public administration has responded to this challenge.

### 3.1 *Requests and complaints*

There has certainly been a strong public appetite with high volumes. No-one knows exactly how many requests have been made, but extrapolations from MoJ statistics indicate some 400,000 requests have been made in the first four years. MoJ figures state that about 80% of requests to central government are granted in full or in part. The vast majority of requests are not about high politics in Westminster and Whitehall. Most people want information about things which relate to their daily lives—their homes, their schools, their hospitals, their local environment.

My office has received some 10,250 complaints as at 1st December 2008. That is quite a small number compared to the total number of requests. We have so far closed 8,920 cases. Of these just under 1,100 have resulted in a formal Decision Notice. Of the remaining cases, well over half have been closed informally following a careful consideration of the issues which often involves extensive investigation. Many of these have involved a negotiated outcome, acceptable both to the requester and to the public body concerned. The final third of cases have been ineligible, incomplete or have been so obvious that we have been able to deal with them easily and quickly.

There appears to a wide respect for our formal decisions where we conclude whether or not to order disclosure. Many of these are controversial, require complex analysis and/or call for careful judgement. There is a wide range of subject matter. In one day recently, I personally signed four diverse Decision Notices—covering reform of the House of Lords, British support for an oil pipeline in Uzbekistan, the South West Trains rail franchise and access to Employment Tribunal records. A few other cases further illustrate the range:

- local authority pension investments in hedge funds;
- the contract between Ryanair and Derry airport;
- housing and travelling expenses of Members of Parliament;
- a Gateway review of identity cards;
- details of the 1911 census;
- alleged crimes by foreign diplomats;
- reports on the impact of crop spraying;

- the draft dossier on Iraq’s alleged weapons of mass destruction; and
- salaries of top BBC presenters.

All our Decision Notices are on a searchable database on the ICO’s website. In about 30% of cases we upheld the requester’s complaint in full. In about 25% we rejected the complaint. And in about 45%, we partly upheld the request—usually ruling that the complainant is entitled to some information, but not all. Either side can appeal against our Decision Notice, without cost, to the Information Tribunal. I regard it as a welcome performance indicator that fewer than 30% of “losers” actually appeal, meaning that over 70% accept our ruling. Of those that do appeal, the Tribunal is now broadly upholding the line we have taken in more than 80% of the cases. There is a growing and important jurisprudence from the Tribunal and a few cases are now going to the higher courts. So far, they are interpreting the Act in a way which is largely consistent with our approach over the first four years.

After four years, it is possible to highlight the exemptions which are the most challenging for public authorities and for the ICO. These include:

- Section 35 (“Formulation of government policy etc”)—where most cases turn on the weighing the competing public interest considerations. The imminent Tribunal decision on the appeal relating to the Cabinet discussions on Iraq will shed further light on the approach to be taken here.
- Section 36 (“Prejudice to effective conduct of public affairs”)—where cases need the “reasonable opinion” of the “qualified person” as well as the application of the public interest test.
- Section 40 (“Personal information”)—where the complex dovetailing of FOIA with the data protection legislation calls for many difficult judgements in practice.

### 3.2 *Delay and funding*

It is widely accepted that delays have been the most serious problem with Freedom of Information—within public authorities, within the ICO and at the Tribunal stage. We are now closing over 50% of straightforward cases within 30 days, but most of the remaining cases now have to wait six months before we can start on them. We are however meeting the current target that 70% of all cases closed should be less than one year old. We are now able, each year, to close slightly more cases than we receive. We have new triage arrangements to speed up early closures and fast-track a few cases of particular significance. But the delays for most cases which require full investigation remain frustrating and disappointing.

Problems of delay are largely attributable to lack of resources. Frontier Economics, engaged by the Ministry of Justice, calculated in 2006–07 that the total cost of FoI, across the whole of the public sector, was about £35 million p.a. Of the total, the ICO currently receives £5.5 million as grant-in-aid for FoI. We do not yet know our grant for 2009–10. Despite a 15% increase in complaints received, we have been told that an increase cannot be contemplated and that a cut is possible. This would be very serious. For the current year, the MoJ has helped us recruit seven secondees from central government departments. Secondees are welcome, but are not cost-free and it would be perverse to have to train new secondees in place of experienced staff. In fact we have an establishment of only 52 staff devoted to some 2,500 FOI cases a year involving the entirety of the public sector.

### 3.3 *Good practice and enforcement*

We have been able to publish a great deal of guidance to public bodies which has to be constantly updated in the light of ICO, tribunal and court decisions. Our new training DVD “*Tick Tock*” is about to be distributed. We have served six Practice Recommendations, covering both poor request-handling and poor records management. In January 2009, the upgraded programme of Publications Schemes went live. Under section 19 of the Act, each public authority must adopt a Scheme for proactive disclosure of information (i.e. without requests), but we have used the model scheme provisions to achieve this with minimum burden and maximum public benefit. A programme of spot checks will start in April.

### 3.4 *Conclusions and challenges for Freedom of Information*

Freedom of Information necessarily involves controversial issues. There will be many competing public interests. It is a law which challenges unnecessary official secrecy and embraces social and democratic values. It calls for culture change. Cultures do not change overnight, but laws can accelerate culture change. We repeatedly stress to public bodies the benefits of being more open and the disadvantages of secrecy. Public bodies often claim to be open: this is tested once the law comes into force. When governments hide behind unnecessary secrecy the media, and the general public, assume: “They must have something to hide”. That can be very unhealthy.

It is not easy (and anyway too soon) to measure achievements by reference to rationales of trust, confidence, accountability, improved decision-making, reduced impropriety etc. But it can be said that the impact on the general public appears to have been substantial. In ICO’s annual research survey over the last four years we have asked the same question about the benefits of being able to access information held by public authorities. The longitudinal results show very marked increases from 2004 to 2008, clearly

attributable to the impact of Freedom of Information law, with a very significant shift in public attitudes over a very short period of time. For example, the percentage of those agreeing that freedom of information “Increases knowledge of what public authorities do” has risen from 54% in 2004 to 84% in 2008, and those agreeing that it “Increases confidence in public authorities” has gone from 51% to 75%. These figures are matched by attitudes within public authorities themselves—91% now say the Act is needed and 81% say it improves trust.

My overall conclusion is positive. But there are challenges ahead. The most important is to secure adequate and longer-term funding so that the ICO can recruit, train and retain experienced staff and reduce delays in resolving cases. At the same time, more (and faster) cases confirming where the boundary lines are to be drawn should reduce the burden on public authorities and allay any remaining worries about the “chilling effect” of FOI on good government. Looking further ahead, I foresee a gradual shift of emphasis away from individualised requests and complaints in the direction of much more routine proactive disclosure with only the genuine “Crown Jewels” staying secret.

In October 2007 the Prime Minister devoted a significant part of his speech on Liberty to the benefits of Freedom of Information. This sent important signals, not least the abandonment of changes to the Fees Regulations which the Justice Committee and others had opposed. He observed that:

“Although FOI can be inconvenient, at times frustrating and indeed embarrassing for governments, freedom of information is the right course, because government belongs to the people, not the politicians. Wherever possible, that should be the guiding principle behind the implementation of our Freedom of Information Act”.

Open government and the right to know have been established. It is increasingly being recognised within public bodies that open government is good government.

#### 4. DATA PROTECTION TAKEN SERIOUSLY AT LAST

##### 4.1 *Attitudes and profile*

In 2002 Data Protection was suffering a poor reputation. The original Act had been passed in 1984. The Data Protection Act of 1998—implementing the 1995 EU Directive—had largely come into force. It did not introduce fundamental changes, but added a further layer of complexity in a climate of considerable Euro-scepticism. The original Act had been introduced by a Conservative administration and the 1998 Act by the new Labour government. But both measures suffered begrudging governmental support and had been justified as much in terms of free trade flows and international obligations, as in protecting the interests of citizens or consumers or of society at large.

Although much had been done to tick the boxes to ensure technical compliance, data protection was generally given low commercial priority. Worse, there was considerable media scepticism or even hostility as well as public ignorance, indifference or irritation. Data protection was widely seen as remote, unnecessarily complicated and uncertain. The law, the more detailed rules and the available guidance were seen as overly legalistic—almost theological. Data protection was marginalised—as was the Information Commissioner’s Office (ICO) which was not helped by having to promote its third brand name in less than 20 years.

Worse still, Data Protection was wrongly blamed for stopping people doing things and used to justify mistakes or unacceptable activities. The prime example came shortly after I took office when the Chief Constable of Humberside very publicly blamed data protection for the failure to apprehend Ian Huntley, the Soham murderer, any sooner. There was less media attention when he subsequently retracted that claim and data protection was exonerated in the official enquiry conducted by Sir Michael Bichard.

By 2009 the situation has become very different. Data protection has risen sharply up the political, media and public agendas. For the last couple of years, it has been setting the news agenda on a regular basis. Concerns about abuse or loss of personal data, excessive surveillance, privacy intrusions and identity theft now feature regularly in political debate. The ICO’s annual tracking survey also shows that:

- Public awareness of data protection access rights has grown from 74% in 2004 to 86% in 2008.
- People are very concerned about their personal information. Our survey says that 94% of people list “Protecting personal information” as their top concern (equal with concerns about crime) when ranking a list of 10 issues of social concern.
- 95% of organisations say that the Data Protection Act “is needed” (up from 89% in 2006) and 87% say it improves customers’ trust (up from 78% in 2004).

The reasons for this changed situation go wider and deeper than the 277 data security breaches which (as we announced at the end of October) had been reported to us since the HMRC incident. There have in fact been many drivers for change. I have already mentioned some examples of the technological revolution which really gathered pace at the start of the 21st century. The power and benefits of database technology, coupled with instantaneous and comprehensive global communications, have been widely appreciated by businesses, by government and by individuals. Dramatic reductions in the cost of collecting, processing and storing data have fuelled the growth in their use. It is often said that it is now cheaper to store data than delete it. Public service reforms—“Transforming Public Services” and many other programmes—have

harnessed the power of technology, but not always in well thought-through ways. Politicians have been quick to recognise and advocate the benefits of hi-tech projects—ranging from ID cards to electronic health records—without always fully addressing the risks and downsides. The law enforcement community—which understandably always welcomes more information and more intelligence—has embraced IT proposals with enthusiasm. Parliament has not always scrutinised new initiatives requiring legislative approval as fully as it might have done. In short, it is only relatively recently that the risks of massive data collection and use have started to be widely appreciated.

There is now much greater recognition that there are inevitable tensions between legitimate “liberty” and “security” objectives, just as there are between improved and more efficient services and the privacy and integrity of personal information. Inevitably data protection involves difficult balances between competing considerations, usually resolved in terms of necessity, proportionality, transparency and data minimisation.

#### 4.2 *Role of the ICO*

The ICO can claim some credit for getting data protection to be taken more seriously. We have made many changes to the ways in which we discharge our statutory responsibilities. Our Corporate Plans and Annual Reports have documented structural and other changes which have allowed us to separate out our responsibilities and set priorities and targets. This has meant increased focus on educational, influencing and enforcement activity in preference to reviewing complaints from individuals where our powers are weak and our impact limited.

Our overall approach is captured in our Data Protection Strategy. In line with Better Regulation principles, the Strategy is risk-based. It sets out how we approach our task of minimising data protection risk. It makes clear that we will place most attention on situations where there is a real likelihood of serious harm arising from improper use of personal information and also where our intervention is most likely to make a difference.

The Strategy emphasises the need to build on enlightened self-interest and states one of our key priorities as:

“Strengthening public confidence in data protection by taking a practical, down to earth approach—simplifying and making it easier for the majority of organisations who seek to handle personal information well, and tougher for the minority who do not.”

This explicit “carrots and sticks” approach to minimising risk means being clear about harm. For individuals tangible and reputational harm can arise because personal information about them is:

- inaccurate, insufficient or out of date;
- excessive or irrelevant;
- kept for too long;
- disclosed to those who ought not to have it;
- used in unacceptable or unexpected ways beyond their control; or
- not kept securely.

But there are also societal harms, such as:

- excessive intrusion into private life which is widely seen as unacceptable;
- loss of personal autonomy or dignity;
- arbitrary decision-making about individuals, or their stigmatisation;
- or exclusion;
- the growth of excessive organisational power; or
- a climate of fear, suspicion or lack of trust.

The full Strategy sets out how we determine priorities within this framework, how we decide whether and how to intervene, how we work with other organisations and how we fulfil our international functions in an age where information flows show no respect for international borders. It concludes with current priorities under six main headings:

- The unlawful trade in confidential personal information.
- The emergence of a surveillance society.
- Security of personal information.  
Increased information sharing.
- Law enforcement activity.
- Effective data protection supervision.

### 4.3 Achievements

A summary of highlighted ICO activity in fulfilment of this Strategy illustrates the range of our work:

Guidance programme	Transformed our approach with a comprehensive suite of Good Practice Notes and other Plain English guidance.
Codes of Practice on Employment Practices, CCTV and Information Sharing	Comprehensive, targeted Codes setting out clear “Do’s and Don’ts”.
ICO enforcement activity	Formal regulation though better- targeted and often high-profiles Prosecutions, Enforcement Notices and Undertakings.
Inspection and audit	An expanded audit unit about to conclude the first government spot check. More audits this year than ever before.
Penalties for Section 55 offences (unlawfully obtaining personal information)	Published <i>What Price Privacy?</i> which led to statutory custodial penalties in 2008 Act.
Data retention by police forces	Enforcement action to prevent excessive retention of minor convictions upheld by Tribunal. Now going to Court of Appeal.
Surveillance Society	Launched report, conference and debate about excessive surveillance which (amongst other things) has led to two simultaneous Select Committee enquiries.
Privacy Impact Assessment and Privacy by Design.	Two major initiatives to reduce surveillance risks and build in safeguards for personal information from the outset.
ID cards and National Identity Register	Questioned rationale; warned of function creep; secured statutory objectives; now engaging with IPS to minimise DP risks.
Connecting for Health (electronic health records)	Extensive discussions on general and specific issues.
ContactPoint (children’s database)	Questioned need for comprehensive database; now discussing with DCSF how to minimise security and other risks.
Social networking Communications Database	Launched micro web-site and issued well-publicised guidance Raised initial concerns about implications of database of telecoms traffic data. There will now be full consultation and debate before any legislation reaches Parliament.
EU Article 29 Working Party	Substantial involvement eg with Opinions on personal data and search engines
International transfers and Binding Corporate Rules	Leading role in making it easier to export data in compliant ways.
London Initiative	Led international programme to improve effectiveness of Commissioners

Our data protection achievements also go well beyond educating, influencing and regulating. The ICO now handles over 200,000 phone calls and 25,000 complaints each year with clear service standards. We resolve almost all of these informally, often in ways which change business practices. The processing of 315,000 notifications from data controllers, provides both transparency and the funding for our data protection work.

At the personal level, I was honoured to receive the “International Privacy Leader of the Year” Award from the International Association of Privacy Professionals in Washington in March 2008. More recently, I was voted 3rd (out of 50) in Silicon.com’s Poll of “*IT Agenda Setters*”. I was pleased to be invited by the Prime Minister and the Justice Secretary to co-chair the *Data Sharing Review* with Sir Mark Walport and our Report was published in July.

### 4.3 New Legislation

The Data Sharing Review led directly to the proposals which are expected very shortly in the Justice and Coroners Bill. I understand that the Justice Committee will be scrutinising the Bill more closely on a separate occasion. Very briefly, however, the new powers will increase the ICO’s inspection and information-gathering powers, especially in relation to public sector bodies. These will sit alongside the new regime of civil penalties for serious breaches of data protection requirements which are yet to be brought to into force. We are also delighted that the government has now announced the intention to increase our data protection resources substantially by adopting a tiered approach to notification fees, so that larger data controllers will pay more than the standard £35 each year.

Mention should finally be made of the Review of the EU Directive which ICO launched in July. RAND Europe has been commissioned to report on the strengths and weaknesses of the Directive and to identify promising avenues for reform. Their report is due in April. I hope that this will pave the way for a more effective, but less burdensome, framework for data protection in the future.

#### 4.4 *Conclusions and challenges for data protection*

Data protection is no longer a topic for experts. It affects every one of us as individuals and virtually every organisation. Getting the right balance for privacy, and safeguarding the integrity of personal information, bring to life the language of human rights. Regulation must always be a mix of principle, common-sense and pragmatism. But the issues will get even more demanding as information technology becomes ever more ubiquitous and central to our lives.

I am confident that data protection is now taken a great deal more seriously. But plenty of challenges remain. These include:

**Governance and Accountability**—No organisation can afford to leave data protection as the responsibility of a single silo—whether its legal department, its IT team or its compliance department. There must be leadership at Board, Chief Executive and Permanent Secretary level to ensure that the right policies and procedures, the right technology and the right awareness and training arrangements are in place across the entire organisation. The ICO will be launching the Personal Information Promise on European Data Protection Day on 28 January. But much remains to be done to ensure—as we put it in the Thomas/Walport Data Sharing Review—that people at the top take the subject as seriously as is now the case for health and safety.

**Information as a Toxic Liability**—It has become fashionable to talk of information as an asset. But it is also a liability. There has been much recent attention on the importance of ensuring the physical security of personal information. Few can now be unaware of the financial, reputational and social risks of getting it wrong. But good practice extends well beyond adequate security. The same sort of problems can occur if other aspects are neglected. Data minimisation and data cleansing are vital to make sure that information is accurate, relevant, not excessive and not retained for too long. False matches must be avoided. People should not be stigmatised, or discriminated against, as a result of poor data handling. Data protection must be seen as an integral part of risk management arrangements.

**New Powers, Sanctions and Resources for the ICO**—I am delighted that my successor can look forward to imminent strengthening of the ICO's role. The evidence to the Data Sharing Review expressed the consistent and strongly held view that ICO's powers and resources are not adequate. The power to impose civil penalties for serious breaches has been introduced by the Criminal Justice and Immigration Act 2008, though not yet brought into force. This will provide powerful incentives and deterrents. The imminent new legislation to strengthen inspection powers is equally welcome, though close scrutiny of the small print will be needed and we would have preferred the powers to cover all data controllers, not just those in the public sector. The proposed increase in notification fees—which we hope will take effect no later than October 2009—will generate much needed extra funding for ICO's new and existing data protection work.

ICO has sound plans for getting to grips with its new responsibilities, but their adjustment in the light of final proposals, and their implementation, will need high priority. The expansion of the office—new staff, additional accommodation and increased expectations—is welcome, but will require careful handling.

**Thinning the fog**—Although ICO has done much to give guidance to organisations and individuals, a major educational agenda remains. In the Thomas/Walport Report, we described a continuing “fog of uncertainty” about data protection. Electronic communications provide new opportunities to get messages across—but they must be the right messages, targeted on the right people at the right time.

**Earlier involvement**—The ICO has often learned about governmental initiatives involving personal information very late in the day. We can then be called upon to respond authoritatively, but at short notice. There has been some improvement recently, and our initiatives with Privacy Impact Assessments and the Privacy by Design to get departments to identify and address the issues at the outset are already bearing fruit. More needs to be done, however, at earlier stages. And we endorse the words of the European Court of Human Rights in the recent Marper DNA case:

“.....any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance [as to what are the permissible limits in interference with private life].”

**The Global Agenda**—Ways need to be found to secure a global approach to the regulation of personal information. Valuable work has been done by a mix of international and domestic organisations in public and private spheres. But substantial gulfs remain—particularly with the USA. The work which ICO has commissioned from RAND Europe will bring new thinking to the EU debate. The UK government needs to participate actively and constructively in these debates and assume a leadership role in ensuring that the European Commission brings forward acceptable proposals as soon as possible after 2010.

5. ENDNOTE

The ICO has come a long way in the last six years. We can claim good progress with our aim to be recognised as a world leader on both freedom of information and data protection. I have been immensely privileged to serve as Commissioner and to lead a great team. The ICO cannot stand still. The world is continually changing. I am confident that the ICO is well-placed to rise to the challenges it will continue to face. It will welcome fresh leadership and fresh thinking. But it will be business as usual for the next five months.

*Richard Thomas*  
Information Commissioner

*January 2009*

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**Memorandum submitted by Ministry of Justice**

CORONERS AND JUSTICE BILL

I refer to the Justice Select Committee report on the Coroners and Justice Bill, specifically the reference at paragraph 20 to provide further information on the additional resources to be made available to the Information Commissioner via graduated data protection notification fees.

As you know, the Information Commissioner's data protection responsibilities are currently funded by notification fees paid by data controllers. Sections 17 and 18 of the Data Protection Act 1998 require every data controller processing personal information to notify the Information Commissioner's Office (ICO) and pay the prescribed fee, unless they are exempt. It is an offence to process personal data without notifying the ICC.

The proposal to change the notification fee structure from a flat to a tiered one stemmed from the Data Sharing Review, conducted by Mark Walport of the Wellcome Trust and the Information Commissioner, Richard Thomas.

The Ministry of Justice consulted on this and other related matters in a consultation on the Information Commissioner's inspection powers and funding arrangements in 2008. As a result, the Government committed to adopt a tiered notification fee structure. A tiered structure will more accurately reflect the actual costs of regulating different sized data controllers, and provide an opportunity to increase the annual revenue of the ICC to ensure it has the appropriate resources to carry out its functions. The proposed fee structure will see the fee payable by small and medium-sized data controllers remain the same at £35 per annum, while large data controllers will pay a higher fee.

The tier criteria for the proposed notification fee structure will be based on the definition for the size of organisations adopted by the UK Government and adapted from the European Union definition found in Recommendation 2003/361/EC. Indicators of size will include turnover and number of employees of the data controller. Data controllers will undertake a self-assessment on the basis of the criteria to determine which tier they fall into.

The two-tiered notification fee structure will be taken forward in an amendment to the Data Protection (Notification Fees) Regulation 2000. Work is still underway on the details of these amendments. The Ministry of Justice is working closely with the ICO to ensure that the proposed fee structure meets its stated objectives.

Total revenue from notification fees in 2006–07 was £10.2 million. The Information Commissioner estimates that the cost of fulfilling his existing and new regulatory and advisory responsibilities will be £16 million per year. We intend that this amount is funded in full through the revised notification fee structure, expected to be in place from 1 October 2009.

I will write to the Committee again once we have further details of the new fee structure.

I am copying this letter to Dominic Grieve, David Howarth, Lord Kingsland, Lord Thomas of Gresford and Baroness D'Souza and placing a copy in the Library of the House.

*Rt Hon Michael Wills MP*  
*Minister of State*

*26 January 2009*

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