



House of Commons  
Justice Committee

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# The functions, powers and resources of the Information Commissioner

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**Ninth Report of Session 2012–13**

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

*Ordered by the House of Commons  
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## 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).

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The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

### Committee staff

The current staff of the Committee are Nick Walker (Clerk), Sarah Petit (Second Clerk), Gemma Buckland (Senior Committee Specialist), Helen Kinghorn (Committee Legal Specialist), Ana Ferreira (Senior Committee Assistant), Miguel Boo Fraga (Committee Assistant), Holly Knowles (Committee Support Assistant), George Margereson (Sandwich student), and Nick Davies (Committee Media Officer).

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## Summary

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On 5 February 2013 we held an oral evidence session with Mr Christopher Graham, the Information Commissioner, and his two Deputy Commissioners. The evidence session raised several important issues which we draw to the attention of the House by means of this Report.

First, we have concerns relating to the funding of the Information Commissioner's Office at a time when its responsibilities in the field of data protection look set to expand dramatically if new EU data protection legislation comes into effect and recommendations made by the Leveson Inquiry for the ICO to take on additional functions are adopted. At the same time, the proposed EU Regulation would remove the Information Commissioner's funding for data protection work through the notification fee payable to him by data controllers. We are concerned that his Office faces a potential shortfall of £42.8 million as a result of the Regulation, and we recommend that the Government should find a way of retaining a fee-based self-financing system for the Information Commissioner's data protection work, if necessary by negotiating an option for the UK to retain the notification fee or introduce an alternative fee. We point out that if the Government fails to achieve this, the unappealing consequence is that funding of the ICO's data protection work will have to come from the taxpayer.

Secondly we consider Lord Justice Leveson's recommendation that the Information Commissioner's Office be reconstituted as an Information Commission. We are satisfied that the current corporation sole model remains the most appropriate one for the Information Commissioner. We also reiterate our previous recommendation that the Information Commissioner should become directly responsible to, and funded by, Parliament.

Last year in our report on referral fees and the theft of personal data we considered the adequacy of the Information Commissioner's powers to enforce data protection legislation. We return to this issue in this Report, taking account of developments over the intervening period. We reiterate our recommendation that the Government commence legislative provisions which would enable courts to impose custodial sentences for offences involving the unlawful obtaining or disclosure of personal data. We recommend that as a general rule public sector organisations should accept the offer of a free audit of their data protection practices and we consider that it is in the public interest for them to do so. We also support the Information Commissioner's proposal that his powers to serve Assessment Notices should be extended to NHS Trusts and local authorities to allow his Office to compel audits of their standards of data protection.

In this Report recommendations are set out in **bold text** and conclusions are set out in ***bold italics***.



# 1 The Information Commissioner's Office's resources and status

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## Background

1. As part of our responsibility to monitor the Ministry of Justice's associated public bodies, we maintain a continuing and close interest in the work of the Information Commissioner's Office (ICO). The Information Commissioner himself, Christopher Graham, and his Deputy Commissioners, are regular contributors to our inquiries on issues relevant to the ICO's work. In the last year they have provided important evidence as part of our inquiries into post-legislative scrutiny of the Freedom of Information Act 2000<sup>1</sup> and into EU data protection framework proposals.<sup>2</sup>

2. From time to time we also take the opportunity to raise topical issues in the area of data protection and freedom of information with the Information Commissioner, and to enable him to give us his views on the work of his office. In September 2011 we took evidence from Mr Graham and as a result produced a report which contained certain recommendations on the ICO's status and powers, as well as welcoming the Government's proposals to ban referral fees.<sup>3</sup>

3. On 5 February 2013 we again held an oral evidence session with Mr Graham, accompanied by his two deputies. A number of issues were raised, to which we would like to draw the attention of the House. The Information Commissioner also provided the Committee with written evidence and supplementary information. We are grateful to the Information Commissioner for this evidence.

## The ICO's Finances

4. Our evidence was taken at a time of considerable financial pressure for the Information Commissioner. The Commissioner, who is a corporation sole, has two sources of funding which reflect his two distinct responsibilities. In respect of his work on freedom of information his Office receives grant-in-aid from the Ministry of Justice. The Data Protection Act 1998 (DPA) provides for the financing of the ICO's activities in relation to data protection through the notification fee which is a small sum paid by each registered data controller. The Commissioner is restricted in terms of virement; with the exception of hybrid cases which involve both data protection and freedom of information, he is restricted to using his relevant income sources for their specific purpose only. He cannot transfer underspend from one purpose to the other.

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1 Justice Committee, First Report of Session 2012–13, *Post-legislative scrutiny of the Freedom of Information Act 2000*, HC 96-I

2 Justice Committee, Third Report of Session 2012–13, *The Committee's opinion on the European Union Data Protection framework proposals*, HC 572

3 Justice Committee, Ninth Report of Session 2010–12, *Referral fees and the theft of personal data: evidence from the Information Commissioner*, HC 1473, para 14

5. The Information Commissioner has sustained significant cuts to the grant-in-aid which he receives. The income for freedom of information work has been cut by 23% from £5.5 million in 2011–12 to £4.25 million in 2012–13. In line with public spending targets his Office has also planned for a further cut of 6% in 2013–14 and the Ministry of Justice has asked the Commissioner to prepare a business case showing how the Office would be impacted by a further 5% cut in that year.<sup>4</sup>

6. The Information Commissioner has been successful in significantly cutting the backlog of freedom of information appeals which had built up within his Office. The ICO completed 4,763 pieces of casework in 2011–12<sup>5</sup> in contrast to 3,019 in 2008–09.<sup>6</sup> He has been successful in increasing the amount of completed freedom of information complaint casework by 10.8% from 2010–11 to 2011–12. At the same time his Office has received 7.7% more complaint casework.<sup>7</sup>

7. This improvement in performance is corroborated by others. In our inquiry into post-legislative scrutiny of the Freedom of Information Act, for example, Martin Rosenbaum of BBC News said of the ICO:

It used to be absolutely terrible; the delays were worse than anything you would experience from a local authority. In one of my cases, the commissioner was considering the matter for more than four years before I got a decision. That has dramatically improved, but nevertheless it is important that the commissioner has a level of resources that enables him to process the complaints that he receives sufficiently quickly, efficiently and effectively so that he can then turn round with confidence and address the public authorities that have been slow. Previously, a lot of them would have been very dismissive of any complaint from the commissioner, saying, "You are worse than us."<sup>8</sup>

8. It is understandable that the Information Commissioner now considers that he is “running out of road and cannot absorb further cuts to the FOI budget without it adversely affecting performance”.<sup>9</sup> In his written evidence to us Mr Graham suggests that the immediate challenges of funding which his Office faces require a relief in the rule governing the apportionment of overheads and virement.<sup>10</sup> This would mean that surplus income from the notification fee could be used to mitigate the impact on the ICO’s freedom of information work of the reduction to the grant-in-aid.

**9. We commend the Information Commissioner for his success in reducing his budget at the same time as making inroads into the backlog of freedom of information complaints, and improving the amount of casework completed. The increased productivity of the ICO**

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4 Ev 14

5 Information Commissioner’s Office, *Information Commissioner’s Annual Report and Financial Statements 2011/12: In the Rights space - at the right time*, 4 July 2012, HC 350, p 16

6 Information Commissioner’s Office, *Annual Report 2008/09*, July 2009, HC 619, p 32

7 Information Commissioner’s Office, *Information Commissioner’s Annual Report and Financial Statements 2011/12: In the Rights space - at the right time*, 4 July 2012, HC 350, p 16

8 HC (2012–13) 96-II, Q 163

9 Ev 14

10 *Ibid.*

*has enhanced the Office's reputation.* The Government should consider relaxing the governing rules around virement and overheads to allow the Information Commissioner to function as effectively as possible at a time when he is receiving increasing quantities of casework and the Ministry of Justice is exploring even deeper cuts to his budget.

## Impact of the EU Data Protection Regulation and Directive on the Information Commissioner

10. We recently reported our opinion on the European Commission's proposals for a Regulation and Directive on data protection. We found that while the need for reform was well-founded, the Regulation as proposed was unworkable and over-prescriptive. We did, however, support the Government and the Information Commissioner in their efforts to improve the proposals through negotiation with other Member States and the Commission.<sup>11</sup>

11. Since our Report was published, the Government has published its impact assessment of the reforms. This document details the cost, benefits and the increased burdens on the Information Commissioner as well as on the UK economy. While the final outcome of the reforms remains unclear, there are as it currently stands a number of significant implications for the Information Commissioner. It is clear that if the Regulation enters into force in its current form there will be a significant increase in the role of the Commissioner as the data supervisory body for the UK. The impacts on the Information Commissioner are set out in Box 1.

### Box 1: Impact of the EU Regulation on the Information Commissioner

#### Increased burdens:

- Increase in the number of investigations from requirement to notify the supervisory authority of data breaches.
- Increase in binding corporate tax rules the Information Commissioner has to approve from the new requirement.
- Increase in the use of administrative sanctions, and less discretion of the Commissioner's Office as to whether to take formal action.
- Increase in the cost of providing support for data controllers.
- Increase in data protection complaints, particularly as a result of the new 'right to be forgotten'.
- Increase in the Information Commissioner's role at an EU level and its interaction with other supervisory bodies.

#### New burdens:

- Requirement that the Information Commissioner give prior authority to controller and processes where they use non-standard contractual clauses and appropriate safeguards out a legally binding instrument for international data transfers. This includes prior consultation requirements.
- The right to a judicial remedy against the Information Commissioner, leading to an increase in legal costs.

*Data Source: Ministry of Justice, Impact Assessment on the Proposal for an EU Data Regulation, 22 November 2012, p 23*

11 HC (2012–13) 572, para 151

12. The Government, with the Information Commissioner, has estimated that the increased cost to the Office of these new burdens will realistically total an extra £28 million per year. Of this, extra staffing costs would account for £26.3 million and £1.7 million will be needed to provide additional support costs. The single biggest burden is estimated to be the work associated with the increase in the use of administrative sanctions which, it is estimated, will require £8 million in funding alone.

13. It is not clear whether all of these proposals will be passed into EU law, but it is the case that the role of the Information Commissioner is likely to expand dramatically following the introduction of any Regulation. The current income that provides for the data protection side of the Information Commissioners work was £15,484,000 in 2011–12<sup>12</sup>. It follows therefore that in order to comply with the Regulation the ICO would need to nearly triple its funding for data protection work.

14. Heavily complicating this problem is the fact that under the DPA the ICO's £15 million income from data protection comes from the notification fee which is required to be paid by all data controllers to the Information Commissioner. Under the EU Regulation, however, such a notification fee would be abolished. As a result of this, and the increased costs deriving from the Regulation, the Information Commissioner potentially faces an alarming shortfall of £42.8 million.<sup>13</sup>

15. In this context, we note that Article 47(5) of the draft Regulation states that:

Each Member State shall ensure that each supervisory authority is provided with the adequate human, technical and financial resources, premises and infrastructure necessary for the effective performance of its duties and powers, including those to be carried out in the context of mutual assistance, co-operation and participation in the European Data Protection Board.

16. *As negotiations at European level proceed on the data protection proposals the Information Commissioner will need to keep the Government informed of what the exact implications for his office will be, and to make clear the resources which he needs to fulfil his obligations should the Regulation come into effect, whether in its current form or with amendments. No one seems to know where resources would come from to replace the notification fee if it is abolished. The Government needs to find a way of retaining a fee-based self-financing system for the data protection work of the Information Commissioner, if necessary by negotiating an option for the UK to retain the notification fee or introduce an alternative fee. If the Government fails to achieve this, the unappealing consequence will be that funding of the ICO's data protection work will have to come from the taxpayer. The Regulation cannot be allowed to compromise the work of the ICO on data protection and the Government should not support proposals which could have that effect. It must continue to negotiate with the European Commission to secure a more flexible and reasonable Regulation in line with the recommendations in our previous Report on the issue.*<sup>14</sup>

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12 Information Commissioner's Office, *Information Commissioner's Annual Report and Financial Statements 2011/12: In the Rights space- at the right time*, 4 July 2012, HC 350

13 Ministry of Justice, *Impact Assessment on the Proposal for an EU Data Regulation*, 22 November 2012, p 24

14 HC (2012–13) HC 572

## The Leveson Report

17. The potentially dramatic increase in the role of the Information Commissioner as a result of the EU Regulation comes at a time when the demands on his Office of data protection work are already increasing. The phone hacking scandal and the subsequent inquiry by Lord Justice Leveson into the ethics, practice and culture of the press drew attention to the past failings of the ICO during Operation Motorman. It also showed the importance of data protection and the need for a regulator with the ability to take effective action.

### *Functions of the ICO*

18. The Leveson Inquiry makes a number of specific recommendations for the ICO in relation to both its status and the discharge of its functions. Leveson says that the Office should:

- Take immediate steps to prepare, adopt and publish a policy on the exercise of its formal regulatory function in order to ensure that the press complies with the legal requirements of the data protection regime;
- Prepare comprehensive good practice guidelines and advice on appropriate principles and standards to be observed by the press in the processing of personal data;
- Prepare and issue guidance to the public on their individual rights in relation to data protection and the press;
- Publish advice aimed at individuals concerned that their data have been or may have been processed by the press unlawfully;
- Include in its Annual Report to Parliament regular updates on the effectiveness of the foregoing measures;
- Adopt the guidelines for prosecutors on assessing the public interest in cases affecting the media which were issued by the Director of Public Prosecutions in September 2012;
- Engage with the Metropolitan Police in the preparation of a long-term strategy in relation to alleged media crime with a view to ensuring that the Office is well placed to fulfil any necessary role in that respect;
- Review the availability to the Office of specialist legal and practical knowledge of the application of the data protection regime to the press;
- Review its organisation and decision-making processes to ensure that large-scale issues can be satisfactorily considered in the round.

19. In addition, Leveson recommends that:

- The prosecution powers of the Information Commissioner should be extended to include any offence which also constitutes a breach of the data protection principles;<sup>15</sup>
- A new duty should be introduced for the Information Commissioner's Office to consult with the Crown Prosecution Service in relation to the exercise of its powers to undertake criminal proceedings.<sup>16</sup>

20. The Government has yet to respond in full to these proposals. Should it accept those of Lord Justice Leveson's recommendations which would lead to an expansion of the role of the Information Commissioner in monitoring the press in relation to its standards of data protection and compliance with the DPA, this new role will inevitably require new resources and expertise. This is an important issue, and the Government should not assume that the Information Commissioner's Office in its current formation has the capacity to carry out, in a proper manner, these recommendations.

21. In his oral evidence to us, Mr Graham made clear his ongoing concerns over the increasing role he is being asked to play, with restricted resources.

I am constantly saying to my friends in Whitehall, "if you want us to do this task, where is the money going to come from?"<sup>17</sup>

**22. The Government should be mindful, in its response to the Leveson Inquiry, of the finite capacity of the Information Commissioner's Office to fulfil its current role. If the Government requires that his Office expand its role in monitoring the standards of data protection in the press, it should ensure he has the resources to do so properly.**

### ***The status of the ICO***

23. In relation to the institutional status of the ICO, Lord Justice Leveson's Inquiry recommended that the Government consider amending the DPA to reconstitute it as an Information Commission, led by a Board of Commissioners with suitably broad expertise.<sup>18</sup> He concluded that there were a number of significant drawbacks to the single commissioner model. It can render an organisation vulnerable to pressure as profile and reputation are focused on an individual personality; the absence of a senior effective board can expose the office to a presidential style of leadership with insufficient internal checks and balances; and the absence of an executive board can mean that priorities, business risks, resources and performance are not managed coherently.<sup>19</sup>

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15 See paras 43–48 below.

16 The Information Commissioner's Office, *The Information Commissioner's Response to the Leveson Report on the Culture, Practices and Ethics of the Press*, 7 January 2013, pages 3–14, [www.ico.gov.uk](http://www.ico.gov.uk)

17 Q 41

18 The Leveson Inquiry, *Report on the Culture, Practices and Ethics of the Press*, Part H, Chapter 6, para 4.9

19 *Ibid*, para 4.6

24. The Information Commissioner takes an opposing view. In his response to the Inquiry he argued that there were a number of advantages to the single model: that there is a clear line of accountability; that there are benefits to having a figurehead and public face; it allows for quick and responsive leadership; it minimises the risk of split loyalties and internal politics; and it minimises cost to the public purse.<sup>20</sup>

25. In oral evidence Mr Graham elaborated on these arguments. He said that the criticisms of the corporation sole model were relevant in the context of the events that took place between 2003 and 2006, and that since that time much in the Office had changed.

The Office has grown and changed considerably since the period that the judge was looking at. We now have 386 colleagues ... and the structures that support the Commissioner are considerably developed. The judge did not ask me about the management board that we have, with non-executive colleagues joining us and he did not ask about the structure of the leadership group and so on ... I hope very much there is going to be a wide-ranging debate and consultation about what the structure might be in the future, but as for now, I would say “If it ain’t broke don’t fix it”.<sup>21</sup>

26. This issue was examined by our predecessor Committee in 2009. It noted the importance of the branding of communications from the Information Commissioner’s Office, and concluded that personal responsibility for data protection and freedom of information was best assured under the corporation sole model.<sup>22</sup>

***27. We agree with our predecessor Committee and the Information Commissioner that the benefits of communicative leadership and personal responsibility are best served under the corporation sole model, which would be at risk of being lost in the creation of an Information Commission. We are confident that this model allows for the necessary expertise to be brought in to support the work of the Office as necessary, and we therefore disagree with the Leveson Report on this point.***

## Accountability to Parliament

28. The adequacy of the resources available to the ICO to fulfil its current and prospective functions cannot be divorced from the issue of the independence of the Office. As Mr Graham said:

I cannot, in leading the ICO, be in a policy vacuum where I have possible responsibilities under Leveson, the Communications Data Bill and “midata”, a possibly reconstructed data protection regime, a possible changed Freedom of Information Act, and a possible abolition of 80% of my income, but, “Hey we will get round to this problem in a few months’ time or is it years?” We need to focus on

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20 The Information Commissioner’s Office, *The Information Commissioner’s Response to the Leveson Report on the Culture, Practices and Ethics of the Press*, 7 January 2013, p 17, [www.ico.gov.uk](http://www.ico.gov.uk)

21 Q 1

22 Justice Committee, Third Report of Session 2008–09, *The work of the Information Commissioner: appointment of a new Commissioner*, HC 146, para 28

these questions now, decide what we want from the ICO, fund it properly and guarantee its independence.<sup>23</sup>

29. We have in the past noted that the 2011 Framework Agreement setting out the respective responsibilities of the Ministry and the Information Commissioner had enhanced the Commissioner's independence, but we have nevertheless recommended that the Information Commissioner should become directly responsible to, and funded by, Parliament.<sup>24</sup> Mr Graham expressed enthusiasm for such a development provided it would resolve the funding difficulties he faces:

I can see the great advantages that the status of an Officer of Parliament would have in relation to the funding problems to which I have alluded. This is particularly true as Government look to the ICO for taking on different pieces of work, whether it is the Home Office and the Communications Data Bill, The Department for Business, Innovation and Skills with their "midata" initiative, or the Department for Culture, Media and Sport [...] If it turns out that being an Officer of Parliament is the best way forward I am not theological about this, but I would certainly welcome it for those very practical reasons.<sup>25</sup>

30. This issue was raised in a recent Westminster Hall debate on our post-legislative scrutiny of the Freedom of Information Act. Helen Grant, the Parliamentary Under-Secretary of State for Justice, said the Government disagreed with the idea.

At the moment, we do not feel that making the Information Commissioner a parliamentary body is appropriate, because its work does not relate primarily to that of Parliament.<sup>26</sup>

***We reject the argument that it is inappropriate to make the Information Commissioner a parliamentary body because his work does not relate primarily to that of Parliament. It is independence of the Executive which parliamentary status can provide.***

***31. We continue to believe that the Information Commissioner will face significant difficulties in functioning effectively unless he becomes more closely accountable to Parliament instead of Government. With the potential removal of the notification fee through the EU Regulation, we reiterate our recommendation that the Information Commissioner should become directly responsible to, and funded by, Parliament.***

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23 Q 41

24 HC (2010–12) HC 1473, para 24

25 *Ibid.*

26 HC Deb, 24 January 2013, col 175WH

## 2 Enforcement of the Data Protection Act 1998

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32. We now turn to consider issues concerning the regulatory and enforcement powers of the Information Commissioner in relation to data protection legislation. We considered these issues in our previous Report<sup>27</sup> but we make no apologies for returning to them in the light of further evidence of difficulties arising for the effective protection of personal data.

### Breaches of section 55 DPA

33. Calls to increase the severity of penalties for obtaining or disclosing personal data contrary to section 55 of the Data Protection Act 1998 (DPA) are not new, and nor are they limited to the Leveson Inquiry and the events leading to it. Section 60 of the DPA sets out that the maximum penalties for these offences are, in summary proceedings in the magistrates' court a fine not exceeding the statutory maximum (currently set at £5,000), and an unlimited fine on indictment in the Crown Court. Proceedings for any criminal offence under the DPA in England and Wales may be brought only by the Information Commissioner, or by or with the consent of the Director of Public Prosecutions. It is the belief of the current Commissioner and his predecessors that the section 60 sentences are insufficiently punitive given the potential for damage from breach of the principles of data protection. He has argued that the severity of some breaches of the DPA merit the ability of the court to use a broader range of penalties, including custodial sentences.<sup>28</sup>

34. Since the introduction of the DPA some steps have been taken to enhance the powers of the Information Commissioner in tackling serious or sustained breaches of the Act. Notably in 2010 the DPA was amended to give the Commissioner the ability to impose a civil monetary penalty of up to £500,000 on a data controller in instances of serious breaches, aimed at incentivising good practice by both public and private bodies in their handling of personal data.<sup>29</sup> Further to this, section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provided for an increase to the upper limit on fines imposed by magistrates' courts to be made through secondary legislation. At the time of writing, this provision has not been commenced.

35. Despite these developments it is clear that there is still considerable public concern about data protection. We have previously recommended that the Government, through secondary legislation, should bring into force section 77 of the Criminal Justice and Immigration Act 2008, which would allow for custodial penalties to be imposed for breach of section 55 of the Data Protection Act.<sup>30</sup> Since then this recommendation has been mirrored by the Home Affairs Committee,<sup>31</sup> the Joint Committee on the Draft

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27 HC (2010–12) HC 1473

28 *Ibid*, Q 1

29 Information Commissioner's guidance about the issue of monetary penalties prepared and issued under Section 55C (1) of the Data Protection Act 1998, [www.ico.gov.uk](http://www.ico.gov.uk)

30 HC (2010–12) HC 1473, para 9

31 Home Affairs Committee, Fourth Report of Session 2012–13, *Private Investigators*, HC 100, para 47

Communications Data Bill<sup>32</sup>, and most recently by the Leveson Report.<sup>33</sup> The Government has continually declined to take this action, for the reasons given in paragraphs 43 and 44 below.

36. The problem with the current framework, Mr Graham said in evidence to us, is that the fines imposed in magistrates' courts are simply too low to amount to a deterrent against misusing personal data. He described the fines paid as "modest".<sup>34</sup> Supplementary evidence which the ICO provided to the Committee detailing fines levied as a result of successful prosecutions in the magistrates' courts, clearly bears out this sentiment.

37. Since June 2011 there have been twelve successful prosecutions for section 55 offences. The fines for offences, which in some cases seem to be large scale operations to sell personal data, are minimal, ranging from £100 to £500. In one instance an offender was convicted and fined £500 for regularly accessing over a period of 17 months the bank accounts of her boyfriend's ex-wife during the time when her partner was undergoing divorce proceedings.<sup>35</sup>

38. It is the case that two more serious instances have been disposed of through conditional discharge<sup>36</sup>, complemented by confiscation orders. But in the conditional discharge cases cited by the ICO in their supplementary evidence to us, the scale of the breach of the DPA does not seem to be reflected in the outcome of the court case. In 2011 a defendant was convicted for 18 breaches of section 55 of the DPA for obtaining the records of 500,000 mobile phone customers from his employer; the data was then sold on. In this case one of the two defendants in the case was given an 18 month conditional discharge and a confiscation order of £28,700.

39. The Information Commissioner said the cause of such low fines was that the amount levied was dependent on the means of the defendant. In most cases, prosecutions are launched against individuals who are involved in family or marital disputes.<sup>37</sup> When giving evidence to the Leveson Inquiry, Mr Graham raised another significant point affecting the size of fines issued in the magistrates' court: the fact that unlawful breaches of section 55 are not recordable offences. He argued that criminal records, which are a matter of both deterrence and of assisting detection, were essential in reflecting the seriousness of the offence.

At present the offence of unlawful obtaining etc is not a recordable offence. It is not therefore recorded on the Police National Computer. Fingerprint impressions, DNA samples and descriptive details are not currently taken from those individuals who are prosecuted by the ICO for the section 55 offence [...] If the penalties for this offence are increased to imprisonment the offence will become a recordable offence.

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32 Joint Committee on the Draft Communications Data Bill, First Report of Session 2012–13, *Draft Communications Data Bill*, HL Paper 179, HC 479

33 The Leveson Inquiry, *Report on the Culture, Practices and Ethics of the Press*, Part H, Chapter 5, para 2.92

34 Q 17

35 Ev 18

36 A conditional discharge is an order discharging the offender subject to the condition that he commits no offence during a period specified in the order.

37 Q 16

This will not only underline the serious nature of the offence but will ensure that those convicted carry a meaningful criminal record.<sup>38</sup>

**We believe that Ministers should give consideration to making breaches of section 55 of the Data Protection Act 1998 recordable offences.**

### ***Blacklisting and The Consulting Association***

40. The limitations on the powers of the Information Commissioner to ensure that breaches of the DPA are properly deterred and dealt with were brought to our attention recently by the publicity surrounding The Consulting Association. The issue was the subject of an Opposition day debate in the House on 23 January 2013 and is currently being inquired into by the Scottish Affairs Committee.<sup>39</sup> While we do not want to pre-empt the outcome of their inquiry, the example is significant in reflecting the limitations facing the Commissioner in enforcing data protection legislation.

41. In 2009 the premises of The Consulting Association were raided by the Information Commissioner and were found to be illegally holding information on 3,213 individuals for use as a blacklist for construction companies. Fourteen prominent construction companies were found to be using the blacklist, which prevented the individuals on the list from obtaining work over numerous years. The Commissioner served these fourteen companies with enforcement notices, ordering them to desist from the use of the blacklist; as he explained to us, he had at that time no other powers in his armoury to use against those companies.<sup>40</sup> The Consulting Association's proprietor, Mr Ian Kerr, was prosecuted in the Crown Court by the Information Commissioner and fined £5,000 for breach of the DPA.

*42. The Information Commissioner has been criticised for the limited nature of the sanction which was imposed on Mr Kerr, and the lack of any penalty on the companies which used the blacklist. It is clear to us that this criticism is misdirected; the Information Commissioner took action in accordance with the powers at his disposal at the time to prosecute Mr Kerr, and the resulting fine was a matter for the court. However, the case illustrates how the scale of data protection offences is not reflected in the penalties available for them.*

### ***The Government's opinion***

43. Given the frequency with which parliamentary committees have recommended to the Government that it introduce a custodial element to the section 55 offence it is not surprising that there has been a well-established response from the Government to the issue. The Government argues that there exist in statute other offences that carry custodial penalties for which those who breach section 55 of the DPA can be convicted. The combined suggestions of the Home Office, the Ministry of Justice and Lord Justice Leveson of relevant offences are set out below in Box 2.

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38 The Leveson Inquiry, *Report on the Culture, Practices and Ethics of the Press*, Part H, Chapter 5, para 2.78

39 HC Deb, 23 January 2013, col 330–377

40 Q 5

**Box 2: Offences involving section 55 breaches that carry custodial penalties**

- Unlawful interception of communications: Regulation of Investigatory Powers Act 2000
- Unauthorised access to computer material: Computer Misuse Act 1990
- Dishonestly making a false representation: Fraud Act 2006
- Bribing another or being bribed: Bribery Act 2010
- Unauthorised access to computer material: Contrary to section 1 of the Computer Misuse Act 1990
- Unauthorised access to computer material with intent to commit another offence: Contrary to section 2 of the Computer Misuse Act 1990
- Phone hacking: Regulation of Investigatory Powers Act 2000
- Misconduct in public office: common law offence
- Inchoate and accessory offences including attempt and conspiracy

*Data Source: List of offences compiled using Ministry of Justice, Government Response to Justice Committee Ninth Report of Session 2010–12, December 2011, Cm 8240, p. 5; Home Office written evidence to the Joint Committee on the Draft Communications Data Bill, para 92; The Leveson Report, Part H, Chapter 5, para 2.95). It is noteworthy that these three sources each give slightly different lists of such offences.*

44. Further to this the Government set out in its response to our Report that the Information Commissioner can seek to obtain the proceeds of illegal transactions, including those involving breaches of the DPA, through confiscation orders.<sup>41</sup> This instrument has, however, been used on only two occasions in section 55 offences, relating to the same instance of the misuse of personal data.<sup>42</sup> The case in question, referred to in paragraph 37, relates to the illegal acquisition of 500,000 mobile telephone records and their subsequent sale. A total of £73,700 was obtained under a confiscation order. This instance alone, while encouraging, does not seem sufficient to guarantee the deterrence of breaches of the DPA which could potentially result in highly profitable criminal activity.

45. The Leveson Inquiry explored whether custodial penalties should be available for serious data misuse under section 55 in relation both to the press and more generally. It considered whether the Government's justification for not implementing section 77 of the Criminal Justice and Immigration Act 2008, which would provide for a custodial sentence, was valid. It is the case that the Information Commissioner can only undertake prosecutions relating to data protection for offences under section 55 of the DPA, and cannot prosecute the offences listed in Box 2.<sup>43</sup> The Leveson Inquiry suggested that there were two serious consequences of the fact that misuse of personal data was only subject to custodial penalties in relation to offences outside the remit of the Commissioner:

- It effectively relegates section 55 to a residuary position, in practice only of real use in cases where all other criminal possibilities have been eliminated.
- In cases of extreme breaches the expert regulator is in danger of being left out of the picture all together.<sup>44</sup>

46. Mr Graham was concerned that the issue would continue to drag on amidst the post-Leveson discussions and deliberations over press ethics and practice:

My worry now is that there is going to be another lull while there is a major consultation on all things Leveson, including changes to the Data Protection Act and

41 Ministry of Justice, Government Response to the House of Commons Justice Committee Ninth Report of Session 2010–12: *Referral fees and the theft of personal data*, Cm 8240, December 2011, p 4

42 Ev 17

43 The Leveson Inquiry, *Report on the Culture, Practices and Ethics of the Press*, Part H, Chapter 5, para 2.95

44 *Ibid*, para 2.97

its treatment of the media, including the constitution of the Information Commissioner's Office and so on, and that section 55 is going to be part of that general consultation. That will be the third consultation on this proposal.<sup>45</sup>

47. In his written evidence, the Commissioner also said:

It should not be necessary to undertake a third open consultation on section 55 penalties. It would also muddy the waters if the remote possibility of prison for the criminal section 55 offence were to be allowed to confuse the debate over the exemption at section 32 for processing for journalism or the other special purposes. Unlawful disclosure needs a more effective deterrent if citizens are to have confidence in other transparency and open data initiatives involving data sharing, shared services, digital by default and joined up delivery. This is a reform that really will 'brook no delay'.<sup>46</sup>

***48. In the debate concerning implementation of the Leveson Report's recommendations, we share the concern of the Information Commissioner that confusion might arise over issues surrounding section 55 offences and press freedom. Wholly legitimate concerns over press freedom could result in necessary action to deter and punish serious misuse of personal data being put off. Introduction of the option of custodial sentences for section 55 offences would emphasise their seriousness. We call on the Government to adopt our previous recommendation, as well as that of the Home Affairs Committee, the Joint Committee on the Draft Communications Data Bill and the Leveson Inquiry, and commence sections 77 and 78 of the Criminal Justice and Immigration Act 2008 to allow for custodial sentences for breach of section 55 of the Data Protection Act 1998.***

## **Powers to compel audit**

49. In our evidence session with the Information Commissioner we also returned to the subject of compulsory audits. The Information Commissioner has the statutory power to inspect central Government departments' compliance with data protection, and will then issue guidance to them as to how to improve their practice.<sup>47</sup> Alongside this the Commissioner offers free audits to both public and private sector organisation to assess how effectively those organisations handle personal data.<sup>48</sup>

50. The Commissioner cannot compel organisations outside central Government to accept an audit; this is a significant limitation on his ability to investigate, identify problems and prevent breaches of the DPA that we identified in our previous report.<sup>49</sup> He may, as the Government pointed out in response to that Report, apply to the court for a warrant to inspect the premises of a data controller under Schedule 9 to the Act if there are reasonable

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45 Q 17

46 Ev 14

47 The Privacy and Electronic Communications Regulations allows the Information Commissioner to compel audit of providers of public electronic communications services; he may also audit public authorities listed under section 41A(2) of the DPA.

48 HC (2010–12) HC 1473, para 15

49 *Ibid*, para 20

grounds for suspecting that a data controller has contravened the Act.<sup>50</sup> Following this the Commissioner may issue a civil monetary penalty of up to £500,000 for seriously breaching data protection principles, dependent on the severity of the breach.

51. In instances where the Commissioner discovers breaches of the DPA while conducting an audit, his policy is to advise as to how to fix the problem rather than impose a hefty monetary penalty on the organisation. For Mr Graham the benefit to organisations of receiving a free data protection audit is clear. He set out the case in relation to local councils:

It does not have to be very onerous. It is simply the ICO coming in and asking “How do you do things? You are going to be in trouble if you carry on doing that, so here is a list of things you need to do”. You are only in serious trouble with the ICO if, having got the list, you do not do anything about it. It is the only free consultancy you are going to get.<sup>51</sup>

52. In practice these benefits do not appear to be recognised by many organisations offered free audits by the Information Commissioner; in our last Report on the issue we pointed out that in practice 29% of public organisations and 81% of private organisations had declined in 2010–11.<sup>52</sup> The Information Commissioner has, however, increased the number of audits which he conducts. In 2011–12 his office undertook 42 audits, an increase of 60% on 2010–11. The audits undertaken during this period were spread across varied sectors. 24% were conducted in central government, 38% with NHS trusts and local authorities, and ‘over a quarter’ with private sector organisations.<sup>53</sup>

53. The outcomes of audits provide an insight into the success of organisations in their protection of personal data and compliance with the DPA. The Commissioner audits an organisation’s standard of data protection, ranking them for high assurance, reasonable assurance, limited assurance, and very limited assurance. The outcomes of the resulting reports can be kept confidential should the subject organisation require it, but the sector wide audit assurance ratings are published in an audit outcomes analysis.<sup>54</sup> The table below shows the percentage of organisations recently audited and the attributed assurance level.

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50 Ministry of Justice, *Government Response to the House of Commons Justice Committee Ninth Report of Session 2010–12: Referral fees and the theft of personal data*, Cm 8240, December 2011, p 9

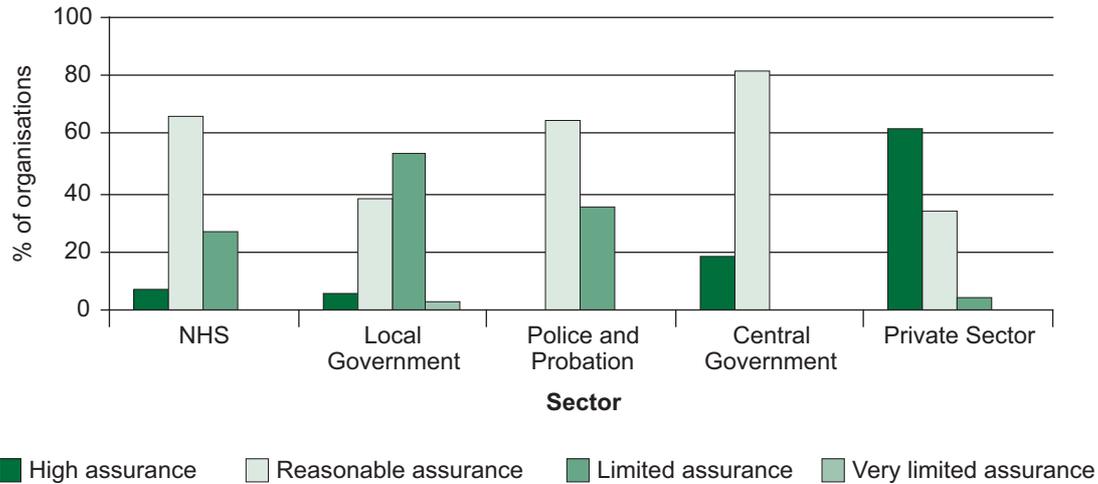
51 Q 17

52 HC (2010–12) HC 1473, para 15

53 Information Commissioner’s Office, *Information Commissioner’s Annual Report and Financial Statements 2011/12: In the Rights space – at the right time*, HC 350

54 Information Commissioner’s Office, *Audit Outcomes Analysis*, [www.ico.gov.uk](http://www.ico.gov.uk)

Figure 1: Audit assurance levels by sector, 2010–12

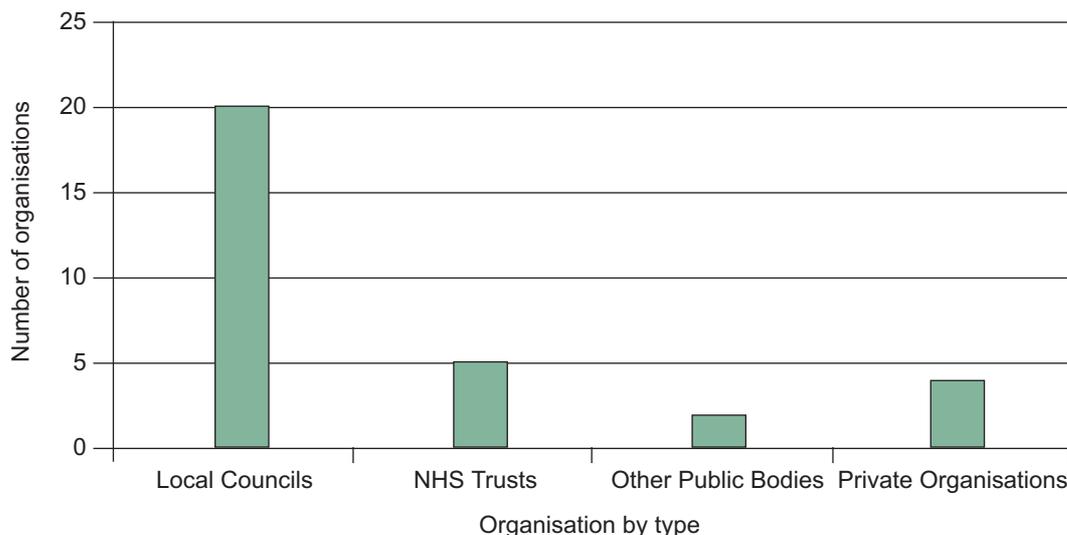


Data Source: Data compiled using the audit outcomes analysis, available on [www.ico.gov.uk](http://www.ico.gov.uk)

54. Any conclusions drawn from this information should be subject to two caveats; firstly the number of organisations audited is small and cannot be considered statistically significant. Secondly the audits were undertaken over differing periods of time in each sector. What can be inferred from this, however, is that while a large proportion—over 60%—of audited private sector organisations were awarded high assurance levels, this cannot be said with such certainty about the public sector. Notably over 50% of audited local government bodies were considered to give the Information Commissioner limited assurance over their data protection, which his Office describes as meaning that there is scope for improvement in existing arrangements. Only a small number of public sector organisations were considered to give high assurance.

55. The civil monetary penalties which have been served can also shed light on the nature of the organisations which have been found to have been in serious breach of the DPA. Since 2010 the Information Commissioner has had the ability to issue CMPs and has used them increasingly to deter and punish bad practice. The table below shows the penalties which have been paid by organisations according to their type. Local councils have overwhelmingly been the main recipient of CMPs.<sup>55</sup>

<sup>55</sup> Ev 20; figures do not include monetary penalties which on publication were under appeal or had not yet paid the penalty. Other public bodies in this instance were police forces.

**Figure 2: Organisations which have paid a Monetary Penalty**

Data Source: Information Commissioner's Office, Ev 20

56. Cases in which the Information Commissioner serves monetary penalties are without exception serious breaches of data protection. The amount of the penalties served has varied from £60,000 to £250,000, but they are subject to a 20% discount for timely payment. The average penalty given to local councils is just under £100,000, and £190,000 for NHS Trusts.<sup>56</sup> In one recent example, the London Borough of Lewisham was fined £70,000 for a case in which a social worker took papers relating to child protection out of the office and left them on a train. The papers contained details of a family with children who were subject to care proceedings because of allegations of abuse and neglect.<sup>57</sup>

57. Breaches such as this are unacceptable when the Information Commissioner provides free audits on how organisations can improve their practice. In instances where offers of audits are accepted the Information Commissioner seeks assurances that they will undertake to improve their practice and provides advice on how to do this. For example Leicestershire County Council signed an undertaking to improve its guidance relating to the security of data while home working following an incident in which a bag containing sensitive information was stolen from the home of a social worker.<sup>58</sup> Mr Graham was very clear that this was his preferred method of practice:

Many of our civil monetary penalties have been imposed on local government, on councils for actions that would make your hair stand on end. I take no joy from visiting a civil monetary penalty on local authorities who are hard-pressed as it is, but they do very stupid things. The message seems to be getting through but it would be much better if we could simply send in the good practice audit team to help them get things right.<sup>59</sup>

56 Ev 20; figures do not include monetary penalties which on publication were under appeal or had not yet paid the penalty. Other public bodies in this instance were police forces.

57 Information Commissioner's Office, *Monetary Penalty Notice served on London Borough of Lewisham*, 12 December 2012, [www.ico.gov.uk](http://www.ico.gov.uk)

58 Information Commissioner's Office, *Undertaking with Leicestershire County Council*, 17 April 2012, [www.ico.gov.uk](http://www.ico.gov.uk)

59 Q 13

58. In November 2011 the Information Commissioner gave evidence to us on this subject, and he then submitted a business case to the Ministry of Justice asking that the Government extend Assessment Notices, under section 41A(2)(b) of the DPA, to enable him to carry out compulsory audits in the NHS and local government sectors. In their response to our Report the Government undertook to consider the business case and consult on it as appropriate.

59. The Government have taken no action to fulfil the Information Commissioner's recommendation. The case for extension is summarised in the business case which the Commissioner submitted to the Ministry of Justice in November 2011:

[In] the NHS and local government there are particularly significant and widespread data protection compliance concerns. The success of having this power in practice has been clearly illustrated by the fact that the Information Commissioner has not had to serve an assessment notice to date. 100% of those central government data controllers currently covered who have been asked to agree to a consensual audit have done so.<sup>60</sup>

60. As well as being the subject of significant data protection concerns, NHS Trusts and local councils have been reluctant to consent to audits. In his business case in November 2011 the Information Commissioner reported that in instances where his enforcement team have referred an NHS Trust for a serious data protection breach, only 53% have ultimately consented to an audit. He also reported that only 47% of local government organisations which he had contacted agreed to a consensual audit. As Mr Graham said:

We can fairly say that the Health Department is very supportive but DCLG is strongly opposed [...] until local government gets the message, local council taxpayers will continue to be hit with civil monetary penalties for really basic stupid errors.<sup>61</sup>

**61. *It is shocking that public sector organisations, which hold highly sensitive data, should refuse a free audit, and even more so in cases where there are serious concerns over the security of that data. It is indicative of a culture in some public authorities in which data protection and privacy do not register as being sufficiently important. We recommend that as a general rule public sector organisations should accept the offer of a free audit from the Information Commissioner, and we consider that it is in the public interest for them to do so.***

**62. *The case for extending compulsory audit to NHS Trusts and local councils is clear; while bodies continue to decline free and consensual audits, the only feasible recourse for the Information Commissioner is a civil monetary penalty which ultimately is at the expense of the taxpayer and council tax payer. We recommend that the Secretary of State bring forward an order under section 41A of the Data Protection Act to meet the***

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60 Information Commissioner's Office, *Business case for the extension of Assessment Notice Powers*, November 2011, p 2

61 Q 15 [Christopher Graham]

**recommendation of the Information Commissioner that his power to serve Assessment Notices be extended to NHS Trusts and local councils.**

# Conclusions and recommendations

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## The ICO's Finances

1. We commend the Information Commissioner for his success in reducing his budget at the same time as making inroads into the backlog of freedom of information complaints, and improving the amount of casework completed. The increased productivity of the ICO has enhanced the Office's reputation. The Government should consider relaxing the governing rules around virement and overheads to allow the Information Commissioner to function as effectively as possible at a time when he is receiving increasing quantities of casework and the Ministry of Justice is exploring even deeper cuts to his budget. (Paragraph 9)
2. As negotiations at European level proceed on the data protection proposals the Information Commissioner will need to keep the Government informed of what the exact implications for his office will be, and to make clear the resources which he needs to fulfil his obligations should the Regulation come into effect, whether in its current form or with amendments. No one seems to know where resources would come from to replace the notification fee if it is abolished. The Government needs to find a way of retaining a fee-based self-financing system for the data protection work of the Information Commissioner, if necessary by negotiating an option for the UK to retain the notification fee or introduce an alternative fee. If the Government fails to achieve this, the unappealing consequence will be that funding of the ICO's data protection work will have to come from the taxpayer. The Regulation cannot be allowed to compromise the work of the ICO on data protection and the Government should not support proposals which could have that effect. It must continue to negotiate with the European Commission to secure a more flexible and reasonable Regulation in line with the recommendations in our previous Report on the issue. (Paragraph 16)
3. The Government should be mindful, in its response to the Leveson Inquiry, of the finite capacity of the Information Commissioner's Office to fulfil its current role. If the Government requires that his Office expand its role in monitoring the standards of data protection in the press, it should ensure he has the resources to do so properly. (Paragraph 22)

## The status of the ICO

4. We agree with our predecessor Committee and the Information Commissioner that the benefits of communicative leadership and personal responsibility are best served under the corporation sole model, which would be at risk of being lost in the creation of an Information Commission. We are confident that this model allows for the necessary expertise to be brought in to support the work of the Office as necessary, and we therefore disagree with the Leveson Report on this point. (Paragraph 27)

## Accountability to Parliament

5. We reject the argument that it is inappropriate to make the Information Commissioner a parliamentary body because his work does not relate primarily to that of Parliament. It is independence of the Executive which parliamentary status can provide. (Paragraph 30)
6. We continue to believe that the Information Commissioner will face significant difficulties in functioning effectively unless he becomes more closely accountable to Parliament instead of Government. With the potential removal of the notification fee through the EU Regulation, we reiterate our recommendation that the Information Commissioner should become directly responsible to, and funded by, Parliament. (Paragraph 31)

## Breaches of section 55 DPA

7. We believe that Ministers should give consideration to making breaches of section 55 of the Data Protection Act 1998 recordable offences. (Paragraph 39)
8. The Information Commissioner has been criticised for the limited nature of the sanction which was imposed on Mr Kerr, and the lack of any penalty on the companies which used the blacklist. It is clear to us that this criticism is misdirected; the Information Commissioner took action in accordance with the powers at his disposal at the time to prosecute Mr Kerr, and the resulting fine was a matter for the court. However, the case illustrates how the scale of data protection offences is not reflected in the penalties available for them. (Paragraph 42)
9. In the debate concerning implementation of the Leveson Report's recommendations, we share the concern of the Information Commissioner that confusion might arise over issues surrounding section 55 offences and press freedom. Wholly legitimate concerns over press freedom could result in necessary action to deter and punish serious misuse of personal data being put off. Introduction of the option of custodial sentences for section 55 offences would emphasise their seriousness. We call on the Government to adopt our previous recommendation, as well as that of the Home Affairs Committee, the Joint Committee on the Draft Communications Data Bill and the Leveson Inquiry, and commence sections 77 and 78 of the Criminal Justice and Immigration Act 2008 to allow for custodial sentences for breach of section 55 of the Data Protection Act 1998. (Paragraph 48)

## Powers to compel audit

10. It is shocking that public sector organisations, which hold highly sensitive data, should refuse a free audit, and even more so in cases where there are serious concerns over the security of that data. It is indicative of a culture in some public authorities in which data protection and privacy do not register as being sufficiently important. We recommend that as a general rule public sector organisations should accept the offer of a free audit from the Information Commissioner, and we consider that it is in the public interest for them to do so. (Paragraph 61)

11. The case for extending compulsory audit to NHS Trusts and local councils is clear; while bodies continue to decline free and consensual audits, the only feasible recourse for the Information Commissioner is a civil monetary penalty which ultimately is at the expense of the taxpayer and council tax payer. We recommend that the Secretary of State bring forward an order under section 41A of the Data Protection Act to meet the recommendation of the Information Commissioner that his power to serve Assessment Notices be extended to NHS Trusts and local councils. (Paragraph 62)

# Formal Minutes

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**Tuesday 12 March 2013**

Members present:

Sir Alan Beith, in the Chair

Steve Brine	Mr Elfyn Llwyd
Rehman Chishti	Andy McDonald
Jeremy Corbyn	Yasmin Qureshi
Nick de Bois	Graham Stringer
Gareth Johnson	Mike Weatherley

Draft Report (*The functions, powers and resources of the Information Commissioner*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 62 read and agreed to.

Summary agreed to.

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

*Ordered*, That the Chair 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 19 March at 9.15 am

## Witnesses

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**Tuesday 5 February 2013**

*Page*

**Christopher Graham**, Information Commissioner, **David Smith**, Deputy Commissioner and Director of Data Protection, and **Graham Smith**, Deputy Commissioner and Director of Freedom of Information

Ev 1

## List of printed written evidence

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1 Information Commissioner

Ev 14

## List of Reports from the Committee during the current Parliament

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The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

### Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681-I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518-I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519-I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901

### Session 2012–13

First Report	Post-legislative scrutiny of the Freedom of Information Act 2000	HC 96-I (Cm 8505)
Second Report	The budget and structure of the Ministry of Justice	HC 97-I (Cm 8433)
Third Report	The Committee's opinion on the European Union Data Protection framework proposals	HC 572 (Cm 8530)
Fourth Report	Pre-legislative scrutiny of the Children and Families Bill	HC 739 (Cm 8540)
Fifth Report	Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 927
Sixth Report	Interpreting and translation services and the Applied Language Solutions contract	HC 645
Seventh Report	Youth Justice	HC 339
Eighth Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 965

# Oral evidence

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## Taken before the Justice Committee on Tuesday 5 February 2013

Members present:

Sir Alan Beith (Chair)

Steve Brine  
Rehman Chishti  
Jeremy Corbyn

Mr Elfyn Llwyd  
Andy McDonald  
Graham Stringer

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### Examination of Witnesses

*Witnesses:* **Christopher Graham**, Information Commissioner, **David Smith**, Deputy Commissioner and Director of Data Protection, and **Graham Smith**, Deputy Commissioner and Director of Freedom of Information, gave evidence.

**Chair:** Welcome to the Information Commissioner and to the two Mr Smiths. We are very glad to have you with us this morning. We have a number of things to cover and I am going to ask Graham Stringer to open the questions.

**Q1 Graham Stringer:** Good morning. Lord Justice Leveson does not think that your structure is capable of dealing with large-scale issues as it presently stands. I understand you disagree with that but have made some changes in the structure. Could you explain your reasoning and the changes you have made to the Committee, please?

**Christopher Graham:** Good morning, Chairman, and Mr Stringer. Lord Justice Leveson's inquiry was examining, so far as the Information Commissioner's Office was concerned, events that happened between 2003–2006 and subsequently. When I gave evidence, I was not questioned at all about the structure of the ICO. Lord Justice Leveson felt that the Commissioner as corporation sole model was—I do not think he used the phrase—what might be characterised as a bit of a one-man band, whereas we come before you as a trio to demonstrate the information rights in the round responsibilities that we have for data protection and for freedom of information.

The Office has grown and changed considerably since the period that the judge was looking at. We now have 386 colleagues—that is, the equivalent of 363 full time—and the structures that support the Commissioner are considerably developed. The judge did not ask me about the management board that we have, with non-executive colleagues joining us, and he did not ask about the structure of the executive team, the leadership group and so on. So the evidence of what we did or did not do between 2003 and 2006 does not help us to decide what is the appropriate model for an ICO that is now charged with many and varied responsibilities, only one of which deals with privacy and the media. Of course, we will listen carefully to what the judge was saying and I hope very much there is going to be a wide-ranging debate and consultation about what the structure might be in the future, but, as for now, I would say, “If it ain't broke, don't fix it.”

**Q2 Graham Stringer:** Two questions follow from that. Can you put some flesh on the bones in terms of numbers—how many people there are working for you now compared to the 2003–2006 period? Can you comment on Leveson's observations that your predecessor did not involve himself enough in Operation Motorman?

**Christopher Graham:** I thought the criticism was that the Information Commissioner either then or now took too much personal responsibility and there was not enough collective discussion. That is a wrong description, both on how things were and how things are. We have expanded simply because of a number of changes that my predecessor introduced, which persuaded the Government to introduce a tiered notification fee, so our resources increased and held up very satisfactorily on the data protection side. Of course, there was also the introduction of the civil monetary penalty regime and our good practice audits and so on. That is really where the expansion has come. I am confident that it is well managed, well directed and that we have clear policies and strategies, but if Parliament wants it to be structured another way then let us have the debate.

**Q3 Graham Stringer:** Can you put some numbers on the change in the number of employees, the change in number of officials—an order of magnitude, not precise?

**Graham Smith:** In around 2003 there were about 120 employees. The organisation was primarily focused on data protection because the Freedom of Information Act had been passed, but the Government then decided not to bring it into full effect until 2005. So we took on additional staff when the Freedom of Information Act came fully into effect. The organisation then grew to about 200. As you have heard from Mr Graham, the organisation has now grown to about 360 and most of that growth has been on the data protection side. In terms of our resources, whereas around 2005–06 it was two parts data protection to one part freedom of information, it is now, today, four parts data protection to one part freedom of information.

**Q4 Chair:** Is there not a sense among the public—particularly those who have been affected after all that has gone on, not only in Leveson but in other things such as personal injury insurance-related issues and all of these things—that a completely cavalier attitude to data protection has remained quite widespread in public bodies, including the police, and that the Information Commissioner’s Office has not been either strong enough or capable enough to deal with it?

**Christopher Graham:** I am going to ask David to contribute on this in a moment, but I would refute that. We can show evidence of the action of the ICO, with the increased resources and increased powers that we have, really making people sit up and take notice, but I don’t know what you would say, David.

**David Smith:** That is right, Chairman. “Cavalier” would be going too far, particularly when talking about public bodies. There are undoubtedly cavalier operators in the area of the Privacy and Electronic Communications Regulations, spam texts and unsolicited calls. We have already taken some enforcement action and I have another monetary penalty notice with me against another organisation which I think you would fairly describe as cavalier. Public bodies have featured prominently in our monetary penalties. “Cavalier” goes a bit too far, but there has been insufficient attention to getting privacy right and protecting personal data has not been high enough up their agenda. Our powers are driving that. I do not think we are before you today, Chairman, as we might have been a few years ago, arguing for very much increased powers. We do have—and I am sure the Commissioner will say a little more about that—still the question of section 55 and the custodial sentence.

**Chair:** We are going to ask him questions about that shortly.

**David Smith:** Also, there are our audit powers and whether we should be able to go in as of right to audit businesses rather than only be able to do so with consent.

**Q5 Andy McDonald:** This is probably a question for David Smith and it is the issue of blacklisting and the Consulting Association. I am talking about the Opposition Day debate we had last week. The GMB’s principal concerns were that there was distinct inaction in terms of steps taken against companies who had used the blacklisting service; some had been involved in public contracts, including the construction of this very building. Secondly, the concern was about the steps or lack of steps taken to inform people who had been on that blacklist. Specifically, can I ask you what steps you are taking to rectify the fact that, after three years, only 7% of those 3,213 individuals on the blacklist held by the Consulting Association know that they were on such a list in the first instance?

**David Smith:** You raise a number of points there. One was the criticism by GMB and others that we did not take appropriate action against the construction companies. I have to say, Chairman, that we refute that. Our powers at that time did not extend to monetary penalties. The only criminal action was that

of Ian Kerr, who ran the Consulting Association, the holder of the blacklist, who was not notified or registered as a data controller. We did prosecute Kerr and, indeed, we got the case taken up to the Crown court rather than just the magistrates court, albeit that the fine was still only £5,000. The other organisations—those construction companies that supplied information to Kerr—breached the data protection principles but there was no punishment available to us at that time. The only power was to issue an enforcement notice that required those organisations to change their practice.

We did pursue some enforcement notices, but we did not go to the ends of the earth in issuing enforcement notices against all the businesses because, essentially, we were issuing them with an order to stop them conducting a practice that had ceased because the Consulting Association had closed down. We had the blacklist. It would not have served any useful purpose to have pursued them further.

There is then the question of the victims. We were very clear at the time that we seized the Consulting Association database back in 2009 that there was a responsibility to victims, for them to be able to find out if they were on the database and to access the information. Once we had seized the database, we did make available what I would describe as a fast-track access service whereby individuals could inquire of our Office as to whether they were on the database. If their identifying details matched up with those on the database, they would get a full copy of the information kept about them.

We had some 2,000 inquiries and about 200 hits in that time scale. That operated up until—it is continuing to operate—about the middle of last year. We heard nothing, no criticism and no suggestion that that was not a satisfactory mechanism, as I say, until the middle of last year, when we were approached by Liberty in conjunction with the GMB asking us to do more to proactively inform the victims. We have set up arrangements since then with the GMB and a number of other trade unions to help them contact their members where there is an apparent hit on the database. All that is going well. I can look up the figures, Chairman, but we had more inquiries and more hits as a result of that. I think there were something like 50 to 60 from the GMB, who now have the data.

The other step we are taking is to use a commercial service, operated by Equifax, so that where we have a name and address on the Consulting Association records—and some of these records are very old and not entirely reliable—we can check whether there is a good likelihood that that person is still living at the address there. Then we are going to write to those people. We signed the contract with Equifax yesterday and we will be starting that exercise this week. But we do have large numbers on the database with unreliable addresses. You have to appreciate the nature of the business these people were in. They were construction workers on building sites by and large. They moved around the country and some of this information is 20 or 30 years old. To write out to simply everybody and say “You may be on a blacklist” to addresses where

we have reason to believe they are no longer at would be irresponsible.—

**Q6 Andy McDonald:** Can you check the electoral register to see if they are there?

**David Smith:** One of the services through Equifax will be a check against the electoral register.

**Christopher Graham:** As Commissioner, I think the ICO has been taking all reasonable steps since 2009 when we closed down the Consulting Association. I read in the debate in the House on 23 January the Opposition spokesman saying that, as a result of the blacklisting, “lives have been ruined, families have been torn apart and many have been forced out of the industry.” I cannot help thinking that, after three years, where that has happened, the individuals concerned will have had a suspicion that something had gone wrong and they will be the ones who have been contacting the ICO.

I am very glad that we are now able to work with the trade unions and the credit reference agencies to track people down, but then there is a question of how much resource one should be putting into the proactive contacting of people whose names may be on that database but who may not have suffered detriment apart from the fact that they were on that database. How much is down to the ICO and how much is down to the trade unions? The resources we are piling into our information governance section to deal with the calls that have been generated by newspaper stories and so on is quite considerable. I do not say we should not be doing it, but if we do more in that area we are going to do less in another area. It is a question of proportionality.

**Q7 Andy McDonald:** But you are in the ideal position to come to a view about the damage that has been caused because you are going to have that information at your fingertips if this process continues. Would it be reasonable to ask you to come back to say the damage that has been caused to these individuals in this process?

**Christopher Graham:** I do not think I am in a position to say that. The individuals concerned know what damage has been caused to them. I am very glad to take up the invitation of the Secretary of State for Business to meet and discuss the issue more generally, but I do not really think it is for the ICO to be conducting some great public inquiry into the phenomenon of blacklisting. We are doing what we can now, but please remember that we did close down the construction industry database in the first place.

**Q8 Chair:** But the phenomenon, in principle, in your field is the abuse of data. That is a phenomenon which you, especially, are responsible for investigating and policing.

**Christopher Graham:** Yes; I absolutely accept that. Had we had the powers in 2009 that we have now, I am certain we would have done more than issue enforcement notices against 14 companies, but the past is another country.

**Q9 Mr Llwyd:** I am a bit perturbed about something Mr Smith said. Apparently, because the Consulting

Association was wound up, that was a justification for no further action against these large construction companies. I am afraid, if that were a general principle at law, there would be a lot of very guilty people laughing all the way to the bank each and every day. Many of those firms had Government contracts—which makes it possibly more serious, possibly not—but I cannot understand why they were just let off the hook completely.

**David Smith:** Let me come back, Chairman. I can only say that there was nothing we could do to punish them. Today, we would investigate them and almost certainly some of them would face fines—monetary penalties. But we did not have that power then. All we could do was order them to comply with the law in future in a formal enforcement notice, with which non-compliance is a criminal offence that can be prosecuted. All these companies assured us that they were no longer involved with the Consulting Association and, indeed, we closed down the Consulting Association. It did wind up and we were entirely satisfied with that. All we would have done was issue them with a formal order which required them to stop doing what they had already stopped doing. It would not have served a useful purpose or been a good use of our time and effort. It would have achieved nothing further than was achieved anyway.

**Christopher Graham:** Subsequently, of course, the law was changed and blacklisting was specifically made illegal, but we are talking about what we might or might not have done in 2009 when it was not illegal to the extent that it is now and we did not have the civil monetary penalty power to enforce. We can't rewrite history. We did what we could do at the time. We are now working effectively with the trade unions and the credit reference agencies. All the publicity that has been given to this means that, if anyone else is out there who suffered detriment as a result of being in a file somewhere, they can simply exercise their subject access request with the ICO and we can get them the information that enables them to seek a legal remedy.

**David Smith:** Chairman, if I may, it is worth putting on record here the same assurances that we have given to other committees and to the trade unions, that if we receive credible evidence that blacklisting is continuing—sufficient evidence on which to investigate, some positive leads—then we will have no hesitation in investigating again and using the full ambit of our powers.

**Q10 Andy McDonald:** We acknowledge the success of closing down the Consulting Association, but some other organisation or individual may come along who is going to do the self-same thing in future years. You are saying that you did not have the tools then that you have now, but am I right in thinking that the tools you have now are limited to financial penalties imposed upon individuals who supply the information or who access such a database? Do you need any other tools beyond financial penalties on companies or individuals—learning the lessons from this process?

**David Smith:** Essentially, the tools we have at the moment are fines of up to £500,000, primarily against the businesses rather than individual directors. We

have the same questions that a lot of regulators do about how you can pin responsibility on individuals within a company rather than the company itself. But the power—again, which we may come to—which would be welcome is that of compulsory audit, for us to simply be able to go up to some of those construction companies today, knock on their door and say, “We have a power to come in and check your HR systems to satisfy ourselves as far as we can that you are not still involved in that practice.” That is a deficiency in our powers.

**Q11 Jeremy Corbyn:** Thank you for those answers and for what you do. When it comes to a question of credible evidence, where there is a big construction company involved, a union involved, and there are a number of responsible people around who can come up with evidence, I can see what you can do. But if it is a non-organised sector, computers or something like that, and there is a suspicion of an informal network that is keeping certain people out of employment, are you able to investigate that sort of thing, and what is your threshold of evidence before you would seek to investigate them?

**David Smith:** It is really a question of having some leads to go on. If we just have one person who says, “I was turned down for all these jobs. I think there is a blacklist”, that is not a sufficient basis for an investigation. If we see a particular pattern, then, yes, we would look further. I have to say that, with the Consulting Association, we were greatly helped by journalists—it was a journalist that dug deeply and gave us the leads—and by, essentially, a whistleblower from within the industry who told us this was going on, something to bite on that we could go and investigate. We have powers of access to our communications data, which we used in this investigation. That gave us the leads as to where the various calls were being made, to check people, and led us to Ian Kerr. There is a plea there, Chairman. Looking at the regulation of investigatory powers area in the draft Communications Data Bill, we see there is a suggestion that we may no longer have that power of access to communications data. That is very important to us in these sorts of investigations because so much is done over the telephone or the internet these days and that is what enables us to track these things down.

**Q12 Jeremy Corbyn:** Do you get many complaints that you do not follow up?

**David Smith:** It would be flippant to say no. Every complaint we get we look at and it gets a response, but we do not conduct a detailed investigation where we go to the business in every case. We have tens of thousands of cases a year. The trick for us is to spot among those complaints the ones which really do reveal serious wrongdoing and investigate those.

**Christopher Graham:** One should add that, as to the recent civil monetary penalty we imposed on two individuals who were running a spam text operation, the evidence came from information given to us by consumers using the ICO website and flagging their concerns about text messages and unsolicited phone calls. We could then put together a jigsaw and,

working with the phone companies, one could pinpoint the warehouse where the pay-as-you-go mobile phones and the unregistered SIM cards were firing off these nuisance text messages. We certainly use the evidence that comes to us. We have a very good enforcement team, led by a distinguished retired detective from the Greater Manchester Police, and they are very good at running these scams to ground. We are very proud of them.

**Jeremy Corbyn:** We should record that you did very well on that and I have not had one of those messages for nearly a month.

**Chair:** Were you going to move on to monetary penalties, Mr Corbyn?

**Q13 Jeremy Corbyn:** Yes, indeed. As an organisation you have been given powers to introduce monetary penalties and you have indeed increased the amount you have collected in monetary penalties. I can see how it works in the private sector, but I ask myself what is the point of a monetary penalty against a public sector organisation, the NHS or local government, because, in effect, it is one public sector organisation taking from another.

**Christopher Graham:** I would much prefer to have the power in local government, for example, of compulsory audit. We are pressing for that power to cover the NHS and local government. Many of our civil monetary penalties have been imposed on local government, on councils, for actions that would make your hair stand on end. I take no joy from visiting a civil monetary penalty on local authorities who are hard-pressed as it is, but they do very stupid things. The message seems to be getting through, but it would be much better if we could simply send in the good practice audit team to help them get things right. Until that happens—and I regret to say that the Department for Communities and Local Government remains to be convinced that this is a good idea—we have to continue down the civil monetary penalty road. David, you might like to expand on that.

**David Smith:** Yes. It is a difficult one because there is no doubt that, when we impose a penalty on a public body, it is essentially taking public funds from that body and giving them to the Treasury, because we do not keep the proceeds. There is a very strong argument that compliance by public bodies is just as important as—perhaps in some cases more important than—compliance by private sector bodies. There must be an effective punishment for public sector bodies that do not comply. There is, as we can see it and as the law sets out, no alternative available. A fine on a public body makes that public body account for the loss of funds. The body itself faces a fine, it hits the local newspapers and draws attention to the failings of the body, and that trust and confidence question, we think, drives compliance. It also drives accountability within the business. If it is my department that has incurred a £500,000 fine on behalf of the organisation I work for, I am going to be answerable for that and am quite likely to face disciplinary action or similar. So it is a driver, even though it is not necessarily a perfect mechanism. It is the same way other public sector regulators operate within the health service and so forth.

**Q14 Jeremy Corbyn:** The last point from me is this: you suggested, Mr Graham, that we have a compulsory audit of local government and health authorities. Please explain what that means, and do you have the resources to do it?

**Christopher Graham:** We have been expanding our good practice team. At the moment we have a system of consensual audits, and those councils and others who have invited in the ICO good practice team have been very pleased with the results. We get glowing opinions and very good customer satisfaction surveys. But, of course, the councils that really need the advice are the ones who do not ask for it and are sometimes quite resistant. There is the power, which can be exercised by order, for compulsory audit.

At the moment that just applies to Whitehall Departments. We made the case some time ago now for that to be extended to NHS bodies and to local councils. It does not have to be very onerous. It is simply the ICO coming in and asking, "How do you do things? You are going to be in trouble if you carry on doing that, so here is a list of things you need to do." You are only in serious trouble with the ICO if, having got the list, you do not do anything about it. It is the only free consultancy you are going to get, so why on earth would a council that had nothing to hide not want to co-operate with the ICO? I do hope that I can persuade the Secretary of State for Communities and Local Government that this is not an imposition, not a burden, but a help. It is a darn site more helpful than just being hit with a civil monetary penalty of £200,000.

**Q15 Chair:** You have made a business case to the MOJ for extending compulsory audit powers, haven't you, but it depends, in the case of local government, on the Secretary of State—

**Christopher Graham:** Within Government they like to get agreement on these things. We can fairly say that the Health Department is very supportive but DCLG is strongly opposed. We continue to make the case. I think probably we will go ahead with the health service and come back to DCLG on another day, but, unfortunately, until local government gets the message, local council tax payers will continue to be hit with civil monetary penalties for really stupid basic errors. These involve sensitive personal information being sent to the wrong fax machine, being put in the wrong envelope, being dropped in the street, being left on unencrypted laptops and memory sticks. What else?

**Q16 Chair:** I think you have made the case very well indeed. There is also the issue of section 55 powers, which you referred to briefly earlier. Would you like to say a little bit more about that?

**Christopher Graham:** Yes. This is uncompleted business. Every Select Committee that has looked at this agrees that we need to move away from a fine-only regime for the offence of unlawful disclosure of personal information. It is section 55 of the Data Protection Act, where, typically, you go to the magistrates court and get a very modest fine because, of course, it is about ability to pay. Most of the cases that we see are family disputes, marital

disputes, child-care battles and grudges—small-time stuff.

**Q17 Chair:** But it is where information has been obtained by one of the parties to the dispute.

**Christopher Graham:** Yes. One of the parties who has access to a database, either at a bank or an NHS walk-in centre, passes on that information because of a marital dispute or to a claims management company, who will follow up a broken arm with a call, "Would you like to sue your employer?"—that sort of thing. But the penalty is so modest. The going rate—and it keeps going down—is about £120. Years ago, in the Criminal Justice and Immigration Act 2008 there was a proposal, a proposition—

**Chair:** A provision.

**Christopher Graham:**—which is there in suspension, to be commenced, that there should be the potential of a custodial penalty for this sort of thing. But there it stayed. I worked very hard before Lord Justice Leveson's inquiry got under way to try and separate out this section 55 issue from everything else in the hue and cry about the press, but I did not succeed; so nothing happened during the inquiry. At the end of the inquiry, Lord Justice Leveson agreed that it was a bad principle to have un-commenced legislation and that the Government ought to get on and commence section 77 of that Act and also section 78, which gives an enhanced public interest defence for journalists.

My worry now is that there is going to be another lull while there is a major consultation on all things Leveson, including changes to the Data Protection Act and its treatment of the media, including the constitution of the Information Commissioner's Office and so on, and that section 55 is going to be part of that general consultation. That will be the third consultation on this proposal.

There is another problem in getting rid of the fine-only regime because it involves the dreaded word "custodial". I cannot imagine anyone is going to go to prison, but it does access all the other punishments—the community penalties, for example—which the magistrates and the Crown courts cannot impose for this offence; it is only fines at the moment. So, all the very important debates about the balance between a free press and privacy in that general consultation will be muddied by the suggestion of prison. I can see it. The *Daily Mail* was at it on day one following Leveson, "Journalists will go to jail under Leveson proposals." The clever thing to do is to get on and do the section 55 business first and then have your wide-ranging consultation about all things Leveson. I would really press that very strongly.

We cannot afford further delay. I have been banging on about this for the three and a half years that I have been Information Commissioner. Despite the fact that I persuaded this Committee, the Home Affairs Committee, the Joint Committee on the Draft Communications Data Bill and Lord Justice Leveson himself, we are still no further forward, and I see this going off into a black hole of Leveson consultation with presumably nothing done this side of a general election.

**Q18 Chair:** This is an issue on which the Committee has given a firm opinion. I think we might have reason to repeat that opinion to Ministers.

Mr Smith, you have raised concerns that the European Commission is seeking to confine the application of data protection regulation to the private sector using the directive format for the public sector. Why do you think that is a problem?

**David Smith:** This is primarily about having clear law which works primarily for citizens, for individuals, because that is who data protection law is there to protect, but is also understandable by businesses. The more we have divergent legal instruments, so one legal instrument applies to the public sector and something different applies to the private sector—

**Q19 Chair:** Can I stop you there for a moment to underline that there is a difference between what we are talking about here? In the public sector there is a particular concern, for example, that police forces not sharing information that will lead to the safeguarding of children from paedophile attacks, and all of this sort of thing, is a failing of the system as well and that that brings a dimension to the public sector cases which is normally absent from the private sector cases.

**David Smith:** The argument is strongest with the police and justice area. The Commission's proposals at the moment are a regulation for, basically, all areas, public and private sector, apart from police and justice, where there is a directive. When we gave evidence before, we discussed that area. Our view is that we prefer one instrument. You can give flexibility to the police and justice area within one instrument. What we see now as the risk is a proposal that is being driven—and we understand most strongly by Germany—to have not just a directive for the police and justice but to have a directive for the public sector as a whole and a regulation for private sector businesses. There are so many examples these days of contracting-out of services and partnership working, public services that are delivered in the private sector and local councils having commercial activities as well as straight delivery of public services. They will be faced by two different regimes. There are no matters of principle here, Chairman, other than keep it simple and consistent and, the more it is all in one instrument, the easier that will be.

**Q20 Chair:** On a related point, which is something you have mentioned, of work going into the private sector that has traditionally been done in the public sector, the approach this Committee has taken so far to how you handle freedom of information in that area is that the public commissioning body retains the responsibility to provide the information and the contracting mechanism is the method by which it ensures that it has that information, rather than creating a situation in which private companies are directly subject to FOI in some of their activities and not in others. Are you satisfied that that can work or do you have any doubts about it?

**Graham Smith:** It remains to be seen whether it can work properly. That is the conclusion that this Committee and the Ministry of Justice have come to.

Where we have tackled those sorts of issues in the context of the Environmental Information Regulations, where the definition of a public authority is looser, there have been genuine legal problems with identifying organisations that hold environmental information and discharge the functions of a public authority.

It should not, it seems to me, be impossible for legislators to have a go at putting together a definition along the lines of the sort of thing that applies at the moment with freedom of information. For example, health practitioners are covered by the Freedom of Information Act to the extent that they are providing NHS services but not to the extent that they are providing private health services. There is that kind of comparison, but the difficulty comes when you apply the facts of a situation of a private company providing a range of different services and a range of contracts for a range of different purposes—some public sector and some private sector—and just identifying then what is subject to the Freedom of Information Act and what is not.

One area that can be explored further, and it arises sometimes in cases—and there was an important tribunal judgment a week or so ago involving the London Borough of Southwark and a privatised leisure centre—is the issue as to whether in fact you can say that the contractor holds information on behalf of the commissioning public authority. That issue arises. It can present some real practical difficulties and you can have a situation where, in law, on the balance of probabilities, it is found that the contracting organisation does hold the information on the public authority and the public authority might say that it does not actually have any right of access to it. That is where the contractual provisions will come in.

**Q21 Chair:** The contract needs to be clear in that respect.

**Graham Smith:** Exactly. There is some provision under the existing code of practice because this was anticipated, to an extent, when the Freedom of Information Act first came in. The current section 45 code makes some provisions about transparency clauses in contracts, but I think we need to take that a lot further because the stakes are a lot higher given the climate now of more privatisation.

**Q22 Chair:** It is not a new problem in the health service where, in general practice, doctors' practices have always enjoyed exemption because they are private businesses. But things are proceeding apace in probation, for example. We cannot hang about. We have to make sure we have got this right.

**Graham Smith:** Yes.

**Christopher Graham:** Yes. Where you get reorganisation of services, even if it does not involve contracting, we are seeing the phenomenon of the FOI territory contracting. For example, the Serious Organised Crime Agency or various parts of the ACPO world are being merged into the National Crime Agency. The National Crime Agency, as I understand it, is not going to be designated under the Freedom of Information Act, but various functions

that were previously within the realm of FOI are no longer.

**Q23 Chair:** We only just got FOI into ACPO within the last year.

**Christopher Graham:** Yes, but there are various functions that are transferring to the National Crime Agency. I know this has been debated and there are pros and cons, but we have to be ever vigilant. It seems bizarre that all the talk about openness and transparency on the one hand and the restructuring of the delivery of public services on the other may be leading to less accountability rather than more. Transparency and openness cannot just be a one-way street. It cannot be what those who are running these organisations think it would be good for the citizen to know. It is also for the citizen to have the right to ask the awkward questions, which very often elicits important information.

**Q24 Chair:** Just going back to the question of the European directive and regulation, we quoted your fairly cataclysmic prophesies about the potential cost of it as it then stood. Are you gearing up to implementing something like it at some point or are you sceptical about whether we will ever get there?

**Christopher Graham:** We must be, as they say in the Boy Scouts, prepared, but we have also at this moment to wait and see because the process of legislating within the European Union is certainly interesting. Over the next year or so we will have to see how it all ends up. I suspect there will be some pretty significant compromises at the last minute if this thing is going to get on to the statute book, but one thing is clear from the proposals as they stand. The principle of notification for all processing of personal data is out of the window, and that is a bit of a problem for the ICO because our data protection work is funded by notification fees. As Graham said earlier, 80% of our income comes from notification fees. So we are undertaking a lot of scenario planning and options considerations for what life would be like for the ICO, not just under the new regulation but given the various responsibilities that Parliament wants us to undertake as apparently the sort of go-to regulator at the moment.

We are concerned that policymakers in the Ministry of Justice turn their minds to the funding of the ICO so that we can maintain the independence of the Information Commissioner but have adequate resources to do our job. The regulation as it is currently formulated would be very expensive to run because it is very much defined by process rather than outcome. We can see it will be a very expensive regime, but we can also see that our source of income for data protection goes. We have to come up with something else, and we have to have partners in the Ministry of Justice who are able to turn their minds to what that alternative system might be, whether it is an information rights fee that everybody pays and organisations pay, covering both data protection and freedom of information, or whether we are able to raise some more of our money through commercial activities or whatever. But, if you want the ICO to do an effective job of patrolling information rights in the

21st century, we are going to have to have the resources to do it.

**Chair:** Mr Llwyd, I have temporarily distracted you.

**Q25 Mr Llwyd:** Can I ask you about the use of ministerial vetoes, which is again a very important point? In your report, Mr Graham, on 3 September last you said: “For the Statement of Policy, ‘exceptional’ does not mean rare or unusual. Rather, it means a case where an exception should be made and disclosure blocked. In that sense, the ‘exceptional’ could occur very frequently.” You go on to say that in the future “use of the veto should be ‘genuinely exceptional’”. I think that is a view which most people would agree with. Could you expand on the concerns that you have expressed in that report? I am thinking about the veto on the minutes relating to the discussions on Iraq, in particular on the question of whether this was “exceptional”. Is it the case in fact that the Government do not seem to be following their own statement of policy or that that statement of policy is actually wrong?

**Christopher Graham:** I reported to this Committee on 3 September about the ministerial veto activated by the Attorney-General on 31 July in relation to the Iraq minutes. I did that because my predecessor established a very good discipline, which I follow, that each time the veto is used I report that fact to this Committee and we discuss it. I welcome the opportunity of exploring that further. Being a simple soul, I would assume that “exceptional” meant not very often, but I realised, looking more deeply at the guidelines, that it was simply civil service-speak for those occasions when an exception ought to be made. I have come to the conclusion that it might happen very frequently. I was very struck by the Attorney-General scattering the “E” word around—there were a lot of instances of “exceptional” and “exceptionally” in the notice supporting the certificate. That seems to me to conflict with what was said in Parliament at the time that the law was passed, which was: “The Government considers that the veto should only be used in exceptional circumstances and only following a collective decision of the Cabinet. This policy is in line with the commitment made by the previous administration during the passage of the Freedom of Information Bill that the veto power would only be used in exceptional circumstances, and only then following collective Cabinet agreement.<sup>1</sup>”

Jack Straw—the then Secretary of State for the Home Department—said in *Hansard* on 4 April 2000: “I do not believe that there will be many occasions when a Cabinet Minister—with or without the backing of his colleagues—will have to explain to the House or publicly, as necessary, why he decided to require information to be held back which the commissioner said should be made available.”

The first part I quoted is from the statement of policy. The second part is from Mr Straw’s statement in the House. I understood that the veto would be invoked very rarely and I do not think that the Commissioner

<sup>1</sup> *Note from the Witness:* Necessary clarification. I was referring to <https://update.cabinetoffice.gov.uk/sites/default/files/resources/HMG-Veto-Policy.pdf>

or the tribunal is suddenly scattering unacceptable decision notices around.

The problem that we have here is that there is a conflict between the Bill as debated, the Act as passed, and its implementation. I am now in a very difficult position. I absolutely heard what the Committee said in the report on post-legislative scrutiny about the importance of the safe space. The safe space is something that the Commissioner and the tribunal have upheld in countless decisions, but, ultimately, I have to take a decision where there is a public interest balance to be taken. The one thing I cannot take into account legally is whether I think a Cabinet Minister might subsequently decide to impose a veto. So I am between a rock and a hard place. We have to go through the whole business of the public authority considering a request, and no doubt an internal view, the Information Commissioner considering an appeal, possibly the tribunal getting in on the act, and then, at the last minute, the Cabinet Minister says, "That is one we are going to veto." There seems to be very little guidance in the statement of policy about what should or will happen. It is a most unsatisfactory state of affairs but perhaps something I have to live with. I do not know whether Graham would like to expand on that.

**Graham Smith:** Not really. The position is perhaps further complicated by the fact that, on at least two of the requests for information on which the veto has been exercised, the requests have come around a second time. As to the report we have just been talking about in terms of the Cabinet minutes on Iraq, that request has gone through the cycle twice, and likewise the minutes on devolution. It just seems that, when we are all recognising that there are legitimate concerns about the burden that FOI places on public authorities, that is an aspect of the system which one feels perhaps could be improved upon to avoid those sorts of wasteful repeat experiences.

**Q26 Mr Llwyd:** Following on from that point, my understanding is that the Government will now be reviewing and revising their policy on the veto, including in fact its application in cases which do not involve Cabinet-related information. First, how do you think it should be revised? Secondly, will you be in a position to inform that particular discussion?

**Graham Smith:** Perhaps that initial reaction suggests that we are not involved at the moment in that particular discussion. There is no legal requirement on the Government to have a veto policy here. They decided themselves that they would have a policy on the exercise of the veto, and I think now they are trying to extricate themselves from having their hands tied by the policy that they came up with, which, as I think you say, was in the context of Cabinet material being envisaged as what would most likely be the subject of the veto. I should say that it was the previous Government we are talking about there.

We have now had two cases—one involving the NHS risk register on the proposed reforms there, and the other one more recently on the Prince of Wales' correspondence—which do not involve Cabinet discussion. My understanding is that the Government are looking for a policy which can be applied in a

wider set of circumstances than perhaps had been originally envisaged. But there is no obligation on them to have a policy and there is no obligation on them to consult the Commissioner about that policy. When a veto is issued, we are given advance notice of it and offered the opportunity to comment on the statement before it is released. We do not have any experience of seeing things changed as a result of that. We recognise that the veto is an aspect of the statutory scheme as it stands at the moment. We have considered and, on occasions, taken advice as to whether the exercise of the veto was susceptible to judicial review, but on the occasions when we have sought that advice we have been told no, and so, for us, the matter has stopped there.

**Christopher Graham:** Perhaps I could add that I absolutely accept that the veto is part of the legislation. It is an important part of the legislation and it ought to provide reassurance within the public service that the most significant matters will not be left to the Information Commissioner or even to the tribunal. There is a long-stop, so we should not have all this nonsense from civil servants saying, "I can't possibly write anything down. I can't give you my best advice because, because, because". I absolutely accept that the veto is there, but the Commissioner has a responsibility to this Committee and to Parliament to analyse those instances where the veto is imposed and to say whether the reasoning is very convincing.

The use of the word "exceptional" provides too great an opportunity for the Commissioner to say, "Not really very convincing." I hope they can come up with a better policy, and I hope that politicians will never use the veto because there is something that is just "rather embarrassing". It has to be a pretty nuclear situation for the veto to be imposed. I could point to countless decisions of the Commissioner and the tribunal where the safe space has been respected and information that a request is wanted has not been forthcoming because we are responsible people and we are applying the Act as Parliament intended. But what I cannot do, in carrying out my duties and fulfilling the law, is second-guess what a politician might decide to do further down the track. Just to emphasise this, there is an awful lot of public money potentially to be wasted in this merry-go-round. It might be better to have greater clarity about what is truly off limits and what is merely rather embarrassing.

**Q27 Chair:** You will recall that this Committee took the view that it was preferable to have the long-stop of the veto than to yield to the pressure to create some wide general exemption, which was the alternative approach being suggested by senior ex-civil servants, in order to protect the safe space, which of course is under threat probably rather more from public inquiries such as Leveson and Chilcot than it is from the Freedom of Information Act. We felt it was dangerous to be going along the road of a general exemption, and the lesser evil was the use of the veto from time to time, which provided some reassurance.

**Graham Smith:** We welcome that as an outcome but it does take us to this inevitable place of going through a process. Perhaps, if one wanted to, one could take a

fairly inspired guess that the veto would be exercised, but we have to consider and weigh up the public interest, as does the tribunal, conscientiously on the facts, the arguments and the subject matter of the information that is put before us. We can say, with the statutory scheme as it is drafted, that is an inevitable consequence and it is something we all have to live with. It is just slightly galling when there are so many other things that we feel we could usefully spend our time and resources on.

**Christopher Graham:** This Committee pointed out in the post-legislative scrutiny report on the Freedom of Information Act on this very point that there is a political price to be paid for imposing the veto. All I am saying is that the Commissioner will always respond with an analysis to this Committee and sometimes it does not make very comfortable reading for politicians.

**Q28 Mr Llwyd:** Heaven forfend that politicians should wish to hide any embarrassing material. I cannot for one minute believe that to be true. Gentlemen, in light of the fact that you are asked to comment on each use of the veto, can you give the Committee a rough idea of the annual rates at which vetoes are imposed?

**Graham Smith:** We have had six instances of the exercise of the veto so far. I think four of those have been in the last 12 to 18 months—the repeat vetoes in relation to the Iraq Cabinet minutes, the devolution sub-committee minutes, and then the Prince of Wales correspondence and the NHS risk register. I should point out that the Prince of Wales correspondence veto is slightly unusual and you have not had a report from us on that one. That was a case where the Commissioner upheld the Government's withholding of the information, but our decision was overturned by the upper tribunal and so the veto has been exercised in relation to the upper tribunal. But in fact the requester in that case, *The Guardian* newspaper, has applied for leave to judicially review the exercise of the veto in that case. So the legal process is not yet complete.

**Q29 Rehman Chishti:** I have a few questions in relation to costs of compliance. First, what is your view of the Government's proposals, in their response to our report on post-legislative scrutiny of the Freedom of Information Act, to reduce the costs to public authorities of compliance with freedom of information legislation?

**Graham Smith:** We are talking here about the proposals for the cost limit, which threatens to remove from the ambit of the Freedom of Information Act considerable numbers of requests, irrespective of their public interest merit. That is very concerning. The Committee, I think, rightly recognising that there were genuine issues of burden, suggested that it might be appropriate to reduce the cost limit marginally, and I think you suggested two hours of search and retrieval time. But the Government's response said that that is so marginal that it would not have any significant effect. They are also looking at including in the activities that can be taken into account when calculating the cost limit the consideration of the

information against the exemptions in the Freedom of Information Act. That is the thing that I think threatens to remove a lot of requests from the ambit of freedom of information.

If the cost limit was both reduced in terms of the actual amount that we are talking about and the amount of time that we are talking about, and these additional activities could be taken into account when calculating the cost limit, then we really would be talking about a significant number of cases being potentially removed from the ambit of freedom of information. But we do not have detail of the Government's proposals yet. We have not seen any. We have not been asked to comment on or discuss any potential formulae that they might come up with. So at the moment we are just feeling somewhat trepidatious about the situation.

**Q30 Rehman Chishti:** You will be delighted to hear that on 24 January this year the Minister, Helen Grant, said that there will be a detailed consideration and consultation of this.

**Graham Smith:** Yes.

**Q31 Rehman Chishti:** As to the information that you have just given now, will there be that consultation with yourselves on this as well?

**Graham Smith:** I would certainly expect there to be. We believe that the proposals that the Government are coming up with could be dealt with through secondary legislation rather than primary legislation, so, yes, we would expect to be consulted on that. I should say that our experience, both before the Act was brought into force and since, is that we have had full opportunity to comment on proposals from the Ministry of Justice on such things as the fees regime. It just has not happened yet on this occasion.

**Christopher Graham:** I did not find that terribly reassuring from the Minister. Talking about cost limits, she thought that the Committee had not gone far enough, and said, "The Justice Committee recognised that issue in recommending a small reduction in the cost limit beyond which requests need not be complied with. We believe that would result in only the most minimal reduction of costs, so we will consider whether to go further."

I appreciate the opportunity for consultation, but the direction of travel seems to be rather in tightening up the regime with the specific aim of deterring requests. What we have said in our memorandum to you for this session is that it does not follow that the most burdensome requests are those of least merit. We will be looking at the Government's proposals very carefully, but I think it is the responsibility of the Commissioner to point out where measures to address the administrative burden might act to frustrate the aim of the legislation. We will judge where the proposed changes are addressing a real as opposed to a perceived problem and whether they are appropriate in the light of their likely effect. So we wait to see.

**Q32 Rehman Chishti:** I am grateful for that because you obviously have more information at your fingertips than I have over here. If I may move on to my supplementary, do you accept that there is a

phenomenon of “industrial” use of the Act, which is proving overly burdensome to public authorities—perhaps local authorities in particular?

**Graham Smith:** We recognise that there are some users of the Act who use the rights on a large scale. On occasions, that can be regarded as abuse. We discussed the provisions under the Act for vexatious requests at some length in the post-legislative scrutiny sessions before this Committee. There has just been a very useful and important upper tribunal decision on vexatiousness in this context, which again was released last week, and that will help public authorities and the Commissioner in the application of those provisions.

Where I would disagree with the impression I was getting from some of the Committee’s deliberation is that this “industrial” use is, if you like, ascribed to some journalists, who, in my experience, are on the whole using the Act very effectively. It has to be said that it is through journalists that a number of very important pieces of information in the public interest have been disclosed under the FOI Act which otherwise would have been kept secret, and we have been talking about some of them today in the course of the discussions.

One area about which concern has been expressed is the use of the Act by companies for commercial gain. I should preface my comments with the fact that we see things only when they have gone wrong on FOI. We get the complaints when people are not happy with the responses that they have received. We do not get that many complaints from companies that they are disappointed with the outcome and they want to challenge the refusal of a request. We get some. We get companies that are seeking information about successful tenders where they have been unsuccessful, and we get them from companies seeking information about existing contracts with a view to putting themselves into a better position when they anticipate that contract or a similar contract might come up in the future.

On the whole, we find that public authorities tend to be overly cautious in their use of the commercial interest exemptions and we tend to come down in favour of disclosure of information in those circumstances, partly through a point of public accountability for the service that has been provided and the money being spent on it, and partly also because we think that, the more that is understood about the way that contracts are delivered, that drives up performance and improves competition when you come to the next round of bidding. We see the public interest factors there very much strongly in favour. So I think one has to be a bit careful about using a very generic term such as “industrial use” and break it down. That is what I have just tried to do in that reply.

**Christopher Graham:** That is an illustration of the contribution that freedom of information makes to shining the torch into the dark corners of public spending. We hear so much about burdens, but there must be a massive net saving in public expenditure by organisations abandoning practices which do not pass the blush test, by greater competition in the award of public contracts and so on. Much more can be delivered simply through the transparency and open

data approach, which is very welcome but is insufficient. The aggravation of freedom of information is a price we pay for more effective delivery of services because there is a constant prod to do things more effectively and more efficiently because you cannot do things behind closed doors any more. I make absolutely no apology for that. That is what we are here for.

**Q33 Rehman Chishti:** Sure. I have a final supplementary, if I may. Should fees be charged to requesters who take cases to information tribunals?

**Graham Smith:** That is very difficult. It would very much change the scheme as it has been introduced. I believe that this is being looked at in the context of the idea of fees for applications to tribunals generally and not singled out for information. We floated in our written submission in the post-legislative scrutiny the question whether in fact the right of appeal should be restricted to points of law, as it is in Scotland, but we were not particularly advocating that. We just raised it as an interesting issue that might be addressed, but neither the Committee nor any of the other witnesses picked up on it. Where you do have an appeal to the tribunal, to impose a gateway fee would significantly restrict the number of appeals that go forward.

What is relevant is that we have seen, in the last couple of years in particular, much more efficient use by the tribunal of its case management powers so that cases that have no reasonable prospect of success can be the subject of a strike-out application, and we make those applications. The tribunal judges are much more willing to consider those cases very seriously. Whereas in the previous business year we saw about 15% of tribunal appeals being struck out right at the very early stage, so far this year that is running at about 20%. So I think the tribunals themselves are aware of the need to be more efficient and more cost-effective. My own view is that a gateway fee is perhaps a rather blunt instrument in those circumstances, although I can see the attraction in pure cost-saving terms because it would no doubt reduce the number of appeals. Again, it would be arbitrary because it does not necessarily mean that the appeals that are deterred are those without merit, whereas the current strike-out arrangement does address that issue. We spend quite a lot of money on appeals and the cost of legal fees taking them, so it would reduce that.

**Q34 Graham Stringer:** Can you give us a broad-brush view of the problems, as you perceive them, of getting public bodies to comply with the freedom of information, both in the spirit of the Act and the detail of the Act?

**Christopher Graham:** We have had considerable success as the Act has settled down in recent years by being quite aggressive about those local authorities that do not comply in a timely way. We have a programme of monitoring. At the moment, we have just four public authorities who are being watched over the first quarter of the year. One of them is the Department for Education. In recent years the list has been much longer than that. As the ICO itself has speeded up its consideration of appeals, that, as we

intended, has had a salutary effect on the rest of the public service, and other people have got on with it because they realise that the Information Commissioner will not take years to get on to their case. The whole thing has speeded up very satisfactorily.

I do notice the stresses and strains within the public service. We all have fewer resources to devote to information governance, and the ICO is no exception on the freedom of information side, certainly; so it is more difficult. We have had to become much more productive and we have succeeded in dealing with an increased demand for our services while reducing the time taken to deal with things. That is a model for other organisations to follow. But there is no hiding place on this, and those organisations who understand what their obligations are, both under the Data Protection Act and the Freedom of Information Act, usually demonstrate that, in managing information rights, they are pretty good at managing other problems as well. The organisations that cannot manage information rights do not seem to be very good at managing social services, housing or whatever. Things are getting better, but it is not easy.

**Q35 Graham Stringer:** Would it be fair to say, going back to your previous answer, that things are improving, but they would improve more quickly if you were able to audit public bodies?

**Christopher Graham:** Certainly, because we would concentrate our efforts on those organisations. Wirral borough council is on the watch list at the moment. I would really like to send in a good practice squad to Wirral borough council, but I do not have the powers to do that. I am not picking on Wirral; it is just an example that comes to mind.

**Q36 Graham Stringer:** The *Liverpool Echo* might think you are. As to section 45, there are two ways of dealing with that—as a code of practice or setting extra time limits. What is your view of that?

**Graham Smith:** We came forward with a proposal that, if there were statutory time limits, that would put in more of a kind of framework and help to prevent some of the undesirable practices that we see on some occasions, when either the response to a request is spun out on public interest grounds—they take too long under a public interest test extension—or, without a statutory time limit on an internal review, those can take months and months. There is no obligation to give reasons for exercising a public interest test extension or for how long it takes for an internal review. Again, we can do something about it if the complainant comes to us, but, quite often, they do not come until they ultimately get their response and then we find that it has taken six months. Then we can do something about it by way of a practice recommendation.

Certainly for some public authorities, who do not come to the table with a willingness to comply either with freedom of information requests generally or with specific freedom of information requests which they find, say, politically inconvenient or unhelpful, it gives them the opportunity to kick them into the long grass. We do see evidence of that. Our powers to do

something about it are limited, and I think the Act would be stronger if there were statutory time limits. A code of practice is fine, but, by definition, it is a code of practice. While we can take action by way of a practice recommendation for frequent breaches of a code of practice that we have evidence of, it is not the same as an enforcement notice power or a decision notice power where there has been a clear infraction of the Act itself.

**Christopher Graham:** I noticed in the Westminster Hall debate the other day that the suggestion was made that it takes one to two years or more to get a response. I was not clear whether that was referring to internal reviews, but certainly it does not refer to the Information Commissioner's Office. Whatever may have happened a long time ago, we are now turning round appeals under the Freedom of Information Act very quickly. I have a couple of troublesome cases that have been with us for months and months, but in 90% of the cases requests are dealt with very promptly.

We do not have a backlog, but I will, if I may, take the opportunity to tell the Committee that the squeeze on grant-in-aid money for freedom of information has been relentless. I said in my memorandum—when I came before you four years ago for approbation or otherwise—that I had resisted the temptation from one of the members of the Committee to say I would only take the job if there were adequate resources for freedom of information. I said, “No, I want to go and have a look.” We have made considerable changes and we have speeded up, but we are now getting to the point where the squeeze on the grant-in-aid is such that I have to hold posts open and am just beginning to see the threat of a backlog returning if we are not careful. We are determined to manage things to make sure that that does not happen, but we are beginning to run out of road because I can only spend grant-in-aid money on freedom of information. I cannot subsidise freedom of information work from the data protection side of the house. It is a very funny way to run a £20 million-organisation. I am cash rich on the data protection side but very cash poor on the freedom of information side.

That has a bad effect. Despite the heroic efforts of my staff, it is beginning to get very difficult, and yet the demand for our services is increasing all the time. The increase in the FOI appeals caseload is 5% up this year to date, in January, it is up in data protection by 7.3%, and it is up on PECR, which is the nuisance text messages, nearly 9%. So we are very busy, but we have this crazy funding system where to save £1 of freedom of information money, which the Ministry of Justice wants me to do, I also have to save £4 of data protection money because of the gearing, when I could well do with spending that.

**Q37 Graham Stringer:** That is a point well made. I first came across the problems with section 77 when we were looking, on another Committee, at the allegation that the University of East Anglia had deleted e-mails. It seemed to be your view that there was a serious case there, but there was no prosecution possible because of section 127 of the Magistrates' Courts Act, which puts a six-month limit on it. The

Government are making proposals on that. Are you satisfied with the schedule the Government are proposing and with the proposals they are making?

**Graham Smith:** We have not seen the detail. We have seen, as you have, the statement that they are prepared to vary the six months' time limit to run from when we become aware of an offence. We had asked for the offence to be made triable either way, and the Committee supported that suggestion in its report. We can understand issues of courts policy or administration of justice policy as to why they would not want to do that. In terms of increased sentencing, because we have not been able to bring prosecutions, we cannot bring any evidence to say the sentencing is inadequate as we have never got that far. We think that the proposal that has been put forward will help, and it should enable us to avoid cases where we have suspected that offences may have been committed in the past but we have simply not had the time to investigate and to bring a prosecution, so it would be pointless to resource such an investigation. We welcome the proposal and we think we can make it work. We need to see if it does work in practice before we can say that it would not be adequate.

**Q38 Graham Stringer:** I may have misunderstood what you just said, but are you surmising that the proposals would be retrospective and enable you to go—

**Graham Smith:** No.

**Graham Stringer:** I thought I might have misunderstood.

**Graham Smith:** I am sorry if I gave that impression, but, no, I am not expecting that. I was comparing what we might do in the future with what we have not been able to do in the past.

**Q39 Graham Stringer:** Do you have an estimate of how many of these cases there have been where it is likely that things have been destroyed or deleted and you have been unable to take action? How big has that problem been?

**Christopher Graham:** I do not think we should speculate. I do not think we can speculate because we simply have not done the investigation where we knew that we could not get it done in the time to bring the case to court within six months. So it is a very hypothetical question which I would prefer not to answer.

**Q40 Graham Stringer:** It is a hypothetical question, but in the case of the University of East Anglia, which I know most about, you did say fairly strongly that you thought there had been some misdemeanours there. I wondered if there were many other cases like that.

**Graham Smith:** I do not think we have had a case that has been as high profile as that one, although we have had others where evidence has been pursued much more strongly because there was clear evidence there, and we have run out of time with the investigation. But it is certainly not hundreds of cases a year. I would doubt whether it would be more than 10 to 20, but that is very much a guess. It is fairly wild speculation. We get the allegation made quite

often that people feel they are denied information because they cannot believe that an organisation does not have it, or they believe that they knew that they had it once so they must have destroyed it to frustrate their freedom of information request. But, remember, we are not talking about information that has been reasonably destroyed in the proper course of business in accordance with the records management policy; it is only where it has been destroyed specifically to frustrate a request when it has come in, and we have not seen that much evidence of that.

**Chair:** Finally, Mr Llwyd.

**Q41 Mr Llwyd:** Yes, "finally", gentlemen, you will be pleased to hear. You will know that your counterpart in Scotland is an Officer of the Scottish Parliament, and for some time this Committee has advocated that you should likewise become an Officer of this House. The Government argue, of course, that your independence from them is assured and that your functions are not primarily parliamentary in nature. Do you consider that your status and independence from Government are now sufficiently safeguarded under statute and by other means?

**Christopher Graham:** My good friend Rosemary Agnew, the Scottish Information Commissioner, indeed reports to the Scottish Parliament, and I know that this Committee has taken the view that the UK Information Commissioner should benefit from a similar status in relation to Westminster. There certainly have been some safeguards put in place to protect the independence of the Commissioner. We have a framework agreement with our sponsor Department, the Ministry of Justice, which allows us greater independence and autonomy. There were some changes in the Protection of Freedoms Act 2012 that were very welcome.

We have been able to secure exemptions from some of the more troubling and inappropriate Government initiatives—for example, the single Government website and uniform branding, and I made the case that that should not apply to the Information Commissioner. Also, we have not been unduly troubled by some of the more irksome Cabinet Office Efficiency and Reform Group controls, so I am a bit more relaxed about some of this than I was. But we may be moving into a different territory.

Lord Justice Leveson has recommended that the ICO should be reconstituted and that we should not have a commissioner but a commission with commissioners. That is one thing that needs to be looked at. I can see the great advantages that the status of an Officer of Parliament would have in relation to the funding problems to which I have alluded. This is particularly true as Government look to the ICO for taking on different pieces of work, whether it is the Home Office and the Communications Data Bill, the Department for Business, Innovation and Skills with their "midata" initiative, or the Department for Culture, Media and Sport when they are asking us to patrol PECR in a more energetic way.

The grant-in-aid that comes from the Ministry of Justice is purely for freedom of information, and I am constantly saying to my friends in Whitehall, "If you want us to do this task, where is the money going

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5 February 2013 Christopher Graham, David Smith and Graham Smith

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to come from?” Other organisations are funded by a Treasury grant. The Parliamentary and Health Service Ombudsman, for example, has a Treasury grant. As to my friends in Ofcom, to the extent that they receive public funds, money comes from a Treasury grant. That might be a way of dealing with the problem to which I have alluded—the question of apportionment between different streams of work and the fact that we cannot vire between different activities.

I would certainly welcome a debate about the future constitution of the ICO. If it turns out that being an Officer of Parliament is the best way forward I am not theological about this, but I would certainly welcome it for those very practical reasons. To repeat, we have a short-term problem in that the Ministry of Justice is looking for a further reduction of 5% in the next financial year on top of the plans we had for a decrease in grant-in-aid; we have a medium-term problem over apportionment, over virement or not virement; and we have a long-term problem over the notification fee and its abolition.

I hope very much that the Ministry of Justice will look at this overall question in the round. What do we want

from the Information Commissioner’s Office? We have become, as I say, the go-to regulator, but, if you will the ends, you must will the means. We are up for all this. Give us the tools and we will finish the job. It is about powers, resources and constitution. Whether you are looking for a commission, a commissioner or an Officer of Parliament, okay, bring it on and let us have that debate. I cannot, in leading the ICO, be in a policy vacuum where I have possible responsibilities under Leveson, the Communications Data Bill and “midata”, a possibly reconstructed data protection regime, a possible changed Freedom of Information Act, and a possible abolition of 80% of my income, but, “Hey, we will get round to this problem in a few months’ time. Or is it years?” We need to focus on these questions now, decide what we want from the ICO, fund it properly and guarantee its independence.

**Chair:** That seems a stimulating note on which to end. Thank you very much indeed.

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# Written evidence

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## Written evidence from the Information Commissioner

1. I welcome the opportunity afforded me of updating the Committee on the work of my office. I shall be accompanied to the Committee by the two Deputy Commissioners—David Smith who is also Director of Data Protection and Graham Smith who is also Director of Freedom of Information.

2. The Annual Report to Parliament describes the work of the Information Commissioner's Office (ICO) and our draft Corporate Plan sets a path for the upcoming three years. The Annual Report for 2011–12 was published last July. The draft Corporate Plan is currently out for public consultation and will be finalised in time for the start of our financial year on 1 April.

3. I should like to draw the Committee's attention to the key developments and challenges facing the ICO since the publication of the Annual Report.

4. The ICO is facing an on-going squeeze on grant-in-aid from the Ministry of Justice in respect of our Freedom of Information (FOI) work. To date our grant-in-aid has been cut from £5.5 million in 2009–10 to £4.25 million in 2012–13, a reduction of 23%. In line with public spending targets, our planned budget for 2013–14 is for a further £250,000 reduction in funding to £4.0 million, a reduction of 6% over last year and a cumulative reduction of 27%. But, following the Autumn Statement, the Ministry of Justice is now asking us to prepare a business case showing how the ICO would be impacted by a cut of a further 5% in the financial year upcoming.

5. When I first appeared before your Committee four years ago, before I started as Information Commissioner, I declined the invitation to cry poverty on the ICO's part, preferring to see for myself what organisational changes might be required. Since 2009, we have restructured the ICO to make the organisation much better integrated. We have been able to respond to the many and varied challenges facing us in the information rights field—near the top of so many agendas given technology, business, consumer, societal and government expectations.

6. We have succeeded in cutting dramatically the backlog of FOI appeals while managing a demanding caseload. We have also managed to rearrange our spending across FOI and data protection to cope with the "better for less" agenda. But, given our hybrid funding—part grant-in-aid, part notification fee income—we are now running out of road and cannot absorb further cuts to the FOI budget without it adversely affecting performance. We are already seeing a slippage in our FOI casework turnaround times as posts have had to be left vacant.

7. The structural funding problem must now be faced. The ICO is a single organisation dealing with information rights in the round, but funded by two income streams which must be kept separate and strictly accounted for. Many of our activities cover both aspects of information rights, which means that in order to save £1 of FOI grant-in-aid we also have to save £4 of data protection money, all at a time when customers and stakeholders are urging us to do more on so many fronts. But now the notification fee itself, the source of our data protection income, is at risk of abolition. The new EU Regulation would end the requirement to "notify", but the associated notification fees account for 80% of the ICO's income. While data protection authorities under the new system must be both independent and adequately funded, there needs to be some clear thinking in Whitehall to have alternative arrangements in place in time for the transition to a new data protection regime as early as 2016.

8. The long term funding model needs to take account of the new data protection Regulation and also any changes to the ICO's functions and constitution arising from Lord Justice Leveson's proposals. But before that, to deal with the immediate challenge, we need relief around the rules governing the apportionment of overheads and virement. We also need to be clear about how other responsibilities, under, for example, the Communications Data Bill or the BISS Department's midata project, might be funded.

9. We published our response to Leveson on 7 January ([http://www.ico.gov.uk/news/blog/2013/~media/documents/consultation\\_responses/ico\\_response\\_to\\_leveson\\_report\\_012013.ashx](http://www.ico.gov.uk/news/blog/2013/~media/documents/consultation_responses/ico_response_to_leveson_report_012013.ashx) ). The judge's proposals on data protection and the media (and the role and constitution of the ICO) would benefit from a process of public and stakeholder consultation.

10. It would be desirable to separate an open and neutral consultation on the balance to be struck between privacy and freedom of expression from any formal consultation required prior to the speedy commencement of ss 77 and 78 of the Criminal Justice and Immigration Act 2008. Since your Committee recommended ending the "fine only" regime for the s55 offence of unlawful disclosure of personal information, your lead has been followed by the Home Affairs Select Committee and the Joint Committee on the Draft Communications Data Bill—and also by Lord Justice Leveson. It should not be necessary to undertake a third open consultation on s55 penalties. It would also muddy the waters if the remote possibility of prison for the criminal s55 offence were to be allowed to confuse the debate over the exemption at s32 for processing for journalism or the other special purposes. Unlawful disclosure needs a more effective deterrent if citizens are to have confidence in other transparency and open data initiatives involving data sharing, shared services, digital by default and joined up delivery. This is a reform that really will "brook no delay".

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11. On the data protection reform project, the ICO's position is summarised as attached.<sup>1</sup> We remain determined that the Regulation that finally emerges from the legislative process in Brussels should be both deliverable and affordable. Under the current proposals, even with a new funding system, the ICO would have to devote greater resources to non-discretionary processes and fewer resources to proportionate, risk based intervention. A Regulation that is focused on outcomes, rather than mandating ways of achieving them, would allow the ICO to focus on preventing harm and intervening effectively as and when appropriate.

12. On Freedom of Information, we await further detail of the Government's response to your Committee's post-legislative scrutiny of the Act. We fear that even a revised statement of policy on the use of the veto will not help the Commissioner and the Tribunal to divine Parliament's intention in respect of the "safe space". I have to apply the law as it stands and I cannot lawfully seek to second guess what Cabinet Ministers might do, even if I suspect that a veto might be forthcoming. As a result, a good deal of public money could be wasted by Government, the Commissioner, and the Tribunal ahead of a veto which might be pragmatically predictable, but cannot lawfully be anticipated.

13. The Minister (Mrs Grant) in the Westminster Hall debate on 24 January appeared to suggest that the Government might seek to go further than the Committee in tightening the cost limits for FOI requests, with the clear purpose of deterring some of the most demanding requests. Apart from the observation that 8% of requests to central government cost more than £500 to answer and account for 32% of total staff costs, we are not aware of any evidence of "industrial scale" requesting. The most complex, burdensome and costly requests cannot be said, *ipso facto*, to be those of least worth. We are however taking action to deter time-wasting and frivolous use of the Act. We are encouraging public authorities to reject vexatious and manifestly unreasonable requests as such. To that end, we are updating our guidance on the use of the relevant provisions. We are also planning to revise our Charter for Responsible Requesters.

January 2013

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<sup>1</sup> [http://www.ico.gov.uk/news/blog/2013/~media/documents/library/Data\\_Protection/Research\\_and\\_reports/data\\_protection\\_reform\\_latest\\_views\\_from\\_the\\_ico.ashx](http://www.ico.gov.uk/news/blog/2013/~media/documents/library/Data_Protection/Research_and_reports/data_protection_reform_latest_views_from_the_ico.ashx)

## Supplementary evidence from the Information Commissioner

## SECTION 55 PROSECUTION RESULTS

<i>Prosecution Table</i>	<i>Results</i>	<i>Section 55 only</i>	<i>Court</i>	<i>Offence</i>	<i>Result</i>	<i>Date of hearing</i>	<i>Sentence</i>	<i>Costs</i>	<i>Facts</i>
MC	Bury Magistrates' Court	7 x s55 obtaining 22 s55 TICs	Convicted Early plea	01/06/11	<b>Fined £150/ offence = £1050</b>	£1,160.00	Def worked on a commission basis for a personal injury claims co. Over 4 months he obtained contact details of patients attending an NHS medical centre following accidents. Data obtained from his partner, who worked there as a nurse. Def would then contact patients to try and sign them up as clients. Early guilty plea.	AG = aggravating features MG = mitigating features	
DH	Chester Court	Crown 2 x S55 obt & selling.	Convicted Plea before trial	10/06/11	<b>18mth Conditional discharge (Confiscation of Order £28,700)</b>	£500.00	Def obtained the records of over 500k mobile phone customers from his employer's (T Mobile) database and sold batches of this data to his co-def over period 12 months. Financial gain of £28k. CD given as no means left after confiscation order made. Guilty plea shortly before jury trial.		
DT	Chester Court	18 x s55 (6xobt, 6xdiscl, 6xSelling)	Convicted Early Plea	10/06/11	<b>3 yr conditional discharge (Confiscation of Order £45,000)</b>	£0.00	Co-def of DH. Def instigator of offences and persuaded DH to obtain the data for him. He bought the data and sold it on to data brokers for a profit, at double what he paid for it. Benefit figure of £56k. CD given as no means left after confiscation order made. Early guilty plea		
SL	Brighton Magistrates Court	8 x s 55 obtaining	Convicted Early Plea	12/09/11	<b>8 x £100 fine and £15 victim surcharge = £815</b>	£400	Defendant bank cashier accessed an individual's bank account details on 8 occasions. The individual was the victim of a sexual assault by the defendant's husband for which he received a custodial sentence. AG 1. abuse of position of trust, 2. blatant disregard for obvious conflict of interest 3. distress to complainant; MG 1. early Guilty Plea; 2. not used the info in any way no intent to harm ;just wanted to find out about her activities.		

*Prosecution Results Section 55 only*

<i>Defendant</i>	<i>Court</i>	<i>Offence</i>	<i>Result</i>	<i>Date of hearing</i>	<i>Sentence</i>	<i>Costs</i>	<i>Facts</i>
MB	Hendon Magistrates Court	3 offences— 1 x selling 1 x offer to sell + 1 x offer to sell 400	Conviction after guilty plea at earliest opportunity	10/11/11	<b>3 conditional discharge concurrent on all compensation £1700 for test purchase</b>	£850	Offer to sell 65 000 individuals' personal data, who were customers of a gambling company for which Foxy Bingo was the data controller and 400 in relation to Gala Bingo. Test purchase during which MB sold the data for £1700. AG 1. He held huge amounts of personal data and admitted to earning 25—30 000 out of it overall. 2.The data could be used to tempt people who may already have been addicted to gambling into further gambling. MG 1. Fully co-operative with ICO 2. Early GP 3. No intent to harm 4.Impecuniosity at time of offence 5.Contrition
UP	Havering Magistrates Court	1 offence obtaining personal data contrary to s 55	Conviction after 4 hour court hearing	16/12/11	<b>2 conditional discharge</b>	£614 (half the costs applied for)	Def, receptionist in a medical practice, obtained by telephone from another Medical practice, personal medical data of her missing sister-in-law, (BR). Took into account her previous good character, fact that it was a breach of position of trust; her family circumstances in that no actual harm claimed by BR the data subject. It was a serious matter but affected only her family and no one else's. Awarded ½ the costs £614 in view of her means payable at £25 per week and a collection order was made.
JM	Liverpool Magistrates Court	5 offences of obtaining personal data without the consent of the data controller	Guilty plea after 8 hearings and 7attempts to execute warrants applied for	12/01/12	<b>£100/offence and £15 victim surcharge</b>	£1000	The defendant, a former Health Care Assistant in the outpatients department at the Royal Liverpool University Hospital, pleaded guilty to 5 offences of obtaining personal data without the consent of the data controller, her employer. The personal data related to her estranged family's medical records.

*AG = aggravating features*  
*MG = mitigating features*

*Prosecution Results Section 55 only*

<i>Defendant</i>	<i>Court</i>	<i>Offence</i>	<i>Result</i>	<i>Date of hearing</i>	<i>Sentence</i>	<i>Costs</i>	<i>Facts</i>
PB	Highbury Corner Magistrates Court	1 offence of attempting to obtain personal data contrary to section 55 and the Criminal Attempts Act 1981	Guilty of earliest opportunity	27/01/12	<b>£200 fine</b> <b>Victim surcharge</b>	745.80 Costs—full amount applied for)	Def was a manager of a letting agency and he telephoned DWP pretending to be one of his tenants to find out about his claim—he was concerned because the tenant had not paid his rent and the tenant claimed it was his Housing Benefit and that papers he was supposed to have submitted had gone to the DWP. Defendant's admission was not full and frank—necessitated a full read out of the transcript of the call he made in court to avoid a voir dire. In the call he claimed he was the tenant and only failed to get the information because he failed the security by saying he had no middle name.
A letting company**	Reading Magistrates Court	Two offences of obtaining and attempting to obtain	Guilty plea at earliest opportunity	30/03/12	<b>£130 X 2 plus</b> <b>£15 Victim Surcharge =</b> <b>£275</b>	£702.08	** Joint defendants who in e-mails uncovered after a warrant showed they agreed to unlawfully obtain data. The e-mails showed activity and agreement by three individuals to obtain the data and negotiate a price for it to pay OSN though no money actually changed hands hence 'offer to sell'. The data disclosed was new addresses held by the Council for 2 of the 6 individuals
OSN**	Reading Magistrates Court	Three offences of obtaining, disclosing and offering to sale personal data	Guilty plea at earliest opportunity	30/03/12	<b>£230 x 3 plus</b> <b>£15 Victim Surcharge =</b> <b>£705</b>	£351.03	Slough Borough Council Benefits Office employee was using his position as a customer service adviser to obtain, disclose and try to sell personal data to associates of his. The associates were directors of a letting company, who were chasing the data subjects for rent arrears.
SJ**	Reading Magistrates Court	One offence of obtaining and the other of aiding and abetting Ounkar to obtain	Guilty plea at earliest opportunity	30/03/12	<b>£130 X 2 plus</b> <b>£15 Victim Surcharge =</b> <b>£275</b>	£351.03	Director of a letting company—Sent e-mails asking OSN to check 6 addresses of 6 named benefit claimants and received personal data sent to him by OSN in response and made further request for a further 6 sets of similar personal data.
LD	Derby Crown Court	11 x s55 obtaining	Guilty plea	06/12/12	<b>£500 fine in total and</b> <b>£15 victim surcharge</b>	£1,410.80	The defendant was a personal banker who over a period of 17 months regularly accessed the bank accounts of her boyfriend's ex-wife, for personal reasons, as during that time the parties were

*AG = aggravating features*

*MG = mitigating features*

<i>Prosecution Table Defendant</i>	<i>Results Section 55 only</i>	<i>Court</i>	<i>Offence</i>	<i>Result</i>	<i>Date of hearing</i>	<i>Sentence</i>	<i>Costs</i>	<i>Facts</i>
								<p><i>AG = aggravating features</i> <i>MG = mitigating features</i></p> <p>resolving their financial matters following their divorce and the husband referred to his ex-wife's spending which arose her suspicion that her account had been accessed.</p>

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**Monetary Penalties issued to date**
**LOCAL COUNCILS**

<i>Data Controllers</i>	<i>Amount</i>	<i>Date Paid</i>	
Hertfordshire County Council	100,000	13/12/2010	
London Borough of Ealing	80,000	04/03/2011	
London Borough of Hounslow	70,000	02/03/2011	
Surrey County Council	120,000	30/06/2011	
North Somerset Council	60,000	18/11/2011	
Midlothian Council	140,000	06/02/2012	
Worcestershire County Council	80,000	15/12/2011	
London Borough of Croydon	100,000	29/02/2012	
Powys County Council	130,000	03/01/2012	
Norfolk County Council	80,000	02/03/2012	
Cheshire East Council	80,000	20/02/2012	
Telford and Wrekin District Council	90,000	18/06/2012	
London Borough of Barnet	70,000	04/07/2012	
Scottish Borders Council	250,000	28/09/2012	Appealed
Leeds City Council	95,000	12/12/2012	
Devon County Council	90,000	21/12/2012	
Plymouth City Council	60,000	03/12/2012	
Stoke on Trent City Council	120,000	02/11/2012	
London Borough of Lewisham	70,000	04/01/2013	

**NHS TRUSTS**

<i>Data Controllers</i>	<i>Amount</i>	<i>Date Paid</i>	
Brighton & Sussex University Hospitals NHS Trust (BSUH)	325,000	26/06/2012	
Aneurin Bevan Health Board	70,000	24/05/2012	
St Georges Healthcare NHS Trust	60,000	13/07/2012	
Belfast Health and Social Care Trust	225,000	11/07/2012	
Torbay Care NHS Trust	175,000	15/08/2012	
Central London Community NHS Trust	90,000	N/A	Appealed

**OTHER PUBLIC BODIES**

<i>Data Controllers</i>	<i>Amount</i>	<i>Date Paid</i>	
Lancashire Constabulary	70,000	23/03/2012	
Greater Manchester Police	150,000	11/10/2012	
Nursing and Midwifery Council	150,000	N/A	Awaiting payment

**PRIVATE ORGANISATIONS**

<i>Data Controller</i>	<i>Amount</i>	<i>Date Paid</i>	
A4E	60,000	29/11/2010	
Welcome Finance	150,000	13/07/2012	
Prudential	50,000	09/11/2012	
Norwood Ravenswood	70,000	08/11/2012	
Andrew Crossley	1,000	N/A	not paid
Sony	250,000	N/A	Appealed