

The Information Commissioner's response to The Northern Ireland Office's technical consultation on a 'Summary of the Proposed Regulations about the Holding and Handling of Information by the Independent Commission for Reconciliation and Information Recovery'

Introduction

1. The Information Commissioner's Office (ICO) welcomes the opportunity to respond to the above consultation. This Office has responsibility for promoting and enforcing the UK General Data Protection Regulation (UK GDPR), the Data Protection Act 2018 (DPA 2018) and additional information rights legislation.
2. This consultation is in regard to a proposed statutory instrument (regulations) under Section 34 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. Specifically, Section 34 of the Act relates to the processing and handling of information by the Independent Commission for Reconciliation and Information Recovery (the Commission).
3. It is our understanding that the Commission's principal objective is to carry out reviews of deaths and other harmful conduct caused during the Troubles and will therefore need to have access to and process personal information. Our feedback on the proposed regulations is detailed under the headings below.

Article 36(4) – Statutory Consultation on Legislative Measures

4. As stated, the consultation indicates that the NIO intend to introduce regulations that relate to the processing and handling of information under Section 34 of the Legacy and Reconciliation Act 2023.
5. We would therefore like to draw your attention to your obligations under Article 36(4) of the UK GDPR given the reference to legislative measures as proposed in your consultation.
6. Article 36(4) imposes a requirement on Government Departments

and relevant public sector bodies to consult with the ICO when developing policy proposals relating to the processing of personal data. Article 36(4) states that: "*The relevant authority must consult the Commissioner during the preparation of a proposal for a legislative measure to be adopted by Parliament, the National Assembly for Wales, the Scottish Parliament or the Northern Ireland Assembly, or of a regulatory measure based on such a legislative measure, which relates to processing.*"

7. Consultation with the ICO under Article 36(4) is a separate process to any wider public consultation such as this one. Such prior consultation is necessary to ensure compliance with the UK GDPR and to mitigate the risks involved for the data subjects affected by the proposals.

General Data Protection Considerations

8. We have set out below some data protection considerations arising from the current consultation that we would like to draw to your attention at this stage. It is likely that the areas below can be explored further with the NIO as part of the Article 36(4) consultation and engagement process.

Data Protection by Design and Default

9. A fundamental concept of data protection law is that data protection should be built into any project or proposals using personal data from the earliest stages of planning. As such, the NIO should remind the Commission of their obligations under [data protection by design and default](#) when it comes to their policies and procedures in relation to the holding and handling of information.
10. The NIO had previously indicated in their e-mail to our office of 23 March 2023 that they would be updating their [Data Protection Impact Assessment \(DPIA\)](#) in respect of the ICO's previous feedback on the proposals. As such, a key consideration for the NIO is to assess whether there is a need to update the [DPIA](#) (if this has not been done already) and seek expert advice from their [Data Protection Officer \(DPO\)](#) during this process.

Training and Guidance

11. The proposed regulations require that the Commission puts in place a policy statement articulating its policies and procedures in relation to the holding and handling of information. This includes policies relating to:
 - i. securely accessing information held by others (including information which is to be transferred to the Commission);
 - ii. the secure receipt of information being transferred to the Commission;
 - iii. the secure retention of information by the Commission;
 - iv. the secure destruction or transfer of information which is to cease to be held by the Commission; and
 - v. managing and investigating any breaches of the Commission's policies and procedures in relation to the holding and handling of information.
12. We welcome that the regulations have included obligations for the Commission to articulate [data protection policies](#) that relate to the receipt, retention and destruction of personal information. However, it is important that the Commission also ensures that its staff are made aware of such policies and procedures.
13. Furthermore, due to the highly sensitive personal information that Commission staff will deal with, it is important that the Commission also ensures that appropriate [data protection training](#), (which is reviewed at regular intervals), is also in place. This will be particularly important in ensuring that such information is protected and handled appropriately.
14. As such, we recommend that the Commission's policy statement also articulates their policies and procedures in respect of staff training.

Personal Data Breaches

15. The consultation document states that the Commission should articulate and develop policies relating to the management and investigation of any breaches in relation to the holding and handling of information.

16. It is important that any policies in relation to personal data breaches include the Commission's obligations to report certain personal data breaches to the ICO within 72 hours of becoming aware of the breach. Furthermore, the Commission should be minded to refer to our guide on [personal data breaches](#) when drafting the policy.

Secretary of State (SoS) Provisions

17. We note that Section 34 of the Act states that the SoS may, by regulations, make provision about the holding and handling of information by the Commission. This includes, (but is not limited to), measures for holding and handling information securely and provisions relating to guidance/consultation and the destruction or transfer of information.
18. Regarding the issuing of guidance by the SoS, we recommend that this should be an obligation rather than a discretionary power. Furthermore, consideration should also be given to whether any of the other powers conferred on the SoS under Section 34 would be better suited as obligatory rather than discretionary powers.

External Review

19. It is noted that the proposed statutory instrument provides for an "*annual external review of the Commission's policies and procedures in relation to the holding and handling of information*".
20. We welcome that such a review will take place and that the Commission will have to give due regard to its findings. This will help ensure that policies and procedures in respect of personal information remain relevant and fit for purpose.
21. Please be aware that the ICO are happy to provide support where required if the Commission believes that it would benefit from our advice in respect of this process.

Integrity and Confidentiality (Security)

22. The consultation notes that the proposed statutory instrument requires that in drafting the policy document the Commission has regard to, and insofar as possible reflects the requirements of, the following documents:
- Government Functional Standard GovS 007: Security;
 - HMG Personnel Security Controls;
 - Government Security Classifications Policy;
 - International Classified Exchanges; and
 - Guidance: Protecting international RESTRICTED classified information.
23. Elsewhere, the consultation document states that *the "UK Government has well developed and tested policies for handling and holding information and it is envisaged that requiring the Commission to replicate these as far as possible will ensure information is held and handled securely"*.
24. It is important to be aware that data protection law requires organisations to process personal data securely, with [appropriate organisational and technical measures](#) in place.
25. We have concerns regarding the use of the terms "*insofar as possible*" and "*as far as possible*". Whilst the Commission are not obliged to follow existing policy documents and protocols, it will be important that data handling and storage measures ensure that there is a level of security appropriate to the nature, scope, context, and purpose of the data processing. Furthermore, due consideration must also be given to the risks posed to the rights and freedoms of individuals.
26. The Commission should be made aware of these obligations. For more information, please refer to [this section of our website](#).

Assistance from Relevant Authorities

27. It is stated in the consultation document that the proposed statutory instrument "*creates provision for the Commission to request assistance from relevant authorities in holding or handling information*". We note that the relevant authorities are

not obliged to provide the requested assistance but would have to respond to a request and provide reasons if they are unable to assist the Commission.

28. We have concerns regarding this wording and the potential impact that not receiving the requested support may have on the Commission's ability to carry out its functions and on the security of personal data¹.
29. Furthermore, as holding information *'on behalf of'* an organisation creates its own responsibilities when it comes to responding to requests made under the Freedom of Information Act 2000 (FOIA), the Commission will need to ensure third parties are aware of such responsibilities.
30. NIO should take account of the above and ensure that they have appropriate [governance arrangements](#) in place. Additionally, consideration should be given to whether there are any other mitigations that can be put in place to reduce such risks.

Data Controllershship

31. Following on from the previous heading, it is also unclear what the role of other relevant authorities would be in respect of controllership, should the Commission obtain their support for data processing.
32. The NIO and the Commission will need to evaluate what relationship the Commission and other relevant authorities would have with each other, and with the data in question. For example, will the relevant authorities be operating as a processor or joint controller?
33. To clarify, if an organisation makes decisions on what data to process and why – they are likely a controller or joint controller. If they don't have any purpose of their own for processing the data and they only act on the instructions of another organisation, they are likely to be a processor – even if they

¹ For example, the consultation document states that *"it is envisaged that the Commission may request assistance in the form of a relevant authority storing information on their behalf or in transferring sensitive information securely"*.

make some technical decisions about how the data is processed.

34. As such, the Commission must ensure that any such relationship with other authorities is underpinned by a binding Article 28 [controller/processor contract](#), or by having a [transparent arrangement](#) in place in the case of joint controllers.
35. For more information on controllers and processors, please refer to this [section of our website](#).

Right to be Informed

36. The consultation states *that "it is envisaged that the Commission may request assistance in the form of a relevant authority storing information on their behalf or in transferring sensitive information securely"*.
37. It is important to bear in mind data subjects' [right to be informed](#) should the Commission obtain assistance for such processing activities.
38. This is a key part of an organisation's transparency requirements under the UK GDPR. The requirements vary according to whether data was obtained from the individual directly or via a third party. [Article 13](#) of the UK GDPR sets out what information individuals should be provided with where data has been obtained directly from them, and [Article 14](#), where it has not.
39. This '[privacy information](#)' must include (amongst other things) details of recipient organisations with whom their personal data may be shared. This is particularly important if other relevant authorities will be storing or transferring information on the Commission's behalf.
40. As such, the Commission must inform data subjects of any other organisations that will have access to their personal information, unless an [exception or exemption](#) applies.

Information Provided in Confidence

41. Finally, we have noted that the proposed regulations set out that where the Commission provides third parties with a draft report or material, under Section 16 of the Act, the Commission must notify the recipient that the report or material is being provided to them in confidence, for making representations. This part of the consultation refers to instances where third parties will receive a report where a death has occurred following a request.
42. Whilst information relating to the deceased is no longer considered to be personal data and therefore falls outside data protection law, there may be instances whereby information regarding the deceased will contain information about other living individuals. This would therefore engage the data protection legislation. Before releasing reports to third parties the Commission will need to ensure that it is [appropriate to do so](#).
43. In addition, other non-data protection laws may apply. For example, depending on the nature and context of the information pertaining to the deceased, there can be an [ongoing duty of confidentiality](#) owed to the person even after they have died, with a doctor or relevant health professional. In instances such as this, it is important that independent legal advice is sought.

Conclusion

44. We hope you find the above comments helpful. We look forward to receiving your Article 36(4) Enquiry Form and to engaging further on these proposals. Should you have any queries in relation to the when it comes to addressing our points in the letter or the submission of your Article 36(4) Enquiry Form, please do not hesitate to contact our office.