HOME OFFICE

Data Protection

The Government's Proposals

CM 3725

DATA PROTECTION

THE GOVERNMENT'S

PROPOSALS

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This paper describes the Government's proposals for implementing the EC Data Protection Directive (95/46/EC). It is intended primarily for information. However, to the extent that the very tight timetable for preparing the necessary legislation permits, the Government will have regard to any comments it receives. It is unlikely to be able to do so for any received after ***31 August.*** Any comments should be sent to:

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The paper is available on the Internet at http//:www.homeoffice.gov.uk/datap1.htm.

The Government may make any comments it receives publicly available, unless respondents expressly request confidentiality.

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FOREWORD

We all want access to the benefits which the information society can offer us. But we are also entitled to expect those handling information about us to do so properly and responsibly. Data protection is about ensuring that they do.

Within the single market of the European Union, it is important that there should be common standards of data protection. This is to enable business and other transactions to continue unimpeded while ensuring that information about individuals is properly protected. That is the purpose of the EC Data Protection Directive.

This paper sets out the Government's proposals for new data protection legislation to give legal effect to the Directive. The proposals build on our existing data protection law – the Data Protection Act 1984. They attempt to achieve the right balance between individuals' entitlement to privacy in the handling of information about them, and information users' needs in processing information to provide the services which individuals require.

The Government will be introducing the Data Protection Bill in the autumn. I hope that this paper will encourage and inform the debates about this issue.

Jack Straw

Rt. Hon Jack Straw MP,
Home Secretary

Chapter 1
Introduction

1.1 The EC Data Protection Directive (95/46/EC) was adopted on 24 October 1995. EU Member States are required to have in place by 24 October 1998 national provisions giving effect to the Directive.

1.2 The United Kingdom's existing data protection legislation, the Data Protection Act 1984, meets many of the requirements of the Directive. However the Directive goes beyond the present law in a number of respects. In particular it:

- defines certain key concepts differently;
- extends data protection controls to certain manual records;
- sets detailed conditions for processing personal data;
- sets tighter conditions for processing sensitive data;
- requires certain exemptions for the media;
- strengthens individuals' rights;
- strengthens the powers of the supervisory authority;
- sets new rules for the transfer of personal data outside the EU;
- allows the existing registration scheme to be simplified.

1.3 In March 1996 the previous Government issued a consultation paper (referred to in this paper as "the consultation paper") seeking views on the implementation of the Directive in the UK. It received about 300 responses from organisations and individuals. A brief summary of the responses is in the Annex to this paper. The responses have contributed significantly to the development of the present Government's implementation proposals.

1.4 The Government plans to introduce a Bill this Session to implement the Directive. It will form part of the set of measures giving effect to the Government's undertaking to "bring rights home". Article 1 of the Directive requires Member States to:

> " ... protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data".

1.5 Recital 1 in the preamble sets the Directive in the context of the fundamental rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Government's legislative programme for the present Session will include incorporation of the ECHR in UK law.

1.6 Article 8 of the ECHR establishes individuals' right to respect for their private life. The Directive echoes this by referring to individuals' right to privacy. The Data Protection Bill will contribute to this wider right by setting out detailed requirements for protecting the privacy of personal information. The Government will also take the opportunity to deal with the outstanding ECHR judgement in the case of *Gaskin*.

1.7 The Government also intends to bring forward in due course a Freedom of

Information Bill. The proposals for this will be set out in a White Paper to be published later this year. The two sets of legislation will make complementary provision for access to personal information held by the public sector. The Data Protection Bill will also make any necessary provision to ensure that there is compatibility with the rights of access to personal data provided by existing legislation.

1.8 Responses to the consultation paper showed a wide measure of agreement on many issues. In particular, there was little demand for radical change to the present broad structure of the UK's present data protection law. While properly reflecting the Directive's requirements, the Government proposes wherever possible to maintain the substance but simplify the procedural aspects of the present law. The remainder of this chapter briefly summarises the main elements of this approach.

1.9 First, and most important, data protection needs to balance different interests. On the one hand modern society increasingly depends on the collection, storage, processing and exchange of information of all kinds, including personal information. On the other hand it is important to ensure that where information about individuals is used their interests, including their privacy, are properly respected. In bringing forward its Bill the Government will seek to ensure proper protection for information about individuals while avoiding unnecessary interference with legitimate processing. As far as it possibly can, the Government wishes to avoid placing additional burdens on business and other users of personal data.

1.10 Second, although the present arrangements have many good features they could be operationally improved. The Government will use the new Bill to achieve this. For example many consultation respondents, including the Data Protection Registrar, made reasonable criticisms of the present registration arrangements. The Government welcomes the action which the Registrar is taking to develop a simpler, more helpful and more user-friendly scheme. It intends to incorporate this into the new data protection arrangements.

1.11 Third, the Government believes that the costs of data protection should be met by those who process data. This means that they will need to continue to meet the costs of the supervisory authority; and the Government will need to find an equitable means of apportioning the costs.

1.12 Finally, one of the strongest calls among consultation respondents was to avoid creating a two-tier data protection regime. The Data Protection Act 1984 applies to a broader range of processing than the Directive does. The Directive covers only the processing of personal data in the course of activities within the scope of EC law. The UK's law must clearly continue to apply to all activities whether or not within EC law, both to protect individuals and to meet this country's obligations under the 1981 Council of Europe Convention on Data Protection.

1.13 Confining the new law to activities covered by the Directive would have entailed two statutory UK data protection regimes. This would have been difficult to understand, burdensome to operate and complex to enforce. The Bill will therefore establish a single overall data protection framework, with appropriate provision for activities outside the scope of EC law.

1.14 The following chapters describe the Government's proposals. For convenience they follow the same order as the consultation paper.

Chapter 2

Definitions, Scope and Extent (Articles 2-4)

Definitions

2.1 Although superficially similar to those in the 1984 Act, some of the Directive's definitions differ in important respects. The definitions play a key rôle in determining the application of the new law. The Government will take as its starting point the wording in the Directive, but in some cases the Bill may need to be more precise so as to avoid ambiguity.

Article 2(a): Personal data

2.2 As was proposed in the consultation paper, the Government intends to limit the scope of the new law to living individuals.

2.3 It also proposes that the new law should clarify the circumstances in which an individual is "identifiable". Having regard to recital 26, the Government interprets "personal data" as excluding anonymous information to which identifiers are unlikely to be capable of being attached. For example, where a person holds data which are to him anonymous and does not hold complementary information which might help to identify the people concerned, the mere existence of such information elsewhere should not make the data personal within the meaning of the Directive. There must be a reasonable likelihood of the two pieces of information being capable of being brought together.

2.4 The 1984 Act includes within "personal data" expressions of opinion about the individual concerned. The Government proposes to retain this provision.

2.5 The Act excludes from the definition intentions towards individuals. The Directive does not allow such an exclusion. Applying the Directive in full to such information could give rise to problems. For example, allowing individuals subject access to an employer's career planning information could prejudice those plans. The Government therefore proposes to bring such information within the law but provide an appropriate exemption from subject access.

Article 2(b): Processing

2.6 This definition is much wider than that in the 1984 Act. It covers any operation involving personal data from their collection to their destruction, as well as merely holding them.

2.7 Under the 1984 Act, the processing has to be "by reference to the data subject". There is no corresponding provision in the Directive. Therefore the new law will need to catch any automated processing of personal data whether or not by reference to the data subject. The considerations applying to manual processing are slightly different (see paragraphs 2.8-2.14). Similarly, the Directive does not allow continuation of the Act's exemption for text preparation (eg word processing). However, the Government intends to exempt such processing from the new notification requirement, if a free-standing exemption should prove necessary (see paragraph 5.6).

Article 2(c): Filing system

2.8 This definition determines which manual (ie non-automated) records are covered by the Directive. The consultation paper described the difficulties in interpreting this provision and the related recital 27. The application of data protection controls to manual records consisting of a "...structured set of personal data which are accessible according to specific criteria..." is one of the most significant changes required by the Directive.

2.9 Many consultation respondents were concerned about the potentially very wide scope of this definition. They thought that manual filing systems not structured by reference to individuals but only incidentally containing personal data which are thus not readily accessible should be excluded. The Government agrees. It considers that manual data of this kind are clearly outside the Directive's scope. It does not favour extending this aspect of the data protection regime beyond the Directive's minimum. There would be great difficulty in applying the data protection principles and the Directive's mechanisms to material not organised for systematic access; and the fact that it is not so organised provides some safeguard against misuse.

2.10 In deciding which manual data should be covered, the Government believes that it is necessary to have regard to the thinking underlying the application of the Directive to non-automated records. It believes this has two main strands: that the records in question have to be structured by reference to individuals; and that the relevant data should be easily accessible.

2.11 The Government has considered the way forward in the light of these considerations. It has also had regard to the provisions likely to be made in other EU Member States. It has concluded that the right approach is to apply the Directive to those non-automated records which are structured by reference to individuals or criteria relating to individuals, and which allow easy access to the personal data they contain.

2.12 This approach would cover card indexes, microfiches and similar collections from which personal data are capable of being readily extracted. It would also include files about named individuals in which each item has an internal structure conforming to some common system. An example might be a file with the subject's name or another unique personal identifier on the cover, and containing one or more pro-formas.

2.13 This leaves those files about named individuals whose contents are not structured by reference to information about those individuals. An example might be a file with the subject's name on the cover and containing a variety of papers in date order with no simple, systematic means of readily identifying specific personal data. Such files would not be caught by the definition. Recital 27 makes this clear. It says "... files or sets of files as well as their cover pages which are not structured according to specific criteria, shall under no circumstances fall within the scope of this Directive". However, there may be circumstances in which some of the personal data on the file are capable of being readily identified and retrieved. For example a document containing personal data of a particular kind could have been flagged on successive files in a series. In this case the personal data on the flagged documents could be caught, although the rest of the files might not.

2.14 The Government recognises that these arrangements are complex. However, experience from other countries which already apply data protection laws to manual records suggests that there is no easy solution. The

Government believes that its proposed approach properly targets data which could be processed systematically, and that it is broadly similar to that followed by some of our EU partners.

Article 2(d): Controller

2.15 This definition corresponds broadly to that of "data user" in the 1984 Act. The Bill will make corresponding provision. (See also paragraph 2.17).

Article 2(e): Processor

2.16 Superficially this definition corresponds to that of "computer bureau" in the 1984 Act. However, the very much wider definition of "processing" in the Directive means that this definition is also much wider. For example, it will include a person who collects data on behalf of the controller.

Article 2(f): Third party

2.17 This definition will follow broadly that in the Directive. It will exclude employees, agents and contractors of controllers and processors, who will be taken as working "under the direct authority of the controller or the processor". There will be no need for them to have an express authorisation to process data. The authorisation will be taken as flowing from their normal employment or contract with the controller.

Article 2(g): Recipient

2.18 The purpose of this definition is to identify as "recipients" all people, including employees of the controller, who will or may have access to the personal data in question. The effect is to require the controller to identify them or categories of them when he has to provide information about recipients to data subjects under articles 10 or 11 in order to guarantee fair processing. This information must also be provided in connection with notification and publicity under articles 18, 19 and 21.

2.19 In accordance with the second limb of article 2(g), an authority which asks another organisation for information about one or more specific individuals will not be a "recipient". An example might be a local authority asking another for information about one named individual in order to deal with a problem facing that person. Since one-off inquiries of this kind are unpredictable, it would be difficult for those making them to be identified as recipients for the purposes of the relevant articles of the Directive. The context suggests that the reference in this provision to an "authority" should be taken as meaning a "public authority".

Article 2(h): Consent

2.20 The Bill will follow broadly the definition in the Directive.

Scope

2.21 As noted in the introduction, the Government proposes that the new law should apply to processing related to all types of activity, whether or not they come within the scope of EC law. Appropriate provision will be made within the Bill for activities outside the scope of EC law. As regards national security, the Government intends to make provision corresponding to that in section 27 of the 1984 Act.

2.22 In accordance with the second part of article 3(2), the new law will exempt processing by natural persons in the course of purely personal or household activities.

Geographical extent

2.23 Subject to further discussion with our EU partners, for the purposes of determining the geographical extent of the new law the Bill will apply the interpretation of article 4 set out in the consultation paper. UK law will therefore apply to processing:

— by a controller established only in the UK;

- for the purposes of the UK branch of a controller established in more than one EU country;
- by a controller established outside the UK but in a place where UK law applies;
- by a controller not established in the EU but who uses equipment in the UK.

In the last case, the organisation must designate a representative in the UK.

2.24 The second indented part of article 17.3 slightly modifies these arrangements. It requires the law governing the security arrangements applying to processors to be that of the country in which the processor is established.

Chapter 3

The Main Rules Governing Processing (Articles 6, 7, 10-13, 16 and 17)

Safeguards

3.1 Various articles of the Directive require the provision of safeguards in connection with certain processing or exemptions. These include article 6.1(b) and 6.1(e), article 8.2(b), 8.4 and 8.5, article 11.2 and article 15.2.

3.2 The Government has identified possible safeguards for some of these provisions (see paragraphs 3.7 and 3.12). Others might include:

- restrictions on the use to which the data may be put, the people to whom they may be disclosed, or the time for which they may be held;
- a prohibition on identifying the data subjects;
- a requirement to anonymise the data as far and as quickly as possible;
- a requirement to separate out identification data and store them separately;
- a requirement to give access to the data only on "a need to know" basis;
- a requirement to comply with a sectoral code of practice.

Data Protection Principles

3.3 The Government intends to follow the approach in the 1984 Act by retaining eight data protection principles accompanied by statutory interpretation provisions. The corresponding Directive provisions are found in articles 6, 12 and 17.

3.4 The 1984 Act's principle 8, dealing with security, applies to computer bureaux as well as to data users. Article 17 of the Directive has a similar effect, applying the security principle to processors and those acting under their authority as well as to controllers.

3.5 Under the 1984 Act action for non-compliance with the data protection principles may only be taken against registered data users. As required by the Directive, the new law will require *all* controllers to comply with the principles irrespective of any notification requirement.

3.6 The first six principles in schedule 1 to the 1984 Act should require only minor adjustment to reflect the slightly different wording in the Directive. However, articles 12 (on subject access) and 17 (on security) are more detailed than principles 7 and 8 in the Act and may require wider amendment.

3.7 In addition, articles 6.1(b) and 6.1(e) require appropriate safeguards for the further processing or retention for historical, statistical or scientific purposes of personal data collected for other purposes. Recital 29 says that such further processing must not be used in support of measures or decisions about an individual. Another possible safeguard might be modelled on the one found in the 1984 Act, to the effect that damage or distress must not be caused to any data subject (see paragraph 7 of the interpretation provisions in schedule 1 to the Act).

3.8 Some of the interpretation provisions in schedule 1 to the Act are likely to need substantial revision. In particular, changes will be required to take account of the fact that compliance with the principles will be separated from registration. For example, the Bill will need to amend principle 2 which provides that the requirement for purposes to be specified is satisfied only if the purposes are registered.

Criteria for processing

3.9 To the extent that the sense of the provisions of article 7 is clear and unambiguous, the Government proposes to give effect to article 7 in broadly the form in which it appears in the Directive. Where there is ambiguity, some elaboration may be necessary.

Informing the data subject

3.10 As with article 7, the Government believes that articles 10 and 11 can best be implemented through provisions expressed very similarly to those in the Directive. This will give data controllers reasonable flexibility in how they comply with the requirements.

3.11 For example, the Government proposes that it should be left to the controller to determine, in the first instance, the circumstances in which the further information mentioned in articles 10(c) and 11.1(c) needs to be provided in order to guarantee fair processing.

3.12 Similarly, the Government proposes that it should be for controllers to decide whether, in a particular case, disproportionate effort would be involved in providing the information required under article 11.1; and whether they can, therefore, rely on the derogation in article 11.2. A possible safeguard might be to require the controllers to provide the information when they first make contact with the data subject.

Subject access

3.13 The Bill will maintain the general approach to subject access set out in section 21 of the 1984 Act. However, some adjustments will be necessary in order to give effect to the additional requirements of article 12 of the Directive.

3.14 The Government intends to put an end to the practice of "enforced subject access". On 29 May, it wrote to employers' organisations and others concerned seeking views on the best way of doing this. It is considering the responses and will announce separately how it plans to deal with this in the new law.

3.15 The 1984 Act requires the data user to provide the data subject with an intelligible copy of relevant data in response to a subject access request. The new law will take advantage of the flexibility provided by the Directive which allows communication of the information "in an intelligible form". This could include electronic communication and possibly other means. The choice will be for data subjects. They will still be able to request a hard copy of the information, which will have to be granted except in limited cases where this is unreasonable or involves disproportionate effort.

3.16 The third sub-paragraph of article 12(a) requires the controllers to make known to data subjects who request subject access the logic involved in automatic processing of data about them. As permitted by the Directive, the Government proposes to limit the application of this provision to those fully automated decisions set out in article 15.

3.17 The purpose of this provision is to ensure that individuals are able to secure sufficient information to be able to satisfy themselves that their personal data have been properly processed. However,

recital 41 confirms that it is not intended to allow "trade secrets or intellectual property" to be adversely affected. The Government therefore believes that the requirement should normally be capable of being satisfied through the provision of general information about the logic involved, rather than a detailed explanation of key processes which might put the basis of the operation in jeopardy.

3.18 The Government does not propose to change either the £10 maximum subject access fee or the requirement to meet the request within 40 days (though both will be amendable by Statutory Instrument). However, the 40 days will only start running when both any payment which is required and the information enabling identification of the material requested etc. have been received. The 1984 Act requires only the second condition to be met. This change should help reduce those subject access requests which involve organisations in time-consuming and expensive work but are not followed up.

Confidentiality and security

3.19 Article 16 on confidentiality is dealt with in paragraph 6.4; and article 17 on security in paragraphs 2.24 and 3.3-3.8 above.

Exemptions

Subject access

3.20 The 1984 Act provides for a number of exemptions from its subject access provisions. These relate to:

* third party identification (S.21(4)(b));
* the prevention or detection of crime; the apprehension or prosecution of offenders; or the assessment or collection of a tax or duty (S.28(1) and (2));
* judicial appointments (S.31(1));
* legal professional privilege (S.31(2));
* research or statistical purposes (S.33(6));
* back-up data (S.34(4));
* exposure to criminal proceedings (S.34(9));
* examination results (deferral) (S.35);
* human embryology (s.35A);
* various matters relating to health, social services, regulation of financial services etc (Orders made under 1984 Act).

With the exception of back-up data (for which there is no provision in the Directive) the Government believes that the effect of all these exemptions can and should be preserved.

3.21 The additional requirements of the Directive, in particular the inclusion of certain manual records, mean that some extension of the existing exemptions is needed. For example, it will be necessary to cover matters such as the investigation and enforcement work of regulatory authorities where the suspect activity is not a criminal offence.

3.22 In addition the Government believes that it may be necessary to provide exemptions for:

* data revealing the intentions of the controller in respect of the data subject (see paragraph 2.5 above);
* employment and academic references provided in confidence;
* data concerning honours and public appointments;
* examination scripts.

3.23 In some cases, the exemptions will need to cover the information which articles 10 and 11 require to be provided as well as subject access.

Non-disclosure

3.24 The 1984 Act also provides for exemptions from the restrictions on disclosure. These relate to:

* national security (S.27(3));
* the prevention or detection of crime; the apprehension or prosecution of offenders; or the assessment or collection of tax or duty (S.28(3));
* a requirement of law (S.34(5)(a));
* obtaining legal advice in the course of legal proceedings (S.34(5)(b));
* disclosures to the data subject or a person acting on his behalf (S.34(6)(a));
* disclosures at the request or with the consent of the data subject (S.34(6)(b));
* disclosures to a servant or agent of the data user (S.34(6)(c));
* disclosures urgently required to prevent injury (S.34(8)).

3.25 The Government believes that all the exemptions remain necessary and intends to preserve their effect, consistent with the requirements of the Directive.

Chapter 4

Special cases (Articles 8, 9, 14 and 15)

Sensitive data

4.1 As explained in the consultation paper, special rules on the processing of sensitive data will effectively be new to UK data protection law. Subject to the following comments, the new law will make provision corresponding to article 8.1 - 8.3. The law will be cast in a general way to permit the greatest flexibility for controllers in how they comply with these provisions.

4.2 Article 8.2(b) allows the processing of sensitive data "in the field of employment law" in certain circumstances. The Government believes that this expression includes not only specific employment legislation such as the Employment Rights Act 1996 but also other rules of law relating to employment. For example, the rights and duties under anti-discrimination and health and safety legislation constitute a significant part of the law on employment. The Government intends to give effect to article 8.2(b) consistently with this interpretation.

4.3 The consultation paper identified the possibility that under article 8.2(c) a person might seek to endanger another person's interests by deliberately withholding consent. The Government will have regard to this concern in preparing the Bill.

4.4 The first part of article 8.2(e) can be read as allowing the processing of sensitive data either where they are generally obvious (eg a disablement or racial origin) or only where the data subject has taken a deliberate step to make them public. Having regard to the general restrictions in and intention of article 8, the Government proposes to apply the second, more restrictive interpretation.

4.5 The Government interprets the second part of article 8.2(e) as allowing the processing of sensitive data where that is necessary for the purpose of obtaining legal advice, asserting legal rights and involvement in legal proceedings.

4.6 Article 8.4 allows further exemptions from the prohibition on processing sensitive data for reasons of substantial public interest, subject to the provision of suitable safeguards. The Government is considering for exemption under this provision data held for the purposes of:

* medical research;
* personal social services;
* political canvassing;
* monitoring ethnic origin, disabilities or, in Northern Ireland, religion;
* Government statistics, social security and certain other functions of central and local Government still under consideration;
* the prevention and detection of crime etc.

4.7 The safeguards might be drawn from among those mentioned in paragraph 3.2 above. Alternatively safeguards specific to the particular material processed might be appropriate. For example, in the case of medical research there might be a requirement for prior approval of the project by a research ethics committee.

Criminal records

4.8 Article 8.5 deals with the processing of personal data relating to offences, criminal convictions and security measures. The new law will specify that such processing may be carried out under the control of official authority. The Government also proposes to allow processing of such data in other circumstances where suitable specific safeguards are complied with.

Personal identifiers

4.9 The Bill will make provision consistent with article 8.7.

Journalism and artistic or literary expression

4.10 As noted in the consultation paper, unlike the Directive the 1984 Act has no exemptions for processing for the purposes of journalism or artistic and literacy expression. The consultation paper also made clear that a blanket exemption was not possible.

4.11 How far the new data protection law should apply to journalistic and similar purposes raises very difficult points of principle about the rights and responsibilities of the media. The key issue is how to balance the individual's legitimate expectation of privacy against the public's right to know. This balance is far from easy to strike.

4.12 The Government has had detailed discussions with representatives of the press and the broadcasters about this very difficult issue. Useful progress has been made, but this work needs to be completed before firm decisions are taken about the precise scope of the exemptions under article 9. The Government will announce its decisions on this separately in due course.

The data subject's right to object

4.13 Article 14(a) creates a right to object to lawful processing in certain circumstances. The new law will allow exercise of this right where article 7(e) or (f) provides the justification for processing. The Government is still considering in what circumstances it might be necessary to allow the right to be overridden.

4.14 In accordance with the first part of article 14(b) the Government intends to provide for data subjects to be able to object free of charge to their personal data being used for direct marketing purposes (ie to opt out). However, where sensitive data are involved explicit consent (ie opting in) may be needed. The Government is still considering how best to give effect to the requirement for data subjects to be made aware of their right to object.

Automated decision-making

4.15 The Government proposes that the new law should make provision broadly comparable to that in article 15. In the first instance it would be for controllers to decide whether or not their automated decision-making is covered by the provisions giving effect to article 15.1 and 15.2.

Chapter 5

Notification/ Registration (Articles 18-21)

The new arrangements

5.1 In accordance with the strongly expressed views of respondents to the consultation paper, the Government intends the new notification arrangements to be much more straightforward than registration is at present. The Bill will provide for the supervisory authority to draw up the details of the scheme and submit it for approval by the Secretary of State.

5.2 The Government proposes to base the scheme on the one the Data Protection Registrar is currently developing. Following her 1996 consultation exercise on registration the Registrar has further refined her proposals. The Government believes that these will be simpler, more readily understandable and more useful for data controllers, individuals and the supervisory authority.

5.3 The key features of the proposed scheme are:

* a range of methods of notifying (including on-line access);
* a greatly simplified format (including the use of standard packages);
* minimising the detail the controller has to provide.

5.4 As at present, there will be a fee for notification. The revenue it generates will continue to offset the costs of the supervisory authority. The Government therefore believes that it would be equitable to require fairly wide notification.

5.5 However, within this broad approach the Government believes that it is desirable to exempt certain processing operations from notification. In her 1996 Consultation Paper on the Revision of Registration Methods, the Data Protection Registrar identified a number of "standard core purposes". The Government understands that the Registrar has done further work on the categories. They now comprise:

* payroll, personnel and work planning administration;
* purchase and sales administration;
* advertising, marketing and public relations;
* general administration.

The Government intends to exempt from compulsory notification processing operations carried out for these purposes.

5.6 The Government also proposes certain further exemptions. Some deal with existing exemptions which are not covered by the "standard core purposes". Others reflect regime changes made by the Directive. These further exemptions include:

* processing for the purpose of holding registers and other data required by law to be made public;
* processing in connection with mailing and membership lists (as in section 33 of the 1984 Act);
* processing by certain non-profit-making organisations in accordance with article 8.2(d);

* processing of bibliographic data;
* word processing (if not covered by other exemptions).

5.7 The Government proposes not to apply the requirement to notify to manual records. In addition, it will end the existing requirement for head teachers and Governors of schools to register separately.

5.8 The Government is currently estimating the likely costs of the supervisory authority under the new law, and will determine the fee level in that context. It will keep average fees as low as possible. It is also considering revising the fee structure to take some account of organisations' size or range of processing. The options include a tiered structure or paying a fee for each notified purpose.

5.9 The Government proposes to end the requirement for a fresh registration every 3 years. Fees will be paid annually, with direct debit and similar arrangements available. Organisations will need to take no further action beyond informing the supervisory authority as and when there is a change in the notified information.

5.10 Since notification is one way of discharging the requirement for publicity in article 21 of the Directive, organisations exempt from the notification requirement will be able to notify voluntarily. This option will also be available for manual records.

"In-house" data protection officials

5.11 The responses to the consultation paper indicated some interest in the concept of "in-house" data protection officials, provided for by article 18.2 of the Directive. However, very few organisations said that they would take advantage of such arrangements were they available. Bearing in mind the amount of work needed to prepare for the main régime, the Government proposes that the new law should enable an "in-house" officials scheme to be established subsequently by subordinate legislation. In the light of the operation of the new law, it will consider whether the alternative arrangements should be introduced in due course.

Information to be notified

5.12 The new law will require notifications to cover the information specified in article 19.

Prior checking

5.13 The Government is considering which categories of processing operation should be subject to the prior checking system required by article 20. It wishes to limit them to the minimum consistent with the need to provide adequate protection for individuals in the light of the tight criteria set out in the Directive. No decisions have yet been taken, but the Government is currently considering whether there is a case for prior checking some processing operations involving data matching, genetic data and private investigation activities. The proposed prior checking mechanism is described in paragraph 6.10.

Transparency

5.14 Provision will be made in accordance with article 21.2 for notified information to be held in a register maintained by the supervisory authority. The register will be open for public inspection. The Data Protection Registrar is developing proposals to make the register more accessible to individuals, including through on-line access, and to make the information provided more readily comprehensible and useful. There will be a duty on the supervisory authority not to disclose information relating to security measures (i.e that referred to in article 19.1(f)) when the register is interrogated.

5.15 As noted in paragraph 5.10, notification is one means of meeting the requirement for transparency in article 21. The new law will make provision similar to that in article 21.3 for controllers of processing operations who do not need or choose not to notify to publicise by other means the information set out in article 19.1(a) - (e). This transparency requirement applies to controllers processing manual records as well as to those processing automated personal data.

5.16 Registers of the kind described in the second paragraph of article 21.3 will be exempt from the publicity requirement.

Chapter 6

Enforcement (Articles 22-24, 27 and 28)

6.1 The majority of respondents to the consultation paper favoured retaining broadly the existing enforcement arrangements, with which they were familiar and which they believed worked well. The Government agrees that the existing arrangements should form the basis for the arrangements under the new law. However the Directive requires certain changes, and the Government also intends to take the opportunity to streamline the present arrangements.

Breaches relating to notification/ registration

6.2 Broadly as at present, for organisations which are required to notify the supervisory authority of processing operations, it will be an offence to fail to do so and to fail to provide accurate information. Failure to inform the supervisory authority of changes of address will also remain an offence.

6.3 Failure to inform the supervisory authority of other changes to notified information (ie failure to keep the notification up to date) will be subject to an enforcement notice.

6.4 The present law makes it an offence knowingly or recklessly to process data in breach of the register entry. The new law will deal with this behaviour in a different way. Where the controller or a person acting in accordance with the controller's instructions processes data inconsistently with the notified information, the enforcement notice procedure will apply. To meet the requirement of article 16 of the Directive it will be an offence for the processor or an employee of the controller or the processor to process data knowingly or recklessly otherwise than in accordance with the instructions of the controller, unless there is a requirement in law to do so.

6.5 The Government intends to preserve the present offences of unlawfully procuring and selling personal data. It will be necessary to reformulate them to take account of the changes to the registration arrangements.

Other breaches

6.6 As now, where the supervisory authority considers that the data protection principles are being breached it will be able to issue an enforcement notice requiring change to the controller's practice. The Government proposes that this procedure should embrace other breaches of the new law. These will include transfers made improperly to a third country with inadequate levels of protection (see paragraph 7.2); and failure to meet the transparency requirement (see paragraph 5.15).

6.7 The Government proposes a new power for the supervisory authority to require controllers to provide information in certain limited circumstances. These are where the supervisory authority has reason to suspect that the new law is being breached; or where it needs the information to investigate properly a complaint made by a data subject in accordance with article 28.4 of the Directive. Where the information is refused, the supervisory authority will be able to issue an enforcement notice requiring its provision. The existing

power for the supervisory authority to seek a warrant will be retained to support this.

Enforcement notices: procedures and appeals

6.8 The Government proposes that the procedure for issuing an enforcement notice should ensure that the supervisory authority explains:

- the suggested remedial action;
- any necessary immediate enforcement or remedial action;
- the right to make representations before any action is taken;
- the right of appeal.

6.9 As now, failure to comply with an enforcement notice will be an offence; and appeals against enforcement notices will be to the Data Protection Tribunal. Processing will be able to continue until the outcome of the Tribunal hearing is known. To the extent that they are consistent with the nature of this Tribunal, the procedures in the Deregulation (Model Appeal Provisions) Order 1996 will be applied.

Prior checking

6.10 Under the present law processing may lawfully begin once the application for registration has been made. The new law will preserve this provision for the great majority of processing. However, those operations subject to prior checking (see paragraph 5.13) will not be allowed to start until they have been checked by the supervisory authority. The supervisory authority will be required to carry out that check and give its opinion to the controller within, say, 15 working days of receiving the application. The opinion may take the form of a notification to the controller that the supervisory authority is minded to issue an enforcement notice; or a statement to the effect that it does not intend to take any further action in the context of the prior checking exercise. In either case, the processing may go ahead. If the controller decides to go ahead, he will of course be at risk of subsequent challenge from the supervisory authority for any breach of the Act.

Individuals' remedies

6.11 The Directive establishes a number of rights for individuals. The new law will enable individuals who believe any of these rights to have been breached to seek a remedy in the courts. The remedy available will match the nature of the right breached. For example, where the right of subject access has been improperly refused the court will be able as now to make an order requiring the controller to give access.

6.12 As now, individuals will be able to complain to the supervisory authority about any alleged breach of the new law. The supervisory authority will be under a duty to consider complaints of substance.

6.13 Individuals will also be able to seek compensation directly in the courts for damage, and associated distress, arising from any breach of the new law. Defences comparable to those in the present law will be provided.

The supervisory authority

6.14 The Government intends to designate the Data Protection Registrar as the data protection supervisory authority. The Directive requires this to be a public authority. The office of the Data Protection Registrar has overseen the operation of the present data protection regime since its introduction. It has acquired valuable and unique experience in this work. The Government believes that the Registrar is best placed to take forward effectively and efficiently the work needed to oversee the implementation of the new regime. However, with the reduced emphasis on registration, the Government believes that the title of Data Protection Registrar is no

longer suitable. The Government proposes to change it to "Data Protection Commissioner".

6.15 The Government intends to make clear in the Bill that the Commissioner has a general duty to promote good data protection practice. In connection with this duty, the Commissioner will be enabled to carry out quality assessments of controllers' data protection systems (but without the power to compel controllers' involvement); and to propose voluntary codes of practice. Consistent with the Directive, the Commissioner will also be put under a duty to consider draft codes submitted to him, and, if he sees fit, seek data subjects' views on them.

Chapter 7

Transfers of Personal Data to Third Countries (Articles 25 and 26)

7.1 The Government proposes that the new law should broadly correspond to articles 25 and 26 of the Directive with little elaboration.

7.2 The controller will need to decide in the first instance on the adequacy of protection in third countries to which he proposes to export data. Where the supervisory authority considers the protection to be inadequate it will be able to issue an enforcement notice requiring the transfers to cease.

7.3 The new law will require the supervisory authority to notify the European Commission and other EU Member States of cases where levels of protection in third countries are believed to be inadequate.

7.4 The Government will consider further with the Data Protection Registrar whether the supervisory authority should have to maintain a central "data bank" of available information about levels of protection in third countries; and draw up lists of adequate safeguards and standard contractual clauses in accordance with article 26.2. A controller would be able to transfer to a third country which provides inadequate general protection where the particular data were handled in accordance with the safeguards drawn up by the supervisory authority. The supervisory authority would have to notify the arrangements it makes to the Commission.

Chapter 8

Transitional Arrangements (Article 32)

8.1 The Government is considering how to manage the transition from the old law to the new. The arrangements can be decided only when the detail of the new regime is established.

8.2 Consistent with the need to protect individuals' rights and with the practicalities of running overlapping regimes, the Government will use to the full extent the three years within which existing processing must be brought into full compliance with the Directive's requirements. It will take a similar approach to the extended transitional period for existing manual records (which applies only to articles 6, 7 and 8 of the Directive).

8.3 In the spirit of the Council/ Commission Minutes Statement referred to in the consultation paper, the Government proposes that the new law should also contain a reserve power to deal with any problems which may arise at the end of the extended transitional period for existing manual records.

ANNEX

RESPONSES TO THE HOME OFFICE CONSULTATION PAPER ON THE EC DATA PROTECTION DIRECTIVE (95/46/EC)

1. INTRODUCTION

- There were approximately 300 responses to the Consultation Paper.
- Respondents ranged from large multinational corporations to individuals with an interest in data protection.
- Respondents included both public and private sector bodies.

2. LEGISLATIVE ROUTE

- There was strong support for primary legislation. The reasons centred on the need to avoid the confusion that a dual regime may cause.

3. CONTENT OF LEGISLATION

- The majority requested clear and precise definitions to provide for as much certainty as possible.
- They wanted the new legislation to resemble the existing Data Protection Act (DPA) as far as possible.
- A significant minority suggested that a 'copyout' approach should be adopted, accompanied by explanatory guidance.

4. SCOPE OF THE DIRECTIVE

- Many thought protection should be extended to information relating to dead people, at least for a period of time.
- There was considerable concern over the definition of personal data which is broader than that in the DPA. Many wanted the approach in the DPA to be retained.
- The Directive applies only to activities within the scope of European Community law. Respondents were uncertain what this covered.

5. MANUAL DATA

- Most wanted a precise definition of manual data that made clear which records would be covered.
- Many thought the definition should be limited to files accessed by reference to the individual, either by name or personal identifier.
- Most wanted the Government to take advantage of the option to delay full application of the Directive to manual records for 12 years from adoption of the Directive, but were concerned it would not be long enough.

6. INFORMATION TO DATA SUBJECTS

- Many were concerned about the requirement under the Directive for controllers to provide certain information to data subjects where the data were not obtained directly from the data subject but from a third party. There is no equivalent requirement in the DPA. This was thought likely to be burdensome, especially by those organisations which purchase mailing lists or copies of the electoral roll.

7. SUBJECT ACCESS

- Many respondents wanted the data they hold to be exempt from subject access.
- A common concern was the wish to protect information relating to third parties, especially sources of data, complainants or informers.
- A large majority thought that the existing 40 day time period for responding to subject access requests should remain the same.
- Opinion on whether the £10 fee should be increased or not was divided.

8. EXEMPTIONS

- There were many requests for exemptions under the Directive.
- A significant number of respondents referred to specific exemptions contained in the DPA and asked for identical exemptions to be introduced under the Directive.

9. SENSITIVE DATA

- Many respondents were concerned about the effect upon them of the special restrictions on the processing of sensitive data.

10. THE MEDIA

- Respondents from the media wanted the exemption for the media to be as wide as possible to ensure that their activities (particularly investigative journalism) would not be hampered by the provisions of the Directive.
- Amongst other respondents there was concern that the media should not be given carte blanche.

11. NOTIFICATION

- There was overwhelming support for simplification of the existing arrangements.
- Many thought manual records should not be subject to notification.
- Many respondents showed interest in the concept of an in-house data protection official but there was little commitment to use one.

12. ENFORCEMENT

- There was considerable support for the existing enforcement mechanism.
- There were some suggestions that the Registrar should have greater powers of investigation.

13. OVERSEAS TRANSFERS

- The main concern was a desire for certainty as to which countries have adequate data protection measures to allow for transfer of personal data to those countries.
- There was considerable concern that the Directive could hinder the competitiveness of UK companies unless a list of third countries with an adequate level of data protection was agreed centrally between member states.
- Many said that it would be almost impossible to apply the provisions of the Directive to the Internet.

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