
The Law Society
The City of London Law Society
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An evening with the UK Information Commissioner
Wednesday 18 January 2023
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Introduction

CMS was delighted to partner and work with The Law Society (TLS) and the City of London Law Society (CLLS) to provide the opportunity for members of the legal profession (both in private practice and in-house) to hear from the recently appointed UK Information Commissioner, Mr John Edwards. Being a fellow Kiwi, it was a pleasure to see another Kiwi setting out his personal vision for the future of data protection in the UK (and to also hear about the nuances of living and working in the UK compared to New Zealand). The commentary in this note is intended to summarise those key items from the evening which are likely to be of interest to data protection lawyers.

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Mr John Edwards
UK Information Commissioner

Mr John Edwards' Keynote

ICO's general approach to regulation

Between discussing New Zealand's pioneering but patchworked history with privacy, Mr John Edwards also shed some light on the ICO's approach to regulation. He focused largely on how certainty could be created, emphasising that data protection wasn't an exercise in check-box compliance but about ensuring the protection of a fundamental right. The Information Commissioner's keynote address was followed by a fireside chat with Jon Bartley (Partner at RPC and Chair of CLLS Data Law Committee) and the evening finished with an audience Q&A moderated by Dr Joan Purvis (Chair of TALC of TLS and Head of Rights at the BBC).

Having been appointed by a government that stated an intention to "do things differently", Mr Edwards noted there appeared to be a widespread apprehension by the business community that he may wish to disturb the setup of the DPA 2018 and UK GDPR, that people had spent four years investing in and getting used to. He was quick to reassure the audience, consistently made up of private practice and in-house data protection lawyers, that he was not here to "upset any apple carts". Instead, he sought to set out a long-term planning approach, referencing the ICO25 Strategic Plan, which sets out how the ICO envisages their future state and the pathway to that.

The Information Commissioner then discussed the dichotomy between the need to take a high-level principle-based approach due to the vast range of data transactions occurring every minute, and the uncertainty a principle-based approach creates for businesses and the corresponding expense that uncertainty imposes on the economy.

ICO guidance

Mr Edwards spoke to the idea of the regulator "spending once at the centre" to create guidance that created clarity, joking with the audience that he was hoping to eat their lunch (and free them up to add greater value to clients on other work). Later in the evening he used the recently published TRA tool as an example of this concept, which had been well received. Acknowledging that it was a big request asking companies to make a comparative law analysis, the TRA tool and guidance were intended to be user-friendly ways to assist with this. He was quick to point out that things could only be distilled and simplified so far, whilst still applying to edge-case transactions.

To provide further certainty, he referenced the innovative "Sandbox" approach the ICO was implementing, working alongside government agencies and corporates to test their innovations, and come up with potential mitigation strategies. This approach contrasts with the general supervisory dynamic currently in Europe.

Potential Binding Rulings and horizon scanning

The Information Commissioner also discussed the potential use of "Binding Rulings" whereby an entity could bring their interpretation of how the law applied to them and ask the ICO to confirm their approval to this approach. He indicated that in keeping with his preference for transparency he envisaged these being published, although there was more discussion to be had about the protection of confidential information of businesses in those Binding Rulings. He also noted the residual, but inherent, risk that the ICO's findings may be challenged in the courts. However, he acknowledged that given the ICO is only a first-tier tribunal any decisions made by higher courts (whether reversals or upholding the original decision) is a natural and expected outcome.

Mr Edwards also emphasised that the ICO as a regulator was scanning the horizon (Technology Horizon report) to consider how upcoming data-hungry technologies will fit within the current data protection framework and preparing for potential harms created. As a result, the ICO is stepping up its innovation advice service. Some of those technologies noted were consumer health tech, immersive technology, decentralised finance, and next generation Internet-of-Things (IoT). He also indicated the ICO has an upcoming report on nanotechnology.

Artificial intelligence and its impact on data protection

Whilst generally positive about the benefits that technology could offer individuals, he expressed some concerns about the use of "Immature AI" or snake oil type solutions that purported to derive emotional insights. He referred to such technology as irresponsible and the sort of thing that the ICO would be willing to put a "stake in the ground" on. However, as to AI, he welcomed the DCMS consultation on its AI principles, although noted it may be problematic if this resulted in the overlay of another regulatory regime. Otherwise, it was the view of Mr Edwards that the AI principles are likely to provide helpful illumination.

Approach to enforcement

In relation to enforcement, the Information Commissioner was keen to highlight that his powers (as set out at Article 58 of the UK GDPR) were broader than simply fines, and that avoiding the privacy harms that lead to fines in the first instance was a better outcome than fining entities retrospectively. He mentioned as an example, that the ICO recently did not fine a public front-line service organisation for this reason. Mr Edwards stressed that in investigations, the ICO was looking to find clear and immediate harm; it is not about showing a RoPA or DPIA, so much as showing that businesses have taken a risk-based approach that corresponds with the risk they are exposing individuals to. He also hoped the publication of reprimands would provide further certainty and act as a helpful indicator of the ICO's approach and suggested in the future these would be searchable by topic.

The Information Commissioner challenged those implementing new technologies to consider what the real human impact was, having mind to the worse-case scenario and genuinely engaging with strategies for mitigating harm rather than performing a check box exercise. He emphasised the role that legal advisors have to play in creating a compliance culture, and that organisations ask not whether they can do something under the law, but how can they do something under the law.

Data Protection and Digital Information Bill

In respect of the draft Data Protection and Digital Information Bill (the "Bill"), Mr Edwards referenced discussions he had with the Secretary of State to reach a position where he was able to support the legislation. The Information Commissioner was generally comfortable with the three overarching principles the Secretary of State had in mind for the proposed new UK legislation i.e.: no reduction to the rights and protections offered to individuals; UK adequacy with EU not put at risk; and reducing cost to business.

International data flows

Discussing the EU adequacy decision in respect to the UK, Mr Edwards emphasised it was a question of essential equivalence, not exactly equal laws, which was demonstrated by both New Zealand and Israel having adequacy. There was, he said, scope for divergence from the EU black letter law and that he did not consider the Bill in its current form would risk UK adequacy. Furthermore, the Information Commissioner said that he would still consider ECJ rulings, such as the recent ruling on disclosing the categories of recipients in the context of DSARs, as informative owing to the fact the ICO exists in an international ecosystem of regulators.

In relation to free international data flows Mr Edwards' view was that there needed to be a deep inter-state engagement to avoid increasing the costs of compliance. The ICO considers its role as smoothing the way, which it has done for example through the creation of the UK Addendum to the EU SCCs. Mr Edwards also recognised the difficulty in working out the implications of having bespoke carve outs in adequacy decisions for different jurisdictions.

Continued independence of ICO

The Information Commissioner also indicated that despite concerns from European counterparts, he did not consider that a requirement for the Secretary of State to sign off on ICO guidance was a challenge to the independence of the ICO due to the desirability of having executive oversight over delegated legislation. Mr Edwards emphasised that the ICO still had independence through its ability to issue enforcement decisions, including its own reasoning, communicating to the business world its interpretation of the law.

Please click here for a recording of the event.

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