



# Setting a new direction for the Information Commissioner's Office

## *Summary of a private roundtable*

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**This readout summarises a private roundtable organised at the request of the Department for Digital, Culture, Media and Sport, to support its consultation *Data: A new direction*. The consultation period closes on 19 November 2021. The roundtable was held in October 2021 and was one of a series organised by civil society organisations. This short summary is being published to support the consultation process.**

### Introduction

In September 2021, the Department for Digital, Culture, Media and Sport (DCMS) published *Data: A new direction*,<sup>1</sup> a 146-page consultation on various aspects of data protection reform. The consultation closes on 19 November 2021.

DCMS has asked civil society organisations and others to co-ordinate a series of events to inform the consultation. As part of this process, the Institute for Government was involved in organising two roundtable discussions in October 2021. This short summary focuses on one of these events – a discussion about the future of the Information Commissioner's Office (Chapter 5 of the consultation).

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The event brought together participants from government and the public sector, academia and different civil society organisations. It was held under the Chatham House rule: this note of the discussion is therefore non-attributable. It represents what was said at the discussion, and does not necessarily represent the view of the Institute for Government.

The other roundtable, with the Open Data Institute, focused on data sharing in the delivery of public services (Chapter 4 of the consultation). The ODI has published [a summary of that event](#).

## What the consultation says

The Information Commissioner's Office (ICO) is the regulator with responsibility for data protection and other areas connected with the provision and regulation of data and information. Its regulatory mandate comes from at least 11 pieces of legislation, including the General Data Protection Regulation and Data Protection Act 2018, but also from others like the Freedom of Information Act 2000 and Investigatory Powers Act 2016. It is sponsored by DCMS, though has reporting lines and funding from other parts of government for some of its responsibilities (such as the Cabinet Office for Freedom of Information). The information commissioner is also accountable to parliament and may be called to give evidence to the DCMS select committee.

The consultation proposes to:

- Introduce **new powers for the DCMS secretary of state** to prepare a "statement of strategic priorities" to inform how the ICO operates; to prepare a statement of strategic priorities which the ICO must have regard to; to initiate an independent review of the ICO's activities and performance; to direct the ICO to set up a panel of persons "with relevant expertise" when developing codes of practice or complex or novel guidance; and to be given a 40-day period in which to approve codes of practice or complex or novel guidance.
- Introduce a **new overarching objective for the ICO**, to uphold data rights and encourage trustworthy and responsible data use.
- **Place new duties on the ICO** to "have regard" to economic growth and innovation; competition; and a statement of strategic priorities from the DCMS secretary of state when discharging its functions.
- Introduce **a duty on the ICO to co-operate and consult with other regulators**, particularly members of the Digital Regulation Cooperation Forum, and explore whether to establish a new information sharing gateway to allow regulators to co-operate.
- **Clarify the ICO's due regard to public safety** when carrying out its functions.

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- Introduce a statutory objective for the ICO to **consider the government’s wider priorities in its international activities**, and propose it deliver a “more transparent and structured international strategy”.
  - **Move away from a “corporation sole” model of governance and establish an independent board and chief executive** of the ICO, with the chair (the information commissioner) appointed by an existing legal process, and the board members and chief executive subject to the public appointments process. A corporation sole is a single legal entity consisting of an incorporated office occupied by a single person, meaning the powers and responsibilities of the ICO lie solely with the information commissioner.
  - Remove the requirement for the DCMS secretary of state to seek parliamentary approval for amending **the information commissioner’s salary**.
  - **Require the ICO to develop and publish “comprehensive and meaningful” key performance indicators** to underpin its annual report; explore mandating transparency requirements for some of the ICO’s key strategies and processes; and undertake and publish impact assessments (and conduct “enhanced consultation”) when developing codes of practice or complex and novel guidance.
  - Introduce **a requirement for complainants to attempt to resolve complaints directly with the relevant data controller** before lodging a complaint with the ICO, and oblige data controllers to have a “simple and transparent” complaints handling process in place.
  - Consider criteria by which **the ICO could choose not to investigate a complaint**.
  - Consult on **whether the ICO’s existing enforcement provisions are broadly fit for purpose** (the government believes they are).
  - Introduce **a new power for the ICO to be able to commission an independent technical report** to inform its investigations, and consider a new power allowing the ICO to compel witnesses.
  - **Change the deadline where the ICO has to issue a final penalty notice** from six to 12 months, introduce a “stop the clock” mechanism to allow more time for investigations, and require the ICO to set out expected timelines to a data controller under investigation at the start of such an investigation.
  - **Absorb the functions of the (already-merged) biometrics commissioner and surveillance camera commissioner** into the ICO.
  - Consider whether any of the above would affect people with **protected characteristics**.
  - Consult on whether **any other reforms** would improve the effectiveness of the ICO.

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## Opening remarks on data protection

As part of introductions at the start of the roundtable, we asked participants to summarise their current thoughts about data protection in one sentence. These are some of their responses:

- Listening to people's reflections on the consultation as a whole it feels like the reforms people want are more around the provision of advice rather than changing legislation, but [Chapter 5, on reforming the ICO] feels like a bit of an exception to that.
- There are a lot of opportunities to improve data protection in the UK with this conversation, so let's get it right.
- In the UK, people have just started figuring out how to implement GDPR; policy takes a long time to bed in; so although there may be opportunities for change, we also need to think from an implementation operational perspective, not just a utopian policy perspective.
- High standards of data protection are what delivers and builds the trust that enables people to participate in the digital economy, and that's what drives those wider social and economic benefits that that data can create.
- Data protection is very important but it has completely dwarfed the FoI function of the ICO, which gets little attention.

## Key themes from the roundtable

### The ICO has strengths and weaknesses

**The ICO has achieved cut through.** It feels like people are more aware of the ICO and data-related issues than they used to be. People have also been complimentary about its regulatory sandbox and similar initiatives.

**The ICO has a strong international voice.** The current arrangement has allowed the ICO and data protection in the UK to have a strong voice internationally. This is important not just because of the importance of data flows internationally, but because the UK is able to both lead and learn from best practice internationally too. Retaining that role will be important, though it doesn't necessarily have to be through an information commissioner.

**The ICO may not have chosen the right priorities.** Some have questioned, for example, its raids on data firm Cambridge Analytica while some of the difficult, practical and underlying issues haven't had as much attention. Does it have enough power and use what powers it does have in the right way? In response to privacy concerns about ordering apps in pubs, where a lot of the information customers were asked to hand over was unnecessary and irrelevant, the ICO talked about things consumers should think about rather than making a stronger regulatory intervention.<sup>2</sup>

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### **The ICO may not have the powers, and particularly the resources, that it needs.**

This question sits behind many concerns raised. The ICO's remit has expanded hugely, it has a lot more to deal with, and this is a fast moving, ever-growing area. Although it has grown in recent years, will the ICO have everything it needs to conduct its tasks properly? Perceived weaknesses also include its neglect of Freedom of Information (Fol) and transparency, which may not be within its control given the separate funding structures for Fol work (see below).

### **The overall case for change was agreed**

**The current structure is over-reliant on one individual.** The ICO's own response to the consultation welcomes the proposals looking at its governance structures.<sup>3</sup> While there are some benefits to the current "corporation sole" structure – it means there is a clear figurehead within the organisation with clear lines of decision making, and a clear figurehead for the public – there are concerns around organisational resilience (being so reliant upon one individual with so much power, even though they delegate a lot of it, especially when covering such a wide brief). But there would be benefits to widening out the decision making responsibilities within the organisation.

Some participants wondered why it was the chair, rather than the chief executive, who would hold the title 'information commissioner' in the proposed structure.

**The ICO's responsibilities have grown.** One participant noted that when the ICO was set up, "it was a real backwater area of policy, and you had one person essentially looking after it, and that kind of made sense. Now, it's enormous." But the structure hasn't changed. The consultation's solution was "elegant", retaining the best of the current system (the 'brand' of the information commissioner, with domestic and international cut through) but with a much more robust structure underneath it. That would be good for management, but also for internal challenge, if you had a bad commissioner at some point – at present the organisation is very reliant on one figure, whereas an overall board that can hold somebody to account isn't reliant on the chair being "extraordinary". It moves towards the sort of good practice seen in lots of other regulators.

### **It will be important to safeguard the ICO's independence**

**The public have to trust the ICO's independence.** Demonstrating that the ICO is able to carry out its functions without undue interference – independence in fact and in perception – is vital for the ICO's operation. This is particularly important given its role in regulating government and the public sector as well as businesses. The current structures were seen to provide strong safeguards.

### **The proposed process for senior appointments could be more independent.**

One concern, which the ICO raises in its response to the consultation, is whether the proposed appointment process for the chief executive (and the board) is as

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independent as it could be. The ICO uses the example of Ofcom, where the board is responsible for appointing the chief executive, taking the decision that bit further away from ministers.

**The ICO should be accountable to parliament as well as ministers.** While the ICO receives much of its budget from government, questions were raised as to its reporting lines into parliament. These were seen as important to ensure the ICO has some independence of the executive function of government when trying to hold that function to account. There was discussion of the model for potentially comparable regulatory bodies, such as the UK Statistics Authority, which reports directly to the UK and devolved parliaments. There was also concern, for example, that the proposal to give the DCMS secretary of state a parallel power to that afforded to parliament in the approval of codes of practice and complex or novel guidance could lead to difficulties where parliament and a culture secretary held different views.

**Some of the new powers for the secretary of state felt particularly intrusive.** Again, one attendee commented that a veto power over codes and guidance “could have a real impact on the ability of the ICO to produce guidance that reflects a wide range of stakeholders’ views”. Other proposed powers might appear only to ensure the ICO adheres to best practice, such as setting up expert panels when necessary. However the direction to appoint such panels by the secretary of state could have unintended and intrusive consequences: the ICO may not be under any legal obligation to follow what such a panel has said, but there could be real political difficulties in going against a panel established by direction of the secretary of state.

**Not all of the changes may require legislation.** For instance, legislating for the publication of key performance indicators (KPIs) or other disclosures may be unnecessary given that there are other ways to make these things happen which may be more flexible for the future.

### **There was debate whether certain powers should be merged or kept separate**

**On balance merging functions was seen as positive, but there are trade-offs and potential exceptions.** On the one hand, bringing some smaller regulators under the auspices of the ICO – like the biometrics and surveillance camera commissioner – might ensure those other regulators have a future. One participant noted that, “pragmatically, that role hasn’t been given much support; it is already the result of a recent merger; it may be that if it isn’t merged in it will receive no support at all.” Whatever the concerns expressed above about ICO independence, the government isn’t about to defund the organisation. If biometrics is a valued area of regulation, it would be much better for it to be inside the tent. The ICO can then shape its strategies, including by deciding the level of resource to allocate to it.

The appointment of different skills or areas of focus to the board can also help. The problem for some smaller regulators (e.g. in forensics) has been that they’re so small with such little capacity, that the agenda has just outgrown them. One lesson from

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Australia – where there is a data commissioner (more a data management governance type role) and a separate information commissioner (transparency) – is that the two commissioners can find themselves discussing the same issue in different language. Trying to have one regulator may be better in terms of having one view on everything.

On the other hand, there is a risk that other issues get sidelined as part of a super regulator. A recent mySociety report recommended splitting the ICO into a privacy regulator and an information regulator, given its perceived concentration on data protection at the expense of Fol and transparency.<sup>4</sup> The mySociety proposal would have the information commissioner (as opposed to the data protection commissioner) answerable to parliament as an officer of parliament, similar to the head of the National Audit Office (the comptroller and auditor general). The biometrics and surveillance camera commissioner has outlined his opposition to the proposal to absorb his powers into the ICO.<sup>5</sup> One of his arguments against absorption is that he exercises a different kind of function, which shouldn't be mixed up with others. It may also be that bringing all data and information-related regulation together could be too much for one organisation, or one organisational structure, to handle coherently.

**These decisions could be made on the basis of the required functions in legislation.**

The start of the consultation provides a list of legislation the ICO has responsibility for. In a similar way, it may be helpful to look at the particular functions underneath that legislation and those exercised by related commissioners and consider where they might best sit.

### **Freedom of Information should not be overlooked**

**Fol work is being squeezed.** A recent report by openDemocracy, Art of Darkness, found that the ICO budget for Fol casework is shrinking, despite its caseload is increasing.<sup>6</sup> In 2015/16, two thirds of ICO decision notices were issued within 180 days; by 2019/20, just less than one third were. ([Institute for Government research](#) also shows a decline in the information released by government departments in response to Fol requests in years.) The whole conversation around the ICO in the context of the consultation is about data protection, but there is a risk of forgetting the vital function of Fol.

**The ICO cannot solve this problem itself.** There was some discussion of the different funding and reporting arrangements for data protection and Fol, the former being overseen by DCMS and funded from the data protection fees paid by organisations, the latter being overseen by, and funded by grant-in-aid from, the Cabinet Office. The ICO cannot cross-fund other areas from those income sources.

### **Regulators have a life cycle**

**Independence can be over-interpreted.** A newly-established independent regulatory scrutiny body can sometimes run the risk of over-interpreting independence as meaning remoteness or distance or a particular kind of protective outlook. The body can become detached from its policy context and the community that it regulates.



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**Precedent can become inhibiting.** There is also a danger that past enforcement decisions start to imprison the regulator in a caricature of itself – arguably the Health and Safety Executive has found this, to the extent of the cultural meme of the health and safety person who would who would stop people climbing upstairs because it wasn't safe. It may not be true, but it becomes embedded. There may be a whiff of this in the story about pub ordering apps.

**Change in many directions at once creates risk.** If a regulator is reshaped radically in its governance and leadership structures at the same time as its purposes are being reshaped then, with new people coming in, there can be a lack of clarity about the new institutional arrangements or what the new strategic direction is. This could be a moment of vulnerability, when the regulator could be perceived as weak or as being in the pocket of a particular kind of view from government. That may not be the fault of the people being brought on board.

**Powers should be reviewed and justified.** There should be an evidence base for any powers – especially since GDPR is relatively new. Some existing powers have been used infrequently, some haven't really been exercised at all.

There are points in the life cycle where a regulator's leadership has to be particularly sensitive to these issues, and the ICO will have to be cognizant of these in the next phase of its life.

### **The ICO may be being asked to take on too much, or being given conflicting priorities**

**The ICO is being asked to have regard to a long list of things.** The list includes economic growth and innovation, competition, public safety, the DCMS secretary of state's statement of strategic priorities for the organisation, governance, and wider international priorities. On the one hand, that formulation of "having regard to" might be a way of trying to do that in a principles-based way, rather than setting out a list of exact rules. On the other hand, it's quite a long list of things to have a regard to if you're managing an organisation (and given what they already have to deal with). It's not necessarily entirely clear how to balance all of those things. "Having regard" to all sorts of things does require it to have good and varied sources of evidence and input (for example, it needs economic analysis but also a good understanding of the potential trade-offs the public would make and an understanding of other stakeholders).

**A primary objective will help with prioritisation.** Many regulators grapple with long lists of priorities, which can be more easily added to than reduced. That brings a danger that it stops being particularly meaningful – the regulator is required to have regard to everything. The fact the consultation proposes a primary objective is helpful, and gives the regulator a lens it always have to make a judgment through and think about trade-offs through.



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**Some of the new things the ICO should have regard to might hinder its ability to meet its primary objective.** Economic growth and competition are possible examples: the ICO may just think about data through an economic lens, and there has been civil society debate about the extent to which the regulator should care about economic growth versus upholding people's rights. Thinking about data primarily through an economic transactional model is quite different from the world of data privacy and rights. Another example might be the international requirements. Although the ICO talks to international partners, 'data' is clearly a global system and one would expect ICO practice to flow into government's Integrated Review objectives around the UK being a global data and digital hub, that feels slightly different from upholding what the government wants to achieve internationally.

**Ministers may not be best placed to prioritise on organisations' behalf.** Their track record in this regard was described as "not very good nor very helpful". Regulators tend to be given a long list of statutory objectives, reflecting different policy objectives, with lots of trade-offs within them. Regulators look for a ministerial steer on what to concentrate on, but ministers don't actually give much of a steer; the long list is "just a convenient restatement of things that the minister wants to be able to say they've asked the regulator to do". People could be forgiven for scepticism about whether those ministerial steers can be relied on.

### **The ICO needs operational freedom to deliver against its objectives**

**The ICO board needs the freedom to set its strategy.** There needs to be real clarity about what the objectives are and when government is saying "This is what you must do". Then should then be a space in which the board can decide how best it can achieve that. There should be a space where DCMS does not interfere with that in practice, even if it has the power to do so, except by exception when things are not going well.

**Principles-based data regulation has been a UK strength.** The current trend in data management is towards 'principles-based regulation' in which government would say this is what we're trying to achieve, these are some of the sorts of standards we envisage, but how you do it is up to you (like GDPR and equivalents in other jurisdictions like Australia and Canada). That gives the flexibility to adjust to very different situations. The idea being that the ability to demonstrate adherence to relatively few and simple guiding principles then gives a regulator the flexibility to say: 'Can we try it this way?' During the pandemic, other countries with different data regulatory regimes did not have this option, and simply stopped what they were doing, while the UK was able to adapt.

**With multiple requirements, it is still important to focus on opportunities.** For example there may be a risk of focusing too much on the protection side of things and forgetting about the risk of not doing things with data. This also has a cost to the public. A regulator has to have a balanced view – it's not just about saying no, it is also about looking at what government is trying to achieve to the benefit of the public.

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**Streamlining complaints should enable the ICO to use its limited resources more effectively.** Requiring organisations to deal with complaints in the first instance before they can come to the ICO feels sensible, and is something that a lot of other regulators would expect. But there are risks, such as ensuring organisations put a proper complaints processes in place rather than setting them up to frustrate complainants; and ensuring the ICO is still able to monitor trends and spot emerging issues. There may also be occasions where complaints should be supercharged (the IfG has [previously recommended](#) Fol requests about data already mandated to be published should be subject to different rules, although there are already internal complaints processes for Fol).

### **Comparison with other regulators is important to get these judgements right**

**There were questions about how the mandates for other regulators were set.** This might be by the organisation, by its sponsoring department, or by the secretary of state. The consultation (and the ICO response to it) references some analogies, but a list of how various components with regard to regulatory independence – appointments, objective setting, funding – work for other regulators would be helpful. There are some collections of best practice, including from the National Audit Office.<sup>7</sup> Participants also wondered what the best comparators would be for the ICO - the Office for Statistics Regulation, or Ofwat and Ofgem, which regulate economic transactions? That might have consequences for how we think about 'data' and how the regulator approaches its role.

**But the ICO is unique in some respects.** As well as drawing analogies with other regulators, we should draw out where the ICO differs – for example, in its cross-sectoral scope and oversight of the public sector as well as private. The ICO should be aligned with other regulators where possible and not an outlier, but “there are some areas where the responsibilities and remit of the ICO might lead us to a different answer. It is important to recognise that not all regulators are the same”.

Thinking through issues such as the relative influence of parliament and ministers, and of the organisation and government, could also be helpfully informed by comparison to other regulators and commissioners.

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