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The (Scheme) Actuary as a Data Controller

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June 2014

Discussion Areas

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- New IFOA guidance
- Data Protection Act refresher
- Compliance obligations – and risks of non-compliance
- When can an actuary be a data controller?
- Case study
- Practical implications
- Proposed new European Regulation



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Some pertinent questions

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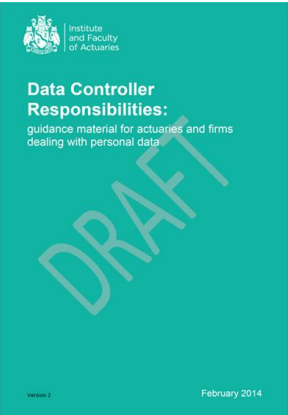
When you process personal data in performing your work are you confident that you are always doing so as an employee on behalf of your firm, and that your firm is merely a data processor?

Has your firm made a notification to the ICO on your behalf?

Has your firm reviewed (or is it reviewing) its data protection policies and procedures?

Does your firm need to (or has it) updated its contracts (e.g. appointment letters, terms of employment, client services agreements) to allocate compliance responsibilities?

What insurance / indemnity cover does your firm carry for your benefit?



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IFOA does not express a view on the interpretation of the Data Protection Act (DPA) or its application to Scheme Actuaries

It may be possible for a Scheme Actuary and/or their employing firm to be a data controller when processing data in relation to a scheme

Analyse whether (and when) and to what extent you are / your firm is: (a) processing personal data; and (b) acting as a data controller / data processor

If you are acting as a data controller: (a) take steps to ensure compliance with the DPA; and (b) create a clearly documented audit trail demonstrating that compliance



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What is Personal Data?

DPA (excerpt from Section 1)

“**data**” means information which:

- a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- b) is recorded with the intention that it should be processed by means of such equipment,
- c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, ...

“**personal data**” means data which relates to a living individual who can be identified:

- a) from those data, or
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes, any expression of opinion about the individual and any identification of the intentions of the data controller or any other person in respect of the individual.

Guidance on determining if data is personal data: Kelway and Edem Cases

- Is the material “data”?
- Is the data “personal data”?
- The Durant test
- The Article 29 Working Party guidance
- The ICO technical guidance note



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Guidance – Durant and WP 136

Durant case

Does the data:

- Have personal connotations affecting the data subject's privacy? For this purpose, the data must be information about the data subject's personal or family life or his business or professional capacity, rather than purely biographical or factual with no personal connotations
- Contain biographical information in a significant sense rather than recording the data subject's involvement in a matter or event with which the individual has no personal connections?
- Have the data subject as its focus?
- Fall in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree.

Article 29 Working Party Opinion (WP 136)

Does the data “relate” to an individual in the sense that it is “about” that individual of its:

- **Content.** Does the information refer to the identity, characteristics or behaviour of the individual regardless of any purpose on the part of the data controller or a third party, or the impact of that information on the data subject?
- **Purpose.** Is the information used to determine or influence the way in which the individual is treated or evaluated?
- **Result.** Is the information likely to have an impact on the individual's rights and interests, taking into account all the circumstances surrounding the precise case?

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Guidance - ICO Technical Guidance Note

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Information Commissioners Office Technical Guidance Note



Is the answer to any of the following "Yes"?

- Can a living individual be identified from the data, or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
- Does the data "relate to" the identifiable living individual, whether in personal or family life, business or profession?
- Is the data obviously about a particular individual?
- Is the data "linked to" an individual so that it provides particular information about that individual?
- Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
- Does the data have any biographical significance in relation to the individual?
- Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
- Does the data impact or have the potential to impact on an individual, whether in a personal, family, business or professional capacity?

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Sensitive personal data

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"sensitive personal data" means personal data consisting of information as to:

- the racial or ethnic origin of the data subject
- his political opinions
- his religious beliefs or other beliefs of a similar nature
- whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992)
- his physical or mental health or condition
- his sexual life
- the commission or alleged commission by him of any offence, or
- any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.



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Processing and data format

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including:

- a) organisation, adaptation or alteration of the information or data,
- b) retrieval, consultation or use of the information or data,
- c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
- d) alignment, combination, blocking, erasure or destruction of the information or data;

Electronic form or structured paper files

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by preference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.



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When is a person a data controller?

Data Controller

- **“data controller”** means ...a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed

Data Processor

- **“data processor”**, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller



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ICO Guidance

Ascertain who decides:

- to collect the personal data in the first place and the legal basis for doing so;
- which items of personal data to collect, i.e. the content of the data;
- the purpose or purposes the data are to be used for;
- which individuals to collect data about;
- whether to disclose the data, and if so, who to;
- whether subject access and other individuals' rights apply i.e. the application of exemptions; and
- how long to retain the data or whether to make non-routine amendments to the data.



In a nutshell

If you are a professional scheme actuary or firm providing a specialist service, and you determine what information to obtain and process in order to do the work (because you are answerable for the content!) you may be a data controller even though the client initiated the work by asking for the advice or commissioning a report

If your appointment is not personal it is likely to be your employing firm that is the data controller

Remember DPA section 1(4)



Summary of key compliance obligations

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Fairness and transparency - Specified purpose(s) - Knowledge - Conditions (e.g. consent)	Respond to data subject requests - Rectification, blocking, erasure, destruction of data - Cease direct marketing - Automated decisions	Email / SMS / fax marketing consents*
Data adequacy, accuracy and relevance; and data retention	Notification (i.e. registration)	Preference Service*
Security: - Appropriate measures (cyber/digital and physical security, policies and procedures; encryption / anonymise, backup etc.) - Data processors / subprocessors	Data transfers: - Adequate protection - Consent - Contractual requirement - Model contract - Safe Harbour - Binding corporate rules	Cookies*
Subject access requests		Use of automated calling devices*
		Telecoms DP requirements*
		Communications systems security*



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* No requirement for Personal Data to be being processed

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Risks / liability?

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Criminal and civil

Fines up to £500,000
(New DP Regulation – 5% of global turnover?)

Reputational damage

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Practical compliance

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Audit your data processing activities and identify:

- The types of data processed
- The nature of the processing
- Any data sharing
- Who the data controller(s) is/are
- Any need to contractually document these activities?
- Which conditions for processing apply?
- Has adequate fair processing information been given?

Allocate responsibilities and make any necessary changes to your notifications, existing documentation, policies and working practices:

- Personally;
- Within or by your firm;
- With employees;
- With subcontractors;
- With your clients; and
- With other third parties

Record your findings, action taken and changes made to create a clearly documented audit trail of compliance



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Contractual allocation of responsibilities

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Issue of fair processing information

Communication / engagement with the ICO

Subject access requests

Security

Data use following termination / expiry

Allocation of liability

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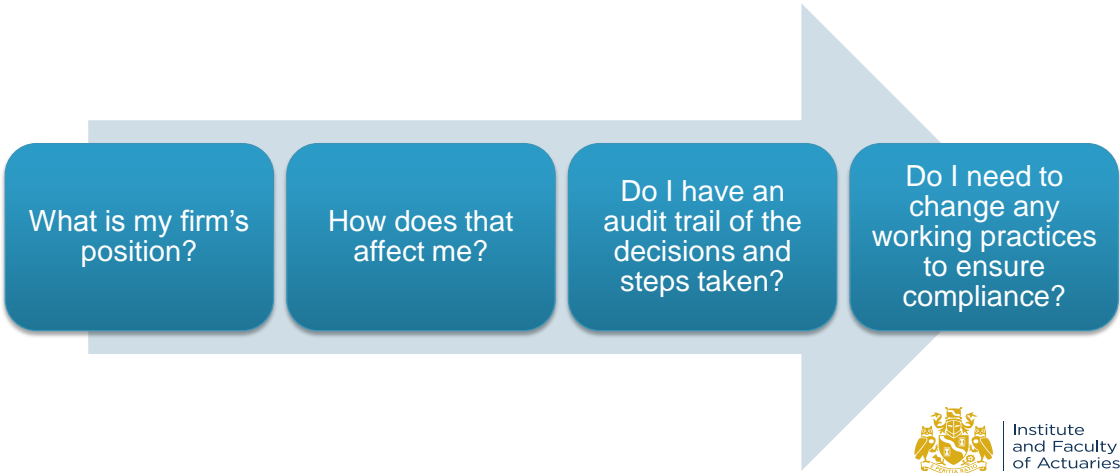
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Case Study

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Things to check

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Proposed new EU Regulation

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Published by EC in January 2012, various proposed revisions, will take direct effect in all EU member states when implemented

Key features:

- Will apply to businesses outside of the EU providing goods or services to, or monitoring the behaviour of, data subjects in the EU (e.g. online services/sales; cookies, tracking devices)
- Larger fines: up to €1m or [2 / 5]% of global turnover?
- Mandatory data breach notification (within 24 hours/without undue delay)
- Requirement for consent to be freely given, informed, specific and explicit
- Data protection officer requirement for larger firms
- Privacy by design and default; privacy impact assessments
- Right to be forgotten / of erasure; right to data portability
- Direct obligations on data processors



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Questions?

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June 2014
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