

COVID-19 Data Protection (GDPR) Issues

23rd March 2020

Summary

The Information Commissioner's Office, which regulates Data Protection regulation within the UK, has issued guidance for those who control and process personal data during the coronavirus pandemic.

The guidance confirms that the ICO appreciates that business resources are likely to be pushed to a limit, and concentrated in other areas, during this period. However, whilst it will take this into account, it reiterates the importance of compliance.

Ensuring continuing compliance

One of the key proponents of the GDPR and the Data Protection Act 2018 is proportionality. The ICO recognises the fact that businesses are dealing with a wholly unprecedented issue and that this will affect a business' resources and time, particularly those of SMEs and smaller businesses. Therefore, the ICO will still expect businesses to deal with data protection issues and requests, but appreciates that the response may not be as prompt as at other times.

In terms therefore of ongoing data protection assessments or audits, it seems that the ICO will allow some forbearance whilst attention is concentrated on other more pressing requirements. That said, businesses still need to ensure that their compliance remains entirely in place and effective.

Access requests

For access requests received from individuals, the ICO does not have the power to increase the standard 28 day period for compliance. However, it would seem it is unlikely that it will take any action if there is a delay caused by the business who has received the request having to divert its time and resources elsewhere during this time. The ICO has said that it will explain to those making a complaint that delays may be understandable.

In our view, requests should be dealt with wherever reasonably possible within the 28 day time period. If you are likely to experience a delay because of pressure of time or resource, then it would be advisable to inform the individual making the request and to set out when it is likely that you will be able to comply. Clearly, it will not be permissible, and will be unacceptable to the ICO, for COVID-19 to be used as an excuse to simply ignore or unreasonably prolong complying with a request.

Homeworking

Homeworking is likely to involve personal data being taken out of the work environment, whether electronically through remote access to your business' systems, or on paper. It is extremely important to ensure that you have all reasonable and proportionate protection in place to ensure that data remains safe.

If your business does not have any form of policy for remote working in place, then we advise that you carry out an assessment of the risks and what action your business will take to minimise the risk of security breaches. You should document that process and ensure that all staff who are working from home, or otherwise away from the office, are aware of their obligations.

In the event of a security breach, you need to be able to demonstrate the measures that you have taken, how you have assessed the risks, and done what you can to minimise those risks bearing in mind the resources available to you. If you reasonably could have done something but did not do so then you will be in difficulty.

Keeping staff informed

You have a duty of care for your staff and to protect their safety. The ICO have confirmed that you can, and indeed should, keep staff safe at all times, which includes revealing whether an employee has contracted coronavirus. However, you probably should not disclose the identity of the individual concerned and it would be disproportionate to divulge more than is absolutely necessary to protect the rights of the individual.

Information about others and privacy notices

There is, understandably, a lot of concern about interaction with others, such as clients or customers, particularly given the advice on social distancing. It is therefore not unreasonable, given your duty of care to your staff, to ask customers to divulge certain information before meeting with them. You should remember however that the information must be proportionate, and only used for the purpose it is given to you.

The requirement for this information should, ideally, be contained in your privacy notice, explaining for what purpose it will be used, on what lawful basis, and how long it will be retained for. This however is something that will not be at the forefront of many business' minds at this difficult time and we believe it is unlikely you will face criticism from the ICO for not doing so, but if this unprecedented situation continues for the foreseeable future then it may well be that it will be something the ICO will expect you to have in place.

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