

The Information Commissioner's response to Ofgem's consultation regarding providing financial protection to more vulnerable consumers

Introduction

The Information Commissioner has responsibility for promoting and enforcing data protection legislation in the UK. She is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

Currently, the Data Protection Act 1998 governs how organisations hold and use personal data in the UK. From 25 May 2018, the General Data Protection Regulation (GDPR) takes effect. The Government has also laid the Data Protection Bill before Parliament. These pieces of legislation will significantly reform data protection law in the UK.

General views on proposals

The Information Commissioner welcomes the opportunity to respond to Ofgem's proposal to protect the interests of the most vulnerable consumers. The Commissioner's response is restricted to those areas that fall within her regulatory remit.

The Commissioner appreciates the importance of protecting individuals who are in vulnerable situations. She understands that those who are most vulnerable may be least able to engage effectively in the markets, which can mean they spend more for gas and electricity.

The proposal to use data matching against lists held by the Department for Work and Pensions of individuals receiving benefits would involve cross-referencing the personal data of several million people. There is also the proposal that companies should use the data they already hold to identify consumers who may be in vulnerable situations.

The Commissioner notes that the proposals are being developed in accordance with the Digital Economy Act's facilitation of limited personal information sharing within the public sector and with gas and electricity suppliers in order to protect those in fuel poverty. While the consultation document notes that this information sharing would be undertaken on the condition that other data protection and privacy obligations are met, there appears to be no consideration of the impacts that data protection reform, introduced by the GDPR and Data Protection Bill, will have on the proposals. The requirements of these pieces of legislation should be placed at the centre of the proposals as they are developed. While the aim of providing protection to more vulnerable customers is understandable, achieving it should not come at the cost of infringing upon individuals' fundamental privacy and data protection rights.

Key data protection considerations

A key principle of data protection law requires that individuals should be aware of how their information will be used, and for what purposes. It is unclear whether the individuals whose data will be matched against recipients of benefits would reasonably expect their personal data to be used in the ways proposed in the consultation document or whether individuals will expect their energy company to profile them for vulnerability. Thought will need to be given to the most effective means of informing consumers that the data-matching exercise is planned, and how to give individuals the opportunity to object, make further enquiries, or exercise their broader data protection rights.

Another requirement of the law is that organisations must have a lawful basis for collecting or otherwise handling personal data. Under the GDPR, these are set out in Article 6. A key requirement of GDPR Articles 13 and 14 is for organisations to inform individuals of their lawful basis for processing.

Where information relates to an individual's mental or physical health, it will be classed as 'special category' data, and attracts additional protections under the law. Names of individuals receiving benefits in relation to a disability will likely be special category data, even though their specific condition would not be known. If suppliers would be able to access, or would be supplied with, information revealing that an individual was in receipt of disability benefits, then a further condition from Article 9 of the GDPR would need to be met. Suppliers will also be required to satisfy a condition under Article 9 where processing of existing customer data, potentially involving profiling or data analytics, infers that an individual or individuals may suffer from mental or physical health conditions.

Article 22 of the GDPR is concerned with automated profiling that produces legal or similarly significant effects on individuals. It does not differentiate between a positive and a negative effect. If the process for identifying vulnerable individuals and changing their tariff is solely automated, then consideration would need to be given as to the impact of the requirements under Article 22. Where automated decision making takes place, including profiling, organisations will be required to inform individuals about the process, including meaningful information about the logic involved and the significance and envisaged consequences of the processing.

Article 35 of the GDPR places a duty on organisations to carry out data protection impact assessments (DPIAs) under some circumstances, set out in Article 35(1), and (3). In particular, DPIAs are mandatory in the case of large scale processing of special category data, such as data relating to mental or physical health. Depending on the final form of the initiative, this may be required of DWP, Ofgem, or suppliers. Even where DPIAs are not mandatory, they can provide a useful tool for managing data well, and for mitigating risks. The Commissioner published guidance under the Data Protection Act 1998 on Privacy Impact Assessments. While this is being reviewed in light of the changes brought about by the GDPR, it provides a framework for beginning an impact assessment.

Concluding remarks

This response has set out a number of key data protection and privacy issues that should be taken into consideration as Ofgem's proposals are developed. However, Ofgem should not lose sight of the fact that the processing of personal data described in the consultation document will need to be undertaken in compliance with all relevant requirements of data protection law. If the privacy of individuals is not given the consideration it requires during the development of the proposals, there is a high risk of infringing upon fundamental data protection rights.

The Information Commissioner's Office would welcome the opportunity to discuss the proposals with Ofgem in more detail ahead of the planned statutory consultation in spring 2018.