

ICO'S REGULATORY APPROACH

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SUMMARY

Until quite recently, notification of personal data breaches such as cyber-security attacks and complaints were confidential unless and until there was a fine or other reprimand which may have been imposed by the UK privacy regulator known as the Information Commissioner's Office's ("**ICO**"). This meant that organisations could feel at relative ease when notifying the ICO of a personal data breach without any immediate damage to reputation in doing so. This has now changed and therefore the risk profile in the UK context has significantly increased. This is because since late last year, complaints and self-reported personal data breaches will be made public by the ICO.

PUBLICATION OF DATA SETS

At the National Association of Data Protection Officers annual conference on 22 November 2022, Information Commissioner John Edwards announced that the ICO's approach to regulatory action would focus on outcomes rather than outputs. In other words it was emphasised that the number or quantum of fines does not reflect the ICO's success, failure or impact, rather the ICO's role in encouraging organisations to comply with their GDPR obligations may be a better measure of success.

In the same announcement, the ICO introduced the publication of reprimands issued from January 2022 onwards, subject to a good reason for not publishing a reprimand. The reasons provided for the publication of reprimands included accountability of organisations, informing the economy, specifying the infringing activities and presenting any action taken by the ICO.

However, it is now apparent that prior to the November 2022 announcement, the ICO started to publish on its website a number of data sets covering data incidents. The data sets cover data protection complaints, complaints under section 50 Freedom of Information Act 2000, self-reported personal data breach cases, civil investigations, cyber investigations, investigations under the Privacy and Electronic Communications Regulations 2003 and Financial Recovery Unit investigations. The data sets are released quarterly and date back to Q4 2020/21. This means that many organisations would not have anticipated that their previously reported data breaches, complaints and investigations would be released to the public.

Where applicable, the information published in each data set includes: (i) the ICO's reference number for the work completed; (ii) the type of ICO work and legislation it falls under; (iii) the organisation responsible for the processing of personal data; (iv) the sector the organisation represents; (v) the nature of the issues involved; (vi) the date the ICO's work was completed; and (vii) the outcome following the ICO's consideration of the issues. Whilst the information provided is high level, the availability of this information has a number of implications.

IMPLICATIONS/KEY TAKEAWAYS

1. Under the UK and EU GDPR, organisations have an obligation to report certain personal data breaches to the ICO within 72 hours of being aware of the breach if possible. Naming organisations that are subject to data breaches and investigations may therefore act as a deterrent to notifying the ICO so as to avoid any reputational damage arising from data incidents. In addition, it is possible that there may be an increase of individual complaints about organisations should individuals become more aware that such complaints will be published.
2. Within the context of M&A transactions, as the data sets are publicly available, they will act as a repository of information for due diligence purposes. Searches can be made on whether an organisation has experienced data incidents involving the ICO, alongside asking questions of the seller.
3. It is noteworthy that the UK is the only country falling under the GDPR regime to publish such information. It therefore remains to be seen whether other supervisory authorities in the EU will follow suit in the spirit of transparency.

FOR MORE INFORMATION

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.



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