

**EXPLANATORY MEMORANDUM TO**  
**THE DATA PROTECTION (CHARGES AND INFORMATION) REGULATIONS**  
**2018**

**2018 No. [XXXX]**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 This instrument sets out a requirement for data controllers (individuals and organisations that handle people’s personal data) to provide information, and pay a charge, to the Information Commissioner. It sets out the different charge levels for different data controllers.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 The notification fees data controllers currently pay to the Information Commissioner (IC) are, as explained in more detail below, £35 and £500 for tiers 1 and 2 respectively. There are three tiers of charges in this new instrument: Tier 1 (Micro Organisations), £40; Tier 2 (Small and Medium Organisations), £60; and Tier 3 (Large Organisations, £2900). There is a £5 discount applied to each tier for data controllers paying by direct debit. In order to reduce the burden on small businesses, organisations which qualify as micro organisations and pay by direct debit will therefore be subject to the same charge as under tier 1 of the current charge structure. Organisations which qualify as small and medium and pay by direct debit will be subject to a charge of £55, which is slightly lower than what it would have been had it risen in line with inflation (£55.97) (based on an annual inflation average of 2.8%). However, most data controllers formerly paying the £500 are likely to now pay a charge of £2900, representing an above inflation increase (an inflationary increase would have seen the £500 fee rising to £623.61 in 2017). This reflects the increased level of information risk inherent in this category of data controllers. The new charge levels are based on the income required to enable the Information Commissioner’s Office (ICO) to adequately deliver on their expanding remit following the implementation of the General Data Protection Regulation (GDPR). A consultation was undertaken (on a proposed model) and the results of this have been reflected in the final design of the new charge structure.

*Other matters of interest to the House of Commons*

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland and it is not a financial instrument that varies between provisions.

#### **4. Legislative Context**

- 4.1 Section 18 of the Data Protection Act 1998 (DPA) currently requires all individuals and organisations that are processing personal data to register with (“notify”) the Information Commissioner (IC), and pay a fee, unless they are exempt. Section 19 of the Act requires an annual fee to subsequently be paid in order for such registration to remain in place. The amount of these fees is currently set out in regulations made by the Secretary of State (the Data Protection (Notification and Notification Fees) Regulations (S.I. 2000/188) (“the 2000 Regulations”). In making such regulations the Secretary of State is required to have regard to the desirability of securing the fees payable are sufficient to offset, amongst other matters, the costs of the IC carrying out her functions under the 1998 Act.
- 4.2 There are currently two tiers of notification fees payable by data controllers (based on size and turnover of organisations): tier 1: £35 – paid by data controllers with turnover of less than £25.9 million per annum and fewer than 250 staff) and tier 2: £500 – paid by data controllers with a turnover of 25.9 million or more per annum and 250 or more staff (or a public authority with 250 or more staff).
- 4.3 The General Data Protection Regulation (GDPR) will come into force on 25 May 2018 and apply directly to all EU Member States. The Data Protection Bill 2017 will implement the GDPR; provide for relevant derogations where Member State flexibility is allowed; and provide for processing for the purposes of law enforcement and intelligence services (which do not fall within the scope of EU law).
- 4.4 The GDPR does not require organisations to register with national data protection supervisory authorities (such as the ICO) in order to process personal data. As a result, the existing statutory requirements to provide a notification and pay a fee to the IC are to be repealed.
- 4.5 Article 52(4) of the GDPR places a requirement on Member States to ensure that their supervisory authorities are provided with the financial resources necessary for the effective performance of their tasks. These Regulations give effect to this requirement, replacing notification fees with new charges on data controllers, unless they are exempt.
- 4.6 The Digital Economy Act 2017 (c. 30) contains provisions (sections 108 to 110) on “Charges payable to the Information Commissioner” which enable the government to introduce regulations in respect of charges to be paid to the IC. Such regulations can set out the charge a data controller is to pay, and information to be provided, to the Information Commissioner. Section 108 (8) of the Digital Economy Act defines a data controller as “a person who, alone or jointly with others, determines the purposes and means of the processing of personal data.” All data controllers processing personal data within the scope of the GDPR and the Data Protection Bill 2017 are required to pay charges, unless a relevant exemption applies.
- 4.7 The powers in sections 108 to 110 the Digital Economy Act will effectively be replaced by clauses 137 and 138 of the Data Protection Bill 2018 once enacted; thereafter, these Regulations will have effect as if made under these powers in the Bill. Clauses 148, 154 and 157 of the Bill 2018 make provision for the Commissioner to, ultimately, issue fixed penalties for non-compliance with regulations made under clause 137. The amount of those penalties is to be set by the Commissioner (within the limits set by clause 157) and shall be set out in a document produced and published by the Commissioner.

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is in the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

## **6. European Convention on Human Rights**

- 6.1 The Minister for Digital and the Creative Industries has made the following statement regarding Human Rights:

“In my view the provisions of the Data Protection (Charges and Information) Regulations 2018 are compatible with the Convention rights.”

## **7. Policy background**

### *What is being done and why*

- 7.1 These Regulations make provision to ensure that the IC has the financial resources necessary for the performance of her tasks and exercise of her powers as required by the GDPR. The charge levels have been increased from the current level of fees to reflect the increased responsibilities of data protection supervisory authorities such as the IC under the GDPR. For example, the GDPR will expand the IC’s responsibilities in relation to mandatory breach notification, data protection impact assessments and certification, as well as increasing the scope and scale of existing IC activities. DCMS estimates undertaken in 2016 analysing the costs associated with implementing the GDPR found that the ICO’s income requirements in terms of its data protection functions will increase from approximately £19 million in 2016/17 to approximately £33 million in 2020/21 once the organisation has fully transitioned to the new requirements. A financial forecast for the first year of operation under the GDPR (2018/19) sets the income requirement for the ICO at approximately £30 million.
- 7.2 The new funding model for the IC has three main policy objectives:
  - a) Safeguards the ICO’s statutory independence by ensuring an adequate and stable level of funding, with no recourse to public funds.
  - b) Raises awareness of, and therefore compliance with, data protection obligations by data controllers.
  - c) Builds regulatory risk into the charge level.
- 7.3 The new funding model is aimed at ensuring that the new charges are fair and reflect the relative risk of the organisation’s processing of personal data. Similar to the previous notification fees, the size of the data protection charge will still be based on the organisation’s size and turnover but these criteria have been updated to more closely align with standard HMG classifications for micro, small and medium businesses. This acknowledges that large organisations are likely to process more personal data and therefore will generally draw more heavily on the ICO’s resources than small organisations that process small amounts of personal data. In designing the new charge structure, the Department has modelled the anticipated income generated for the remainder of the current spending review. Taking into account sensitivities in the assumptions underpinning this model and the ICO’s forecast income requirements for this period, it is not anticipated that significant surpluses will be generated. It is our intention to review the model once the first year of income has been received.
- 7.4 The new charges are as follows:

- a) Tier 1 (Micro Organisations) (£40) applies to data controllers that have less than or equal to 10 members of staff or turnover of less than or equal to £632,000 per annum.
  - b) Tier 2 (Small and Medium Organisations) (£60) applies to small and medium data controllers, namely those that are not in tier 1 and have less than or equal to 250 members of staff or turnover of less than or equal to £36 million per annum.
  - c) Tier 3 (Large Organisations) (£2900) applies to large data controllers with more than 250 members of staff and turnover of more than £36 million per annum.
- 7.5 Public Authorities are required to categorise themselves according to the number of members of staff only. Charities and small occupational pension schemes, both of which are defined in the regulations, will, as per the current scheme, automatically be classified in the lowest tier of the new scheme.
- 7.6 A £5 discount applies where payment of the charge is made by direct debit.
- 7.7 In addition to paying the charges, the SI requires data controllers to supply information to the IC in respect of the number of members of staff of the data controller, the turnover for the data controller's financial year and whether the organisation is a public authority. The data controller is also required to provide its name and address.
- 7.8 A data controller is required to pay the relevant charge in respect of each 12 month "charge period", the first of which begins with the date on which a person becomes a data controller. However, existing data controllers (at the time when these Regulations come into force) are not required to pay a charge or provide information to the IC during the period of 12 months since their most recent fee, under the existing scheme, was received by the IC.
- 7.9 In the current system, there are a number of exemptions from the requirement to register with the IC and pay the requisite fee. The exemptions include manual (i.e. non-automated) processing; processing for personal, family or household purposes; for the purpose of maintaining a public register; for staff administration purposes; for the purposes of advertising, marketing and public relations in respect of a data controller's own activities. There is also an exemption for the purposes of keeping accounts, records and making financial forecasts, except in relation to processing of personal data by or obtained from a credit reference agency (within the meaning of section 145(8) of the Consumer Credit Act 1974). In addition, processing is also exempt if it is carried out by a not for profit body for certain purposes or if it is carried out by a judge for the purposes of exercising judicial functions. Some of the exemptions arise from the Data Protection Act 1998 itself, whilst others are set out in the 2000 Regulations. The new Regulations substantially replicate the current exemptions from paying notification fees, with the exception that they, in effect, remove the current exemption from payment of a fee for data controllers who only undertake processing for the purposes of safeguarding national security. In addition we have introduced a clarification to the wording of the existing exemption relating to processing for personal and household purposes so as to make clear that homeowners using CCTV for these purposes are no longer required to pay a charge under the new scheme.

- 7.10 It is our intention to undertake a full review of these exemptions, including publishing a public consultation in 2018. We are especially minded to consider an exemption for elected representatives, together with members of the House of Lords, subject to the consultation.

#### *Consolidation*

- 7.11 None.

### **8. Consultation outcome**

- 8.1 In 2015, the ICO used BDRC, an independent market research company, to conduct initial research about its funding structure. The contractors of the survey were provided with a sample of 10% of the Information Commissioner's Office ("ICO") register including all top fee payers and a random sample of lower fee payers. This equated to approximately 40,000 data controllers, who were then contacted and around 2,000 responded.
- 8.2 Section 109 of the Digital Economy Act 2017 requires the Secretary of State to consult the Information Commissioner, persons likely to be affected, and other interested parties before making this instrument. The DCMS has had regular meetings with the ICO and other government departments on the proposed charge structure, and, in line with this, a targeted consultation was carried out in 2017 by BDRC on behalf of DCMS. The sample for the 2017 consultation was the circa 2,000 data controllers that responded to the ICO's earlier previous research as set out above. Data was collected between 14 September and 2 October 2017, and 333 data controllers responded. The consultation was on a three tier structure, however both the categorisations of those tiers and the charge amounts proposed for each tier were different to those set out in the final charge structure. A decision was made to change the charge structure from that consulted on as a result of the additional evidence, which indicated that a simple model that reduced the administrative and financial burden on small organisations was most appropriate.
- 8.3 The vast majority of respondents to the BDRC consultation indicated that they thought that a three tier charge structure was easy to understand and that it was easy to self categorise. In excess of 60% of respondents considered that the charge levels (which were higher for tiers 1 (£55) and 2 (£80) but lower for tier 3 (£1000)) were appropriate. There were more mixed views towards the fairness of the charge structure, with 44% agreeing that the the new charge structure was fair compared to the current structure. Of those respondents who disagreed that the new charge structure was fair, the majority (86%) said the charges were too high. The remainder gave varying reasons, including that the charges were not appropriate for local government and other public sector bodies who were struggling financially, as well as being too high for charities or very small companies. These responses were taken into account in our decision to amend the model to one that is simpler and less burdensome on small organisations.
- 8.4 This was a closed consultation and, as such, DCMS did not publish a formal response.

### **9. Guidance**

- 9.1 The ICO will provide guidance on the new charges on its website and in its e-newsletter.

## **10. Impact**

- 10.1 The impact on business, charities and voluntary bodies is judged to be minor. The vast majority of data controllers will be within Tier 1 and therefore will pay only £5 more than the previous fee of £35 (or will continue to pay the same charge if they do so by direct debit). This level of charge has been in operation since 2001 and has not increased in 17 years (the higher rate fee of £500 was introduced in 2009). Although charges for organisations that fall within tiers 2 and 3 will be proportionately higher than what they have paid before, they are considered affordable, and reflect the higher risk and cost to the ICO for its regulatory activity for organisations that fall within these tiers.
- 10.2 The impact on the public sector is similar to the impact on business, charities and voluntary bodies.
- 10.3 Increases to fees and charges are not, in themselves, regulatory provisions. The administrative burden on businesses has been assessed as falling below the threshold that would require a full Impact Assessment. For proportionality reasons a full Impact Assessment has not been prepared for this instrument.
- 10.4 As set out in the de-minimis assessment, the Equivalent Annual Net Direct Cost to Business (EANDCB) is as follows:
- a) Central estimate: £1,752,170
  - b) Higher bound estimate: £3,504,340
  - c) Lower bound estimate: £973,747

Estimates are based over a 10 year period using 2014 prices.

- 10.5 The benefits of the charge structure include an adequately funded ICO which is able to meet its obligations to data controllers, particularly in light of the implementation of the new data protection legislation when data controllers are likely to require increased support and guidance. This in turn can help data controllers meet their obligations in respect of their customers and clients personal data, which could increase public and consumer confidence that their personal data will be handled appropriately.

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small businesses. Small businesses formed part of the consultation. In order to ensure adequate funding of the ICO, small businesses are not exempt from the charges per se. However small businesses and sole traders undertaking little processing of personal data are likely to be covered by one of the exemptions, for example, if they only process personal data for the purpose of marketing their business.

## **12. Monitoring & review**

- 12.1 Section 109(5) of the Digital Economy Act 2017 requires the IC to keep under review the working of these Regulations and may from time to time submit proposals to the Secretary of State for amendments to be made to them. Further, the Secretary of State is required by section 109(6) of the 2017 Act to review these Regulations within 5 years of them being made. It is anticipated that a review will be undertaken at the end of the current Spending Review (SR), in 2021.

### **13. Contact**

- 13.1 Maggie McDonald at the DCMS, telephone: 020 7211 6564 or email: [MAGGIE.MCDONALD@CULTURE.GOV.UK](mailto:MAGGIE.MCDONALD@CULTURE.GOV.UK) can answer any queries regarding the instrument.