



Department for
Digital, Culture
Media & Sport

New Funding Regime for the Information Commissioner's Office

Government response to BDRC consultation

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Department for Digital, Culture, Media and Sport

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1. Contact details

This document is the Government's response to a consultation about a new funding regime for the Information Commissioner's Office (ICO), carried out by BDRC (an independent market research company) from 14 September to 2 October 2017.

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This consultation follows the UK Government's [consultation principles](#).

2. Executive summary

The Information Commissioner's Office (ICO) is the UK's independent body set up to uphold information rights. The work of the Information Commissioner and her office is fundamental to the success of our digital economy, which can only flourish with a strong data protection regime in place. It is therefore of vital importance that we provide the ICO with the level of income it requires to continue to deliver as a world class data protection regulator.

The Department for Digital, Culture, Media and Sport (DCMS), as sponsoring Department to the ICO, has a statutory responsibility to ensure that the ICO is adequately funded and resourced to fulfil its regulatory obligations.

In 2015, DCMS, in conjunction with the ICO, commissioned BDRG, an independent market research company, to conduct initial research about the ICO's fee structure. BDRG were provided with a sample of 10% of the ICO's register including all top fee payers and a random sample of lower fee payers. This equated to approximately 40,000 data controllers. 2017 data controllers responded to this initial research, and it was those data controllers who formed the basis of an additional consultation on new data protection charges in 2017.

Following from this closed consultation, the Data Protection (Charges and Information) Regulations 2018 ("the Charges Regulations"), which implement a new charge structure for the ICO, were laid in Parliament on 20 February 2018 and will come into force on 25 May 2018. The new Regulations and accompanying Explanatory Memorandum can be found on www.legislation.gov.uk.

The Charges Regulations provide for a set of charges payable by data controllers (organisations and individuals that process people's personal data) that will fund the ICO's data protection activities. The new structure has been designed to be as simple as possible for data controllers, and to reflect the levels of information risk associated with an organisation.

In light of the high levels of interest in the consultation during the passage of these Regulations through Parliament, Government has committed to publish the consultation and the associated report from BDRG summarising responses. This document provides detail about the consultation on the charges, the Government's response to that consultation, and the new funding regime.

3. Background

Prior to the new charges coming into force on 25th May 2018, the ICO has been primarily funded through a notification fee levied on data controllers, under powers granted in the Data Protection Act 1998 (DPA). These powers are linked to the requirement in the European Data Protection Directive (95/46/EC) for data controllers to notify (i.e. register with) their national data protection supervisory body (such as the ICO). The existing notification fee regime was implemented in the Data Protection (Notification and Notification Fees) Regulations 2000.

Under the notification fee regime, there are two tiers of charge payable. The vast majority of data controllers pay a charge of £35 (payable by data controllers with a turnover of less than

£25.9 million per annum or fewer than 250 staff). A charge of £500 is payable by data controllers with an annual turnover of £25.9 million or more, and 250 or more staff (or public authorities with 250 or more staff).

On 25 May 2018, the General Data Protection Regulation (GDPR) comes into effect. The GDPR applies a new data protection framework across EU Member States, and will be applied in the UK through new data protection laws. Unlike the existing scheme under the DPA, the GDPR does not require data controllers to register with the ICO, although it does permit Member States to make provision for funding of their supervisory authorities. As such, new legislation was required to put in place a framework for the continued funding of the Information Commissioner.

The current fees have not increased since their introduction in 2001 (Tier 1) and 2009 (Tier 2) and have therefore not kept pace with inflation. At the same time, the ICO's remit has expanded significantly under the new UK data protection regime and, as such, they require an increase to their income to enable them to effectively deliver their responsibilities in relation to data protection. For example, new UK data protection laws will expand the Information Commissioner's responsibilities in relation to mandatory breach notification and data protection impact assessments, as well as increasing the scope and scale of her existing activities, with a corresponding requirement to recruit more staff. In 2016, DCMS estimated that the ICO's income requirements for their data protection functions will increase from approximately £19 million in 2016/17 to approximately £33 million in 2020/21. A financial forecast for the first year of operation under the new legislative framework (2018/19) sets the income requirement for the ICO at approximately £30 million.

4. Summary of the results of the consultation

Section 109 of the Digital Economy Act 2017 requires a consultation to be undertaken prior to the Secretary of State making the new Charges Regulations. The consultation was a targeted one, taking into account the UK Government's [consultation principles](#). The new data protection charges are only payable by data controllers, of whom there are approximately 500,000 registered with the ICO. Therefore, a representative sample of the data controllers registered with the ICO was considered most appropriate for a targeted consultation. In addition to the consultation undertaken by BDRC, DCMS had regular meetings and discussions with the ICO and with other government departments on the proposed charge structure, before determining the final model.

Similar to the research carried out in 2015, the research in 2017 used an online questionnaire and was distributed to data controllers who had participated in the 2015 research. 333 data controllers responded to the consultation via the online questionnaire. Data was collected between 14 September and 2 October 2017. A description of the proposed, three tier charging structure was provided to data controllers in the questionnaire, which is detailed in Table 1.

Table 1: proposed charge structure

Tier	Proposed charge	Description
Tier 1: Small and Medium Firms that do not process large volumes of data	Up to £55	<p>Staff headcount below 250; and</p> <p>Turnover below £50 million per annum; and</p> <p>Number of records processed under 10,000</p> <p><i>*Public authorities should categorise themselves according to staff headcount and number of records only.</i></p>
Tier 2: Small and Medium Firms that process large volumes of data	Up to £80	<p>Staff headcount below 250; and</p> <p>Turnover below £50 million per annum; and</p> <p>Number of records processed above 10,000</p> <p><i>*Public authorities should categorise themselves according to staff headcount and number of records only.</i></p>
Tier 3: Large businesses	Up to £1,000	<p>Staff headcount above 250; and</p> <p>Turnover above £50 million per annum</p>
Direct Marketing top up	£20	Organisations that carry out electronic marketing activities as part of their business.

BDRC provided a report of the results of its consultation on 11 October 2017 to DCMS and the ICO. This report, including the questionnaire that was sent to data controllers, has been published alongside this document.

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 were appropriate. There were more mixed views towards the fairness of the charge structure, with 49% not agreeing that the charges proposed for them was a fair amount to pay to fund the ICO's regulatory activities. Of these, the majority (86%) gave as a reason that the charges were too high. Key themes amongst the reasons given by the remaining 14% included that the proposed new charges were too high for both public sector organisations and small businesses, and in particular that charges should be lower for local councils; that the categories as defined in the consultation were too broad and that the requirement to pay a charge was, in itself, inappropriate. Some respondents also commented that the difference in charge payable by Tier 3 compared to Tiers 1 and 2 was too high.

5. Government response and the new charge structure

The Secretary of State has a duty when making the Charges Regulations to have regard to the desirability of securing that the income generated from the charges is sufficient to offset the Information Commissioner's expenses in discharging functions under (amongst other provisions) the Data Protection Act 1998, Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426), General Data Protection Regulation (and any regulations which implement that Regulation, or the Criminal Data Directive). In order to ensure that the information rights of individuals continue to be effectively safeguarded, it is vital that the Information Commissioner is funded properly.

In making the Charges Regulations, Government gave careful consideration to the points raised in the responses to the consultation. In particular, Government decided to simplify the proposed model and address concerns about financial burdens, particularly on small businesses.

The new charge structure is detailed in Table 2.

Table 2: new charge structure

Tier	Categorisation summary*	Charge (if pay by direct debit) ¹
Micro Organisations	Satisfies the following requirements: <ul style="list-style-type: none"> • Members of staff not more than 10, or • Turnover not more than £632,000. 	£40 (£35)
Small & Medium	Satisfies the following	£60

¹ A £5 discount is applicable for all data controllers paying by direct debit.

Organisations	requirements: <ul style="list-style-type: none"> • Members of staff not more than 250, or • Turnover not more than £36,000,000. 	(£55)
Large Organisations	An organisation that does not fall within either of the two categories above.	£2900 (£2895)

The criteria have been structured so that a data controller who meets one of the two thresholds will be eligible to pay the charge at that level (for example an organisation with 260 members of staff, but turnover below £36 million, will fall into the small and medium organisation tier). This reflects the structure of the current notification fee model, where only data controllers with both staff numbers exceeding 249 and turnover exceeding £25.9 million are required to pay the higher fee. Also similar to the current approach, public authorities will be categorised on the basis of number of members of staff only. In addition, charities and small occupational pension schemes will continue to automatically pay the lowest charge.

The final model does not include the proposed top up for electronic direct marketing, as this was considered unnecessarily complicated. The final structure implemented by the Charges Regulations retains three tiers, as proposed in the consultation, but the categorisations of these tiers have been updated to more closely align them with the categorisation of businesses, similar to the approach taken in the Companies Act 2006. The Government considers that this further simplifies the structure from that consulted on and addresses concerns highlighted in the consultation responses about the categories being too broad. The categorisations have been defined in such a way so as to also account for all types of data controllers (and not just companies, for example). In simplifying the structure, Government has also removed the proposed requirement for small or medium data controllers to be categorised on the basis of the number of data subjects about whom they process data. This has been done to ensure consistency and reduce the administrative burden on data controllers in self-categorisation.

Government has carefully considered the concerns raised during the consultation about the level of charges and the difference between the charge payable by Tier 3 data controllers, compared to Tiers 1 and 2. It is estimated that 470,000 data controllers, or 94% of data controllers liable to pay the charges will be categorised as Micro Organisations. Almost 99% of data controllers (495,000) are estimated to fall within the Micro or Small and Medium Organisation Tiers, while the remaining 1% of data controllers (5,000) are estimated as liable for the highest charge of £2,900. However, the organisations in the Large Organisation Tier often represent a high level of information risk and therefore can have a more significant impact on the resources of the Information Commissioner, whilst only representing a relatively small proportion of the register of data controllers.

In deciding on a final charge structure, Government endeavoured to ensure that individuals and small businesses would not be subject to undue burdens as a result of this new charge structure and would not subsidise organisations with typically higher levels of information risk such as large businesses and public sector organisations. As such, the final structure was modified from that proposed in the consultation, so that the charge for micro organisations paying by direct debit is the same as the current Tier 1 fee level (£35). To offset this change, the amount to be paid by the largest organisations was further increased to £2900 to better reflect the higher risk and cost to the ICO for its regulatory activity for these organisations.

Some responses to the consultation stated that the level of charge payable by public sector organisations, and particularly local councils, was too high. It is estimated that approximately 940 public authorities (including central government departments, NHS Trusts and local authorities) will be subject to the highest tier charge. Government understands the concerns of some public bodies having to pay significantly higher charges, especially given that they are funded by the public purse. In determining the final structure, consideration was given to whether the level of charge in the final structure outlined above is appropriate for public sector organisations. It was concluded that, given public sector organisations often hold very sensitive information and can therefore represent a high level of information risk, it would not be appropriate for them to pay a lower charge than other data controllers of a similar size, and therefore be effectively subsidised by small businesses, charities and other data controllers.

The charges meet the ICO's financial forecasts for the next three years and have three main policy objectives, to: incentivise regulatory compliance; build regulatory risk into the charge level; and safeguard the ICO's statutory independence by ensuring adequate funding.

The consultation did not cover exemptions from paying the charges. The new Regulations therefore substantively 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 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.

The current 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. 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.

There is appetite from stakeholders to conduct a review of the exemptions, and Government has committed to publishing a public consultation on them in 2018. Government is especially minded to consider an exemption for elected representatives, together with members of the House of Lords, subject to the consultation.

In line with the Better Regulation framework, a de minimis Impact Assessment was undertaken of the costs to business associated with administering payment of the charges to the ICO. A full Impact Assessment of the costs to business of the charges themselves is not required, as the charges are not classed as regulatory provisions, as defined in sections 22 and 27 of the Small Business, Enterprise and Employment Act 2015.

There is a statutory requirement on the Information Commissioner to keep under review the working of the Charges Regulations, and for the Secretary of State to review the regulations within 5 years of them being made. It is anticipated that a review of the Charges Regulations will be undertaken at the end of the current Spending Review, in 2021.