What type of data do the transitional exemptions cover?

The DPA came into force in 2001. However, certain data is exempt from full compliance until 24 October 2007. This relief applies to manual data held in relevant filing systems ‘subject to processing which was already under way immediately before October 24, 1998’. The term ‘processing already under way’ has given rise to much debate but guidance from the Information Commissioner suggested considering questions such as whether the processing is within a range of activities or business processes already undertaken by the data controller; does the processing result in a new or different application of the data or is it carried out to achieve a new objective? The intention appears to be to cover processing systems that were live and in use before October 1998 so that these benefited from the exemptions but new processing systems did not. However, the exemptions do not apply to new data added to a system post 1998, only what was held prior to October 1998.

Data held in ‘accessible records’, irrespective of when created also benefit from the relief. Accessible records are defined health records, educational records and local authority housing and social services records.

What are the exemptions?

The exemptions given to eligible data cover -

- The first data protection principle (the requirement to process personal data fairly and lawfully), except the requirement to provide individuals with a data protection notice telling them about the processing;
- Principles two - five which cover -
  - Only processing data for purposes compatible with the purpose for which they were originally collected;
  - Ensuring that personal data are adequate, relevant and not excessive, accurate and up to date where necessary and only kept for as long as necessary for the purposes for which they are held.
- Sections 14 (1) - (3) DPA which provide remedies for inaccurate data.

Therefore, the exemptions do not absolve organisations from some compliance - an organisation still has to have regard to the security of the processing, whether any data are to be transferred overseas and to the requirement to provide a data protection notice.

What does the end of transitional relief mean in practice?

The transitional relief exemptions primarily cover relevant filing systems. These are highly structured manual filing systems that have an external structure (for example student files in A - Z order by student surname) and an internal structure (for example sub-dividers for enrolment, contact details, academic information etc). However, following the Court of Appeal ruling in the case of FSA v Michael John Durant, the view taken by the Information Commissioner has been that most manual files are not relevant filing systems and therefore fall outside the scope of the DPA meaning that organisations do not have to now review these for compliance.

In addition, as the exemptions only cover data held pre October 1998, not data added since then, in reality, for files and filing systems that have continued to be used since 1998, most organisations have treated these as within the

Continued on reverse
scope of the DPA anyway and such files should therefore already be compliant.

The loss of transitional relief should really only be an issue for files falling within the definition of a relevant filing system where they have been little used post 1998 (or 2001 when the DPA came into force) - for example historical or archived files that still retain a structure.

The first question for an organisation to consider in relation to historic manual files is therefore whether these fall within the DPA as relevant filing systems. If they do, and the organisation has relied on the transitional relief provisions, perhaps the main issue to consider is retention. Under the exemptions, organisations do not have to have regard to how long they keep personal data for. From October they do and can only keep this for as long as ‘necessary’.

However, public bodies that have considered retention periods for freedom of information purposes and private organisations that have considered retention periods for corporate governance reasons should not find it too great a leap to review how long they keep manual files for. Issues to consider include legal and regulatory reasons, best practice and business need. And if there is a need to keep records for long periods of time and this can be justified, then there is no DPA breach.

Similarly, the requirement to keep records up to date only applies where necessary. If files are no longer in use then there is no need to update them.

Summary

It would be sensible for organisations to carry out a review before October of what records, if any, they have that fall within the test of a relevant filing system and have up until now benefited from transitional relief. However, even for those organisations that do have such records, the end of the transitional relief period should not cause concern where they have data protection compliance and records management policies in place. Taking a common sense and business focussed approach, these can be extended, to the extent necessary, to the files newly brought within the scope of the DPA.

Louise Townsend, Senior Associate
Outsourcing, Technology & Commercial

© Pinsent Masons 2007

This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.