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Data (Use & Access) Bill Evidence: Holding the Information Commissioner's Office (ICO) to Account

1. I am Professor of Law and the Open Society and Co-Director of the Centre for Intellectual Property and Information Law (CIPIL) at the University of Cambridge. My submission reflects some fifteen years of experience as an academic specialising in data protection.

Executive Summary

2. There are well-founded and serious concerns that the Information Commissioner's Office (ICO) is failing to use its formal regulatory powers transparently and appropriately and is not being properly held to account on this.
3. Indeed, although this has received little attention, it appears that the throughout the last year (366 days) the ICO has issued zero fines and zero enforcement notices against businesses under the UK General Data Protection Regulation (UK GDPR).
4. Proper oversight is urgently required which should be secured through the following amendments:
    - After Clause 102, establishing a periodic Human Rights Review of Regulatory Action by the Equality and Human Rights Commission (see Appendix One), and
    - After Clause 103, providing for a right of appeal to the Tribunal against ICO data subject complaint outcomes which raise a matter of general public importance (see Appendix Two).

A Promise of Effective Enforcement to Deliver Sustainable Trust

5. It is widely recognised that the effective regulatory enforcement of core data protection rights guarantees is crucial to building sustainable individual trust in the data relationships which increasingly underpin all aspects of our economy and society.
6. The UK GDPR promises *"strong enforcement"* (Recital 7) and, more specifically, explicitly states that *"penalties including administrative fines should be imposed for any infringement"* save only that a reprimand may be issued instead in cases of a *"minor infringement"* (or where the fine would lead to a *"disproportionate burden to a natural* person" as opposed to a company or government body) (Recital 148). Fines must be *"effective, proportionate and dissuasive"* (art. 83(1)).

7. It is the legal responsibility of the ICO to deliver such strong enforcement. Indeed, binding case law under the GDPR (now the UK GDPR) explicitly states that its *"primary responsibility is to monitor the application of the GDPR and to ensure its enforcement".*[1]
8. The ICO is not only granted formidable legal powers to secure this but, with approximately 1,000 members of staff,[2] is one of the best resourced data protection and electronic privacy (ePrivacy) regulators in the world.
9. The current Information Commissioner, John Edwards, appeared to recognise the responsibility for delivering strong enforcement during his Pre-Appointment Hearing before the Commons' Digital, Culture, Media and Sport (DCMS) Committee on 9 September 2021. In particular, he recognised that *"companies hoover up too much information", "retain it for too long"* and are *"too opaque in their uses of it"* and stated that *"the role of the information commissioner is to bring them into line"*.[3]

Broken Enforcement of Data Protection

10. Unfortunately, the ICO has not delivered and is increasingly ignoring the imperative to ensure strong enforcement.
11. Indeed, according to the Information Commissioner's own published statistics, some 28,582 individuals lodged data protection complaints in 2024 and had their complaints closed by ICO during that year. Only 17 of these cases (0.06%) were explicitly categorised as *"no infringement"* or *"[n]ot information rights"*. However, in only 1 case (0.00%) out of more than 28,000 was *"[r]egulatory action taken"*.[4]
12. It must be stressed that under law *"regulatory action"* encompasses any use at all of the ICO's core corrective powers (enforcement and monetary penalty notices) and/or its investigatory powers (information and assessment notices) (Data Protection Act 2018, s. 160(1)).[5]
13. By way of a letter issued by the Information Commissioner in June 2022, the ICO formally degraded its use of penalties for infringement of the UK GDPR by the public sector. This was done without any initial consultation process and, given that the UK GDPR indicates that both the public and private sector should equally be subject to fines for non-minor legal infringements (see Recital 148 and article 83(1)), would appear to lack a legal basis. Moreover, the ICO's belated partial review of this approach in December 2024 found that this change had tallied with rising data subject complaints and data breach reports, as well as widespread concerns even within the public sector itself about a deprioritisation of data protection.[6]

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[1] *Data Protection Commissioner v Facebook Ireland Ltd & Schrems* (C-311/18), EU:C:2020:559 at [108].
[2] https://ico.org.uk/media2/migrated/4030348/annual-report-2023-24.pdf, p. 94.
[3] https://committees.parliament.uk/oralevidence/2687/html/ at Q27.
[4] https://ico.org.uk/media2/migrated/4032498/ic-353505-c3d8-response-letter.pdf, p. 2.
[5] The ICO in *"ICO25 – Our regulatory approach"* has adopted an even wider understanding of this term which includes *"any action we decide to take in exercise our power under the legislation we are responsible for"* including "giving *opinion or advice, writing guidance, carrying out audits or assessments, taking enforcement action, issuing warnings or reprimands, and launching criminal prosecutions"*. See https://ico.org.uk/media/about-the-ico/policies-and-procedures/4022320/regulatory-posture-document-post-ico25.pdf, p. 4.
[6] https://ico.org.uk/media2/migrated/4032016/psa-post-implementation-review-report.pdf

14. It is of even greater concern that (despite John Edwards statements to the DCMS Committee in September 2021 and as the 2024 statistics clearly disclose) infringements of data protection by companies have in practice been subject to even less regulatory action. Indeed, going by its published information, it appears that over the past year/366 days the ICO has issued zero fines and zero enforcement notices here.[7] The figure in relation to civil society and public sector would appear to be 1 enforcement notice (against the Home Office) and 2 fines (against the Central YMCA and the Police Service of Northern Ireland).
15. Although regulators responsible for enforcing a GDPR legal text have generally been criticised for a lack of effectiveness, these extremely low figures are clearly out of line with comparable European authorities. Thus, although most large data protection fines are handled through the 'one-stop shop' mechanism within the EU (generally involving Ireland or Luxembourg), the yearly average number of data protection fines issued in Spain is reported as being 266 and rises to 351 in Germany (which has regulators at both Länder and federal levels).[8]
16. As regards ePrivacy regulation under the Privacy and Electronic Communications Regulations (PECR), some very limited fines and enforcement notices continue to be issued against those engaged in spam communications in the form of texts, calls and emails.[9] However, no regulatory action at all has been taken against the huge amount of illegal device-based surveillance of individuals for the purposes of personalised commercial profiling and targeting.
17. Even in the core data protection area, complainants have no regular means of redress against ICO inaction since outcomes have been deemed to within the ICO's discretion, the merits of which both the regular courts and even the Tribunal will not revisit.
18. Holistic scrutiny has also been lacking. For example, the Parliamentary Committee (then the DCMS Committee) which ICO formally *"reports to"* was found in practice to have *"been focused on newsworthy campaigns that accord with the particular interests of members, rather than more prosaic scrutiny of the ICO's performance against its statutory functions and own stated objectives"*.[10]

A Credible Response: Effective Holistic and Individual Scrutiny

19. It is unclear if the Government has recognised the seriously problematic reality of the current ICO approach to its enforcement functions and the dangers this poses to sustainable data trust.

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[7] The figure in relation to civil society and public sector would appear to be 1 enforcement notice (against the Home Office) and 2 fines (against the Central YMCA and the Police Service of Northern Ireland).

[8] https://noyb.eu/en/data-protection-day-only-13-cases-eu-dpas-result-fine.

[9] According to a recent Parliamentary answer 13 monetary penalty notices totalling just £1.27M were issued in this area in 2024 (see https://www.theyworkforyou.com/wrans/?id=2025-02-04.HL4721.h&s=speaker%3A24999). The information published by ICO would appear to indicate that 15 enforcement notices were also issued.

[10] Victoria Heuston and James Tumbridge, *Who Regulates and Regulators? The Information Commissioner's Office* (2020), https://iea.org.uk/wp-content/uploads/2020/07/Who-regulates-the-regulators.pdf, p. 18.

20. The only possible response offered in the *Data (Use and Access) Bill* is to expect a greater specification of information in the ICO's Annual Report to Parliament (Clause 102).
21. However, additional information alone will not address the serious substantive problems which are present.
22. Furthermore, even when included within the Annual Report to Parliament, information related to the ICO's core responsibilities has unfortunately not always proved fully reliable and it remains unclear what recourse is possible when this is case.
23. To take but one example, the Annual Report 2022/23 stated the number of concerns lodged by the public under the Privacy and Electronic Communications Regulations (PECR) as 52,707.[11] In contrast, the Annual Report 2023/24 indicated that some 73,038 PECR concerns had in fact been lodged during 2022/23. Apparently, over 20,000 *"PECR Concerns"* related to *"emails"* had previously been entirely excluded from report. No acknowledgment was made of this approximately 40% difference and a difference in excess of 20,000 was also apparent in relation to the figures for 2021/22. [12]
24. It is therefore manifest that any formally enhanced information requirement needs to be allied to scrutiny operating effectively both at a holistic and individual level.

Holistic Scrutiny: A Role for the Equality and Human Rights Commission (EHRC)

25. With our lives ubiquitously digitised and increasingly automated, effective data protection rights within a broader framework of effective human rights are ever more integral to ensuring just and trustworthy relationships within the economy and society.
26. The Equality and Human Rights Commission (EHRC) is recognised (including by the United Nations) as the UK's National Human Rights Institution.[13] It has a statutory remit to *"encourage good practice in relation to human rights"*[14] and a track-record of conducting inquiries and investigations not in in the restricted area of equality and non-discrimination but also the broader area of human rights.[15]
27. The EHRC should therefore be charged with conducting a periodic (biennial) review of the ICO's approach to and track-record as regards regulatory action from a rights perspective and to publicly report on the same including setting out any relevant recommendations to guide future action.
28. As with recommendations emanating from EHRC inquiries generally,[16] the ICO should be required as a party under scrutiny to have regard to any such recommendations (unless these are specifically overruled by Parliament).
29. In order to enhance Parliamentary scrutiny, the report should also be laid before Parliament and sent not only to the Secretary of State but also chair of Commons Select

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[11] https://ico.org.uk/media2/migrated/4025864/annual-report-2022-23.pdf, p. 81 (N.B. this includes *"PECR – Concerns reported"* and *"PECR Concerns – Cookie concerns reported"*).
[12] https://ico.org.uk/media2/migrated/4030348/annual-report-2023-24.pdf, p. 43.
[13] Baroness Kishwer Falkner, 'A status' is welcome recognition of our human rights work (10 November 2022), https://equalityhumanrights.com/en/our-work/blogs/%E2%80%98-status%E2%80%99-welcome-recognition-our-human-rights-work.
[14] Equality Act 20016, s. 9(1)(b).
[15] See https://www.equalityhumanrights.com/our-work/inquiries-and-investigations.
[16] Equality Act 2006, Sch. 2, para. 18.

Committee charged with overseeing the ICO (currently the Science, Innovation and Technology Committee) and also to the Joint Committee on Human Rights.

30. An amendment along these lines (for insertion after Clause 102 of the Bill) is set out in appendix one of this submission.[17]

Individual Scrutiny: A Role for the Tribunal System

31. In seeking to establish effective data protection rights, the UK GDPR accords a central role to individual complaints to ICO and these necessarily cover a wide and varied area.
32. It is therefore clear that ICO regulatory action (or inaction) must be subject to effective scrutiny from a data protection rights perspective in this individual context also.
33. The Tribunal system already provides such scrutiny for controllers and processors who are subject to ICO regulatory action in the form of a right to appeal. It has, therefore, acquired substantial expertise in the scrutiny of data protection regulatory action.
34. In principle, a similar appeal opportunity should be available for data subjects who assert that a complaint outcome is not appropriate due, for example, to it not being tied to any regulatory action despite a serious infringement of data protection being manifest.
35. In order to avoid overburdening both the ICO and the Tribunal, such an appeal should be confined to those data subject appeals which raise arguable points of general public importance.[18]
36. Albeit translated into a merits context, this kind of limitation would broadly mirror the Supreme Court's threshold when considering appeals on a matter of law.[19]
37. An amendment along these lines (for insertion after Clause 103 of the Bill) is set out in appendix two of this submission.[20]

David Erdos
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Appendix One – Amendment for Holistic Scrutiny of Regulatory Action

After Clause 102, insert the following new Clause –

"Equality and Human Rights Commission Review

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[17] This wording of this amendment is drafted on the assumption that the redesignation of the ICO as the Information Commission has taken effect.

[18] This new appeal mechanism would complement the right to apply for an order to progress a complaint under section 166 of the Data Protection Act 2018 which case law has established is purely procedural in nature and can therefore not examine the merits of a complaint outcome at all. See *Killock and Veale & Ors v Information Commissioner* [2021] UKUT 299 (AAC) and *Delo v Information Commissioner* [2023] EWCA Civ 1141.

[19] https://supremecourt.uk/how-to-appeal/can-i-appeal.

[20] Aside from introducing a general public importance threshold, this amendment is modelled on that tabled by Lord Clement-Jones in the House of Lords. See https://bills.parliament.uk/publications/57358/documents/5489, p. 14 (Amendment 151). As with the amendment in Appendix One it is drafted on the assumption that the intended redesignation of the ICO as the Information Commission has taken effect.

(1) The 2018 Act is amended as follows.

(2) After section 161 insert –

"Section 161A: Human Rights Review of Regulatory Action

(1) The Equality and Human Rights Commission must -

(a) review the extent to which, during each review period, the Information Commission's regulatory action effectively and appropriately ensured the protection of personal data and thereby contributed to the enjoyment of human rights within the United Kingdom,
(b) based on its review findings, make any general recommendations which it considers necessary as to how the Information Commission might better contribute to the enjoyment of human rights through regulatory action to protect personal data,
(c) prepare a report of the review including any general recommendations,
(d) submit the report to the Secretary of State, the person who chairs the Joint Committee on Human Rights and the person who chairs the Science, Innovation and Technology Committee of the House of Commons,
(e) lay the report before Parliament,
(f) publish the report.

(2) In this section:

"human rights" has the same meaning as in Section 9(2) of the Equality Act 2006;

"regulatory action" has the same meaning as in Section 160 of the Data Protection Act 2018 including the effective use or otherwise of such powers in any review of the processing of personal data for the purposes of journalism within the meaning of Section 178 of the Data Protection Act 2018;

"review period" means –

(a) the period of 2 year beginning on the day on which the Information Commission places its first annual report on regulatory action before Parliament,
(b) each subject period of 3 years beginning on the day after the day on which the previous review period ended.

(3) Each review will constitute an inquiry within the meaning of Section 16 of the Equality Act 2006.

(4) The Equality and Human Rights Commission must start a review under this section, in respect of a review period, within 3 months beginning when the review period ends.

(5) The Equality and Human Rights Commission must submit and publish the report before the end of the period of 12 months beginning when the Equality and Human Rights Commission started the review.

(6) If at any time after the passing of this Act—

(a) the name of Joint Committee on Human Rights is changed; or
(b) the functions discharged by this Committee at the passing of this Act, or functions substantially corresponding thereto, are discharged by a different Committee of Parliament, references in this Act to the Joint Committee on Human Rights shall be construed as a reference to that Committee by its new name or, as the case may be, to the Committee for the time being discharging those functions.

(6) If at any time after the passing of this Act—

(a) the name of Science, Innovation and Technology Committee is changed; or
(b) the functions discharged by this Committee at the passing of this Act, or functions substantially corresponding thereto, are discharged by a different Committee of the House of Commons, references in this Act to the Science, Innovation and Technology Committee shall be construed as a reference to that Committee by its new name or, as the case may be, to the Committee for the time being discharging those functions.

Appendix Two – Amendment for Individual Scrutiny of Regulatory Action

After Clause 103, insert the following new Clause –

"**Right of appeal against Information Commission's complaint outcome**

(1) The 2018 Act is amended as follows –

(2) After section 166 insert –

"**166A Appeals against complaint outcomes**

(1) This section applies where a data subject makes a complaint under section 165 or Article 77 of the UK GDPR and the Commission informs them of an outcome.

(2) The data subject may appeal to the Tribunal against all or any part of the outcome.

(3) The Tribunal must determine any appeal under this section on the merits by reference to the grounds of appeal set out in the notice of appeal, save that where the appeal raises no arguable point of general public importance it must be dismissed.

(4) The Tribunal may review any determination of fact on which the outcome against which the appeal is brought was based.

(5) If the Tribunal considers—

(a) that the outcome against which the appeal is brought is not in accordance with the law,
or

(b) to the extent that the outcome involved an exercise of discretion by the Commission, that the Commission ought to have exercised the discretion differently, the Tribunal must allow the appeal.

(6) Where the Tribunal allows the appeal, the Tribunal must set aside the outcome and—

(a) remit the complaint to the Commission, or

(b) vary the outcome.

(7) The power to vary the outcome of the Commission includes the power to substitute another outcome which the Commission could have given or made.

(8) Otherwise, the Tribunal must dismiss the appeal."