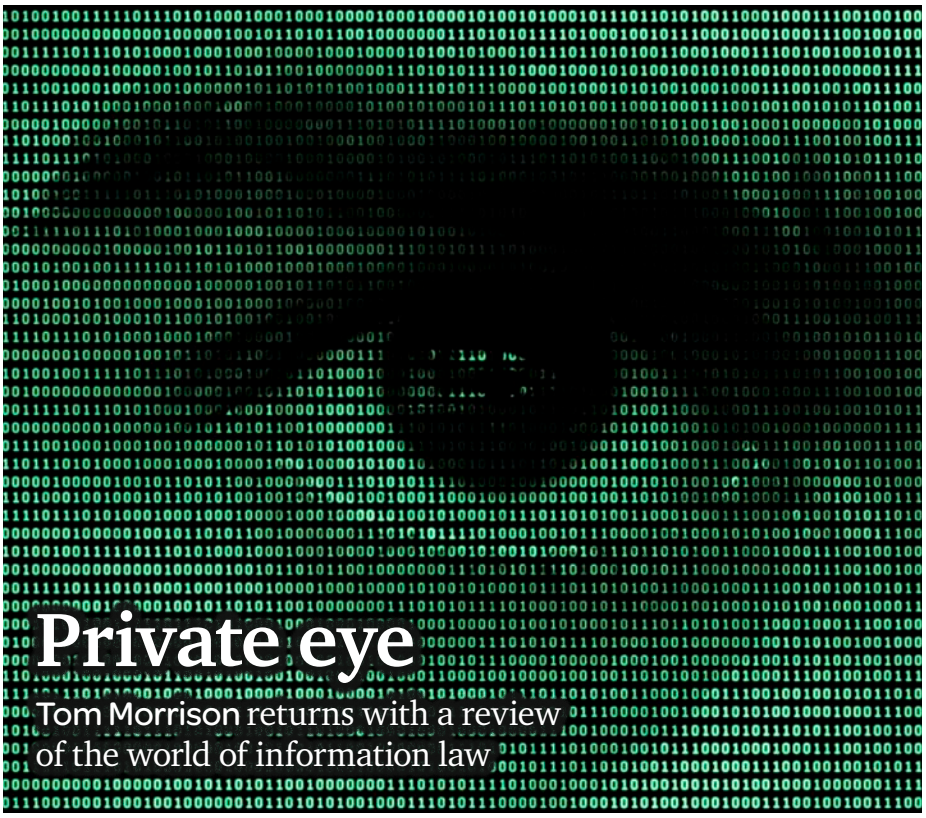

Private eye

Tom Morrison returns with a review of the world of information law

IN BRIEF

- Significant enforcement activity in 2015, especially in relation to spam texts and calls.
- Freedom of Information being reviewed by Independent Commission.
- All change at the ICO as changes to regulatory framework on the horizon.

It has been a busy year for the Information Commissioner's Office (ICO), but some significant changes are afoot which makes it unlikely that 2016 will be any quieter.

We started the year with the usual glut of information law-related news including a flurry of enforcement action. This time it was high street shoe retailer Office in the spotlight, having had to enter into an undertaking with the ICO following a hack of Office's systems which exposed the personal data of over one million of its customers. Contact details and website passwords were held in an unencrypted database on servers which were due to be decommissioned. For businesses this highlights not only the well rehearsed concerns around data security but also the fact that holding onto information for longer than is needed automatically increases risk. For individuals, it is a timely reminder to make sure that you do not use the same password for multiple services otherwise when one is hacked all become vulnerable.

Sadly breaches such as this are increasingly commonplace, with TalkTalk now very much in the headlines at the time of writing having been the subject of a targeted attack. While businesses will need to keep up the battle against those who would do harm with people's information, every one of us will need to keep up our own good online hygiene. We take measured risks every day in our offline lives and we need to do the same when it comes to our use of the Internet. Just as there is general consensus that it is worthwhile putting on our seatbelts before setting off in the car, so we should take sensible precautions in trying to eliminate or reduce the bulk of the risks we take when online. Clunk click, every trip.

Freedom of information

Freedom of Information has caught some of the limelight—including the establishment of a cross party Independent Commission on Freedom of Information. The Commission is to "review the Freedom of Information Act 2000 [(FIA 2000)] to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of [FIA 2000] adequately recognises the need for a 'safe space' for policy development and implementation and frank advice". It is also to consider whether the burden on public authorities is to be "moderated" ie, reduced, by perhaps reigning in the scope of the regime. The ICO has already gone on the record stating that the regime is in its opinion fit for purpose, but there are clearly some tensions at play. The government wants to ensure that there is sufficient space for debate behind closed doors in relation to decision taking—the government of the day, whichever it is, periodically take a bashing as a result of information obtained under FIA 2000. Some public authorities are also complaining that the burden put upon them by FIA 2000 at times seems disproportionate.

Even ardent campaigners for transparency should acknowledge that it is worth checking how well this landmark legislation is serving its purpose over a decade after it fully came into force. While it is not going to be a vote winner to make government less transparent, it must be right to make sure that we are getting value for money out of the regime—ie, is FIA 2000 doing what it was supposed to do, are those the same priorities which we the people share today, do we think the cost to the taxpayer is at the right level and is the regime fit for the foreseeable future? The Commission has put out a call for evidence which indicates a somewhat narrower area of interest, but let's see what comes out of it.

Doing the knitting

As this year has wore on, the ICO has been getting on with its knitting—its daily, weekly and monthly tasks of promoting good practice and bringing to account those who fail to uphold their legal duties when it comes to handling information. A few days before policy oversight for the ICO moved to the Department of Culture, Media and Sport (DCMS), the ICO announced that it was monitoring its now former sponsor over concerns raised about the Ministry of Justice's (MoJ) timeliness in responding to requests received under FIA 2000. The monitoring is due to continue through to the end of November 2015 and was triggered as a result of the MoJ falling below the ICO's standard 85% timeliness rate. Several councils have undergone similar monitoring reviews, with four having recently emerged from the process in better shape.

Long awaited changes such as the ban on enforced subject access have finally been brought into force. Targeted advice has been issued, including to local government on information sharing, to charities on use of information for fundraising and to app developers in relation to programs aimed at children. The usual round of press statements have been issued (I always know it is nearly Christmas when the ICO

reminds us that it is fine for parents to take photos of their children in the school nativity play for their family albums). The ICO has also been keeping in the thick of it when it comes to its own future structure and the regime within which it operates nationally and internationally, more of which below.

The war against spam

A key achievement for the ICO in 2015 has been its progress in the war on spammers. Regardless of what some marketeers may think, there can be few of us who truly look forward to that solar panel salesman calling just as we are tucking into dinner or thinking we have a text from a friend when it is in fact a note from someone wanting to know if they can help you with your motorcycle accident or PPI claim.

The rules around spamming have evolved over many years; the regime has grown ever tighter but the ICO has had the odd bloody nose when taking on those who seem intent on filling our day with annoying marketing messages. In February the ICO welcomed an announcement from DCMS that the law would be changed to make it easier for the ICO to successfully pursue wrongdoers under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) (PECR). In basic terms, PECR requires consent for automated marketing calls and texts. For live marketing calls, the recipient must not have opted out, eg by using registering with the telephone preference service.

The ICO delivered fines under PECR totalling £360,000 between April 2014 and March 2015, but there have been cases where the legislative bar has proven to have been set too high to bring to justice those who we would generally consider to be wrongdoers. The ICO has had to demonstrate that the calls or messages caused or had the potential to cause substantial damage or distress. That bar has been removed, but the ICO still needs to show that there has been a serious breach of the law before it can issue a fine of up to £500,000.

There was a flurry of activity in the weeks running up to the change coming into effect. These included: a raid on a call centre thought to be connected with the making of four to six million automated calls per day relating to debt management or PPI; a warning to a financial services call centre about whom the ICO had received over six hundred complaints relating to unwanted spam texts; an enforcement notice against a lead generation company believed to have sent four and a half million texts over an eight month period about a range of financial services; and a fine of £80,000 against a personal injury claims management company making direct marketing calls to people who had registered with the telephone preference service (which had contacted the company 525 times to warn them about the complaints being received). That company—Direct Assist—went into liquidation. The prize for the largest nuisance calls fine to date stands at £200,000 and is awarded to Home Energy & Lifestyle Management Limited, which made over six million automated marketing calls offering "free" solar panels.

The changes in PECR were not retrospective, so the ICO commenced a new series of investigations and has taken some scalps since. The first fine made under the new "serious breach" regime was issued against Help Direct UK Limited. The fine again stood at £200,000 and was issued in response to nearly seven thousand text-related complaints received in one month.

Other reported activity includes fines of £50,000 and £75,000 respectively against Point One Marketing Limited t/a "Stop the Calls" and Cold Call Elimination Limited for making unsolicited calls which were marketing…cold call blocking devices. No irony there then.

Internal changes as regulatory agenda swells

The current Information Commissioner Christopher Graham has started his final lap before getting ready to step down from post at the end of June. A different character from his predecessor, but no less the peoples' champion, this Information Commissioner like the last one has shown no hesitancy in taking on difficult cases.

The current executive team (including the Commissioner himself) comprises four people. It has brought a welcome stability for many years, but, despite a highly experienced team below them there is a real danger of brain drain at the top as the three most senior post holders will be gone by the time of the Commissioner's departure. Added to this, the Triennial Review of the ICO—(see "Private eye", NLJ, 2 & 9 January 2015, pp 17-18)—is not yet complete and if the Information Commissioner is no longer to be a corporation sole (as recommended by Lord Justice Leveson) then the ICO could become a very different animal to what it is today.

The new executive team will consist of 12 individuals, which increases scope for shared decision making and collective consideration of matters which are crucial to the operation of our information law regime. That team will be busy. Negotiations over the European Data Protection Regulation are ongoing: whatever the outcome of discussions, significant change is on its way. With that and the continued drama over Safe Harbour no longer being automatically considered safe for data transfers to the USA (and the likely accelerated conclusion to the existing EU-US discussions over a replacement for Safe Harbour), there is going to be plenty to be getting on with next year. **NLJ**

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