

**EXPLANATORY MEMORANDUM TO**  
**THE DATA PROTECTION (NOTIFICATION AND NOTIFICATION FEES)**  
**(AMENDMENT) REGULATIONS 2009**

**2009 No. 1677**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1. These Regulations amend the Data Protection (Notification and Notification Fees) Regulations 2000 (SI 2000/188) (“the 2000 Regulations”). Regulation 2 of these Regulations creates an exemption from the obligation under Part 3 of the Data Protection Act 1998 (“the DPA”) (c. 29) to notify the Information Commissioner (IC) when data controllers are processing personal data. The exemption applies when the processing of personal data is by a judge or person acting on the instructions, or behalf, of a judge and is for the purposes of exercising judicial functions. Regulations 3 and 4 of these Regulations amend the fee that must be paid by a data controller to register with the IC, and change the current flat notification fee structure to a tiered fee structure.

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

3.1. While the impact of changing the notification fee structure on medium and small data controllers will be minimal, large data controllers falling within tier 2 of the new fee structure will experience a significant increase from the current annual fee of £35 to £500. However, large data controllers will not be subsidising smaller data controllers. The higher fee payable by tier 2 data controllers reflects the amount of resources invested by the IC in regulating large data controllers. The justification for the significant increase in the fee for those data controllers in tier 2 is further examined in the Impact Assessment attached to this memorandum.

4. **Legislative Context**

**Notification by judges**

4.1. Part 3 of the DPA places data controllers under an obligation to notify the IC when processing personal data as defined under that Act. The 2000 Regulations provide arrangements for these notification requirements. Section

17(3) of the DPA provides that if it appears to the Secretary of State that processing of a particular description is unlikely to prejudice the rights and freedoms of data subjects, the Secretary of State may provide an exemption from notification in relation to that processing. The 2000 Regulations include provision exempting data controllers from the notification requirements when carrying out the processing set out in the Schedule to the 2000 Regulations. These regulations are made under section 17(3) and amend the 2000 Regulations to provide a further exemption.

4.2. These Regulations are required because judges can be data controllers for the purposes of the DPA when exercising judicial functions, and are therefore subject to the notification requirements in Part 3 of the DPA.

4.3. The Secretary of State has consulted the IC in accordance with section 25(4) of the DPA.

### **Tiered fees**

4.4. Section 17(1) of the DPA prohibits a data controller from processing personal data unless the controller is included on the register of data controllers maintained by the IC under section 19(1). To be included on the register, section 18(1) of the DPA provides that data controllers must notify the IC of their intention to process personal data. Section 18(5) of the DPA provides that the notification must be accompanied by a prescribed fee. Notification is renewed each year by paying a prescribed fee (section 19(4)). Currently, the fee under section 18(5) and 19(4) is prescribed by regulations 7 and 14 respectively of the 2000 Regulations as £35.

4.5. These Regulations amend the 2000 Regulations to replace the current flat fee arrangement with a two-tiered structure. Those in tier 1 will pay £35 per year and those in tier 2 will pay £500 per year.

4.6. These regulations fulfil the Government's commitment to implement a tiered notification fee structure in its response to the Data Sharing Review and the House of Commons Justice Select Committee's Second Report of Session 2008-09 on the Coroners and Justice Bill. The proposed tiered notification fee structure has also been raised in Parliamentary Questions in the context of the IC's finances (HC PQ25545, 9 February 2009, Col 1533W).

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

5.1. This instrument applies to all of the United Kingdom.

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

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### **Notification by judges**

7.1. For the purposes of the DPA, a data controller is any person who determines the purpose for which and manner in which any personal data are or are to be processed. Judges, when exercising their judicial functions, may therefore be considered data controllers and must comply with the requirement to notify the IC (section 17(1) of the DPA) and be placed on the register of data controllers (section 19). These regulations provide an exemption from these requirements in relation to processing for judicial functions.

7.2. The processing of personal data in the exercise of judicial functions by judges, and those acting on their behalf has previously been covered by the Ministry of Justice's notification. The new constitutional settlement, created by legislation such as the Constitutional Reform Act 2005 and the Tribunals, Courts and Enforcement Act 2007, has given a statutory basis to the constitutional separation of the judiciary. Furthermore, the Judiciary and Courts (Scotland) Act 2008 which, while not fully implemented, is the basis under which judicial independence has been given new statutory underpinning in Scotland. It is no longer appropriate, therefore, to consider judicial office holders as being covered by government arrangements insofar as the DPA is concerned.

7.3. As required by section 17(3) of the DPA, it appears to the Secretary of State that the processing of personal data for the purposes of exercising judicial functions by a judge or a person acting on the instructions, or behalf, of a judge is unlikely to prejudice the rights and freedoms of data subjects primarily because data subjects would reasonably expect judges to be engaging in data processing of the type they undertake. Notification would, therefore, be an unsuitable administrative formality as referred to in Recital 49 of the Directive 95/46/EC on the protection of individuals with regard to processing of personal data and on the free movement of such data. Furthermore, there are strict obligations on judges only to proceed upon evidence which is capable of being tested or corrected in the course of proceedings. It is significant that the vast majority of adjudicative determinations which affect individuals are made in open court to which the public has full access. Judicial office holders are required to publicly declare and explain their decisions in the majority of cases. In respect of the non-adjudicative functions of judges these correspond, at least in large part, to the staff administration and record keeping exemptions that already appear in the Schedule to the 2000 Regulations.

7.4. This exemption will prevent the burden of notification falling on judges, including people that volunteer for judicial office such as magistrates.

### **Tiered fees**

7.5. The DPA is regulated by the IC, whose data protection responsibilities are funded through the notification fees collected from data controllers.

Currently, all data controllers who are required to notify pay the same fee of £35 per year. The IC's funding has not increased since the commencement of the DPA in 2000, despite an increased regulatory workload. Additional responsibilities for the IC have been brought forward in the Criminal Justice and Immigration Act 2008 and are currently being brought forward in the Coroners and Justice Bill. A tiered notification fee structure would provide the opportunity to increase the annual revenue of the IC, as additional funding is required to ensure the IC is appropriately resourced to fulfil his existing and future data protection responsibilities.

7.6. Additionally, the current flat notification fee structure does not accurately reflect the different levels of regulation required by the IC for data controllers of various sizes. A tiered notification fee structure that more accurately reflects the higher cost of regulating large data controllers would address this imbalance and provide an equitable solution.

7.7. The House of Commons Justice Committee Report, 'Protection of Private Data,' was published on 3 January 2008. The report noted the anomaly that the same basic registration fee of £35 is paid by data controllers, irrespective of size. The Committee considered that a 'graduated rate would be more appropriate, more likely to reflect actual costs, and more suited to providing an adequate income for the policing of data protection' (paragraph 26). The report is available online at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/cmjust.htm>.

7.8. The Data Sharing Review report, published on 11 July 2008, also recommended that changes be made to the notification fee through the introduction of a tiered fee system to ensure the IC receives a significantly higher level of funding to carry out his statutory duties. The Review noted that the existing notification fee has remained unchanged since 2000, and does not consider the data controller's size, the level of regulatory activity a data controller may generate, or increased demands and expectations on the IC since the fee was introduced. The Review also noted the importance of ensuring new funding arrangements are simple and do not impose bureaucratic burdens on data controllers or the IC. The Review is available online at: <http://www.justice.gov.uk/reviews/datasharing-intro.htm>.

7.9. The Regulations will define the two tiers of the new notification fee system and the fee payable by each tier. The fee payable by tier 1 data controllers will remain at £35 per year. Tier 1 data controllers are those who do not meet the conditions of tier 2; charities; and those who are a 'small occupational pension scheme'.

7.10. A 'small occupational pension scheme' is a type of occupational pension scheme that has less than 12 members. The scheme is often used by small family businesses and is usually set up through a large pension company. The trustees of the scheme are classed as data controllers and must notify the ICO. It is common place for all trustees of a particular small occupational pension scheme to register as a data controller with the IC, and because the

large pension company is a trustee it will in most cases relegate the scheme to having to register in the higher tier. This is considered inequitable for what is, essentially, a small business managing its own pension fund. As such, all small occupational pension schemes will be eligible for tier 1.

7.11. The fee payable by tier 2 data controllers will be £500 per year. Tier 2 will encompass all data controllers with 250 or more members of staff and a turnover of £25.9 million or more, as well as all public authorities with 250 or more members of staff. Tier 2 specifically excludes any data controller that is a charity or a small occupational pension scheme.

7.12. The tier criteria are based on the existing criteria used by the Department for Business, Innovation and Skills (BIS) (previously the Department for Business Enterprise and Regulatory Reform) for determining the size of an organisation, which includes turnover, number of employees and balance sheet total. These have been adapted and simplified to reflect the need for administrative simplicity for both data controllers and the IC. Turnover and members of staff are appropriate criteria for most data controllers; however public authorities will not necessarily have a turnover. In this instance, the number of members of staff is used as the only indicator of a public authority's size. The definition of public authority appears in section 1(1) of the DPA.

7.13. The cost of fulfilling the IC's data protection regulatory and advisory responsibilities is £16 million per year. The IC has undertaken research to determine the appropriate fee levels that will deliver the required funding. The IC has confirmed that the majority of his data protection regulatory resources is taken up by large data controllers and is satisfied that the fee levels it has recommended reflect the difference in the cost of regulating large, medium sized and small data controllers. The IC's research indicated that less than 4% of data controllers would meet the criteria for tier 2.

- Consolidation

7.14. There are no plans to consolidate the 2000 Regulations at this stage, as they have not been significantly amended.

## **8. Consultation outcome**

### **Notification by judges**

8.1. The judiciary in England and Wales, Scotland and Northern Ireland have been consulted and support the proposals on judges' notification. Initial consultations took place with the Lord Chief Justice and the Senior President of the Tribunals in 2008, and with the Lord Chief Justice for Northern Ireland and the Lord President in March 2009. The Devolved Administrations were consulted in March 2009 and are also content with the proposals.

8.2. The IC was consulted on the proposals in December 2008. While he understands the arguments, the IC is not entirely persuaded that the proposed

exemption from notification is justified under the provisions of section 17(3) of the DPA.

8.3. Under the 2000 Regulations, there is an exemption from notification for staff administration, which includes processing for the purposes of appointments, removals, superannuation, discipline, work management or other personnel matters. The IC believes that there are sufficient similarities between this exemption and the 'administrative' part of judicial functions to accept the need for an exemption from notification in relation to those functions.

8.4. In relation to the adjudicative side of a judge's functions, the IC expressed concern that the provisions and safeguards in place to protect the interests of the data subject would not apply in all circumstances. He expressed concern that where cases were transferred between different judges or between courts then the identity of the judge might not be fully apparent to a data subject. In response to this concern we intend to replicate, in general terms, the information that would be available on the register of data controllers and make it available on relevant websites.

8.5. The IC's view is that the actions of judges are, in many cases, critical in determining whether and how rights and freedoms are enjoyed by data subjects and so it was difficult to see easily how this could be divorced from their processing of personal data, and in particular sensitive personal data, and lead to the conclusion that the processing they do is unlikely to prejudice the rights and freedoms of data subjects. We agree with the IC that the actions of judges are in many cases central to determining the rights and freedoms enjoyed or not enjoyed by individuals. However, the key issue is whether processing of personal data for the purposes of exercising judicial functions by a judge or a person acting on the instructions, or behalf, of a judge would prejudice the rights and freedoms of data subjects. For the reasons set out above in paragraph 7.3 we do not believe that would be the case.

8.6. The IC also expressed concern that where there might be a failure of proper processing, for example, by not anonymising personal data where appropriate, then this could not form a proper ground for appeal. He was also concerned about the wider implications of judges being data controllers, including the duty to respond to subject access requests, situations of courts where more than one judge sits and the relationship between individual judges and the Ministry of Justice. In response to the concerns expressed by the IC, guidance is being drafted in conjunction with the judiciary on their responsibilities under the DPA.

8.7. In summary, the IC, while he understands the arguments, is not entirely persuaded that the proposed exemption from notification is justified under the provisions of section 17(3) of the DPA. However he has no wish to see unsuitable administrative formalities introduced and is encouraged by our willingness to improve the transparency of processing by judges which is the key function of notification.

## **Tiered fees**

8.8. Between 17 July and 27 August 2008, the Ministry of Justice ran a public consultation on the tiered fee structure and other proposals to amend the data protection regime in the UK, entitled 'Inspection powers and funding arrangements of the Information Commissioner'. In the main, this consultation was conducted in accordance with the Code of Practice on Consultation issued by the Cabinet Office and fell within the scope of the Code. The Code of Practice on Consultation notes that "a minimum 12 week consultation process is required during the development of policy". The Code of Practice also says, "however, there will be exceptional circumstances that require a consultation period of less than 12 weeks". Michael Wills MP, Minister of State in the Ministry of Justice, approved a shorter consultation period of six weeks due to the pressing need for the IC to acquire new powers to discharge his data protection functions. The Data Sharing Review conducted by the Information Commissioner, Richard Thomas, and Dr Mark Walport of the Wellcome Trust, had already consulted broadly on the data protection framework including the powers of the Commissioner and penalties for non-compliance with data protection legislation. Moreover, this consultation was targeted at a specific group, data controllers, and was focussed on proposals that were neither technical nor complex.

8.9. There were 72 responses to the Ministry's consultation on the powers and funding arrangements of the IC. 71% of respondents commented in favour of introducing a tiered notification fee structure to ensure the extent of regulatory activity required by the IC is reflected more accurately in the level of notification fee. The consultation is available online at:

<http://www.justice.gov.uk/consultations/consultations-closed-with-response.htm>

8.10. To supplement the consultation the Ministry held a stakeholder event on 28 August, which also discussed the proposed change to the notification fee structure from a flat to a tiered structure. Attendees at the stakeholder event were overwhelmingly in favour of a tiered notification fee structure, reflecting the outcome of the formal consultation.

8.11. Following this feedback from stakeholders, and in light of the recommendations of the House of Commons Justice Committee Report and the Data Sharing Review, the Government committed to change legislation to introduce a tiered notification fee structure.

8.12. The IC has been consulted throughout the development of this proposal and has confirmed his support of the changes in relation to fees.

## **9. Guidance**

9.1. Guidance is not required for regulation 2 of these Regulations. For the change to the notification fee structure (regulations 3 and 4), the IC will publish guidance to educate all data controllers. This education period is

expected to be undertaken in the three months leading to commencement, which is set for 1 October 2009.

## **10. Impact**

### **Notification by judges**

10.1. An Impact Assessment has not been prepared for this part of these Regulations as it has no impact on business, charities or voluntary bodies. The majority of the judiciary are magistrates. The exemption from notification will prevent an unnecessary administrative formality falling on magistrates and lay members.

10.2. There is no adverse impact on the public sector. It will prevent an unnecessary administrative formality on those who process personal data in the exercise of their judicial functions.

### **Tiered fees**

10.3. The impact on charities is nil. Charities will be eligible for tier 1 and therefore will not be subject to any increase in fees. The impact on business and voluntary bodies is variable. Small and medium-sized data controllers will not be impacted, as they will be eligible for tier 1 and will not be subject to any increase in fees. Data controllers with 250 or more members of staff and a turnover of £25.9 million or more will be eligible for tier 2 and be subject to an increase in fees. The notification fees for tier 2 data controllers will rise from £35 per year to £500 per year.

10.4. The impact on the public sector is variable. Public authorities with fewer than 250 members of staff will not be affected by the change in notification fee structure. Public authorities with 250 or more members of staff will be eligible for tier 2 and be subject to an increase in fees.

10.5. An Impact Assessment on the introduction of a tiered notification fee structure is attached to this memorandum.

## **11. Regulating small business**

11.1. Regulation 2 of these Regulations does not apply to small business. Regulations 3 and 4 apply to small business.

11.2. To minimise the impact of the requirements in relation to fees on firms employing up to 20 people, all firms with less than 250 members of staff will be eligible for tier 1 and will not be subject to any increase in notification fees.

11.3. The basis for the final decision on what action to take to assist small business is based on the IC's confirmation that the greater majority of his data protection costs relate to large data controllers.



## **12. Monitoring & review**

12.1. These Regulations will be reviewed within two years of implementation. The intended outcome of regulation 2 of these Regulations is to prevent an unnecessary administrative formality in relation to the processing of personal data in the exercise of judicial functions.

12.2. The change to the notification fee structure, provided by regulations 3 and 4 of these Regulations, is to achieve full cost recovery of fulfilling the IC's data protection functions. The outcome will be subject to ongoing internal review and the legislation may be amended as required. This will include considering whether the criteria need to be reviewed if there are changes to the criteria used by BIS to determine the size of an organisation.

## **13. Contact**

Belinda Lewis at the Ministry of Justice Tel: 0203 334 4550 or email: [Belinda.Lewis@justice.gsi.gov.uk](mailto:Belinda.Lewis@justice.gsi.gov.uk) can answer any queries regarding the instrument.

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>Ministry of Justice</b>	<b>Title:</b> <b>Impact Assessment of amending the Information Commissioner's Office notification fees under the Data Protection Act 1998</b>	
<b>Stage:</b> Statutory Instrument	<b>Version:</b> 2	<b>Date:</b> 15 June 2009
<b>Related Publications:</b> The Data Protection (Notification and Notification Fees) Regulations 2000, The Data Protection (Notification Fees) (Amendment) (No.2) Regulations 2009		

### Available to view or download at:

<http://www>.

**Contact for enquiries:** Belinda Lewis, Information Policy

**Telephone:** 0203 334 4550

### What is the problem under consideration? Why is government intervention necessary?

The costs and workload of the Information Commissioner's Office (ICO) have increased since the Data Protection Act 1998 (DPA) commenced, yet the ICO's funding has not increased accordingly. The notification fee collected by the ICO is a flat fee for all data controllers and does not recognise that the majority of the ICO's resources goes towards regulating larger data controllers.

Government needs to amend DPA regulations to implement a tiered fee structure, which will ensure the ICO is adequately funded to fulfil existing and future duties and address the inequity in the current fee system.

### What are the policy objectives and the intended effects?

The objectives are to provide necessary income for the ICO's current and future data protection responsibilities, and more accurately reflect the costs to the ICO of regulating data controllers of different sizes.

The intended effects are that the ICO will be fully funded to carry out its existing and future data protection responsibilities and an equitable notification fee structure in accordance with the Better Regulation agenda. These will in turn contribute to a more robust data protection regime and greater public confidence in the handling of personal information.

### What policy options have been considered? Please justify any preferred option.

(1) Retain status quo; (2) Increase flat rate fee for notification; (3) Introduction of tiered notification fee structure.

The preferred option is (3). This raises the additional funds required to enable the ICO to conduct its existing and future regulatory duties and addresses the inequity whereby data controllers pay the same fee irrespective of size. Option (3) also complements the House of Commons Justice Select Committee report 'Protection of Private Data', which concluded a "graduated rate would be more appropriate" to provide an adequate income for the policing of data protection.

### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy will be reviewed within two years after implementation.

### **Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister:

Michael Wills.....Date: 2 July 2009

## Summary: Analysis & Evidence

<b>Policy Option: Tiered notification fees</b>	<b>Description: Replacing the existing flat notification fee structure with a tiered structure</b>
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups'  ICO procurement of infrastructure for new tiered notification system: £1.5m; expansion of office accommodation: £.75m; project management costs, recruitment, education and training: £0.25m. Costs to data controllers: £4.7m
	<b>One-off</b> (Transition) <span style="float: right;"><b>Yrs</b></span>	
	<b>£ 2,500,000</b> <span style="float: right;">2</span>	
	<b>Average Annual Cost</b> (excluding one-off)	
<b>£ 4,700,000</b>	<b>Total Cost (PV)</b>	<b>£</b>
Other <b>key non-monetised costs</b> by 'main affected groups' ICO will need to carry out an effective education program to ensure all data controllers are aware of the changes to the notification fee regime. Data controllers will need to be aware of the changes and ready to undertake a self-assessment when notifying with the ICO to determine the fee payable by their organisation.		

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups' A tiered structure will increase ICO resources by approximately £4.7m per year, enabling it to fulfil current and future regulatory responsibilities such as the additional duties brought forward in the Criminal Justice and Immigration Act 2008 and being brought forward in the Coroners and Justice Bill.
	<b>One-off</b> <span style="float: right;"><b>Yrs</b></span>	
	<b>£ Nil</b>	
	<b>Average Annual Benefit</b> (excluding one-off)	
<b>£ 4,700,000</b>	<b>Total Benefit (PV)</b>	<b>£</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' All data controllers will benefit from a more equitable fee structure and from a fully resourced data protection regulator to help foster good practice, increase compliance and deliver decisive enforcement action where needed. The general public will have greater confidence in the strength of the UK data protection regime.		

### Key Assumptions/Sensitivities/Risks

The main assumption is that the tiered notification fee structure will provide the ICO with the required funds to enable its existing and future responsibilities under the DPA to be carried out.

Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
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What is the geographic coverage of the policy/option?	United Kingdom			
On what date will the policy be implemented?	01/10/2009			
Which organisation(s) will enforce the policy?	ICO/Civil/Tribunal			
What is the total annual cost of enforcement for these organisations?	£ N/A			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£ N/A			
What is the value of changes in greenhouse gas emissions?	£ N/A			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro 35	Small 35	Medium 35	Large 500
Are any of these organisations exempt?	Yes	Yes	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)
Increase	£	Decrease	£	<b>Net</b> £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

The Data Protection Act 1998 (DPA) is regulated independently of Government by the Information Commissioner's Office (ICO). The ICO's main functions are:

- the promotion of good practice – providing information and advice;
- the resolution of problems – complaints from people who feel their rights have been breached; and
- enforcement – using legal sanctions to ensure compliance with data protection obligations.

The DPA provides the ICO with an effective framework within which to regulate the obligations of data controllers. Government recognises, however, that the UK data protection framework must be continually developed and revised where appropriate to ensure it remains fit for purpose.

Data controllers must notify the ICO of their intention to process personal data before doing so, and be listed on the ICO's register of data controllers. To remain on the register, a data controller must renew their registration each year by paying an annual notification fee, which is currently £35.

The House of Commons Justice Committee Report, 'Protection of Private Data,' was published on 3 January 2008. The report noted as an anomaly that the same basic registration fee of £35 is paid by data controllers, irrespective of their size. The Committee considered that a 'graduated rate would be more appropriate, more likely to reflect actual costs, and more suited to providing an adequate income for the policing of data protection'.

The Data Sharing Review report, published on 11 July 2008, also recommended that changes be made to the notification fee through the introduction of a tiered fee system to ensure the regulator receives a significantly higher level of funding to carry out his statutory duties. The Review noted that the existing notification fee has remained unchanged since the DPA came into force in 2000, and does not consider the data controller's size, the level of regulatory activity a data controller may generate, or increased demands and expectations on the ICO since the fee was introduced.

Between 17 July and 27 August 2008, the Ministry of Justice ran a public consultation on this and other proposals to enhance the data protection regime in the UK. To supplement the consultation the Ministry held a stakeholder event on 28 August, which also discussed the proposed change to the notification fee structure from a flat fee structure to a tiered structure. Respondents to the consultation and attendees at the stakeholder event were overwhelmingly in favour of a tiered notification fee structure. A majority of respondents agreed that the existing structure was no longer appropriate and that a tiered approach would ensure greater equality between data controllers.

The Government committed to introduce legislation to facilitate a tiered notification fee structure in the Ministry's response to the Data Sharing Review Report and the consultation on the ICO's powers and funding. We are also bringing forward a number of measures to enhance the UK data protection framework. These measures are included in the provisions of the Criminal Justice and Immigration Act 2008, and the provisions of the Coroners and Justice Bill which is currently proceeding through Parliament.

In 2008/09 the ICO's income from notification fees was approximately £11.3 million. The ICO has estimated that the cost of meeting its current and future data protection regulatory responsibilities will total £16 million per year. It is expected that this additional cost, totalling £4.7 million, will be funded in full by the proposed tiered notification fee structure.

## **Part I: AMENDING THE FUNDING STRUCTURE FOR THE ICO'S DATA PROTECTION RESPONSIBILITIES**

The Government proposes to replace the existing flat notification fee structure with a tiered fee structure. This would provide additional funds to ensure the ICO can fulfil its current and future data protection responsibilities.

Recent research undertaken by the ICO has indicated that larger enterprises take up the great majority of its regulatory resources. A tiered notification fee structure would therefore more accurately reflect the cost of regulating different sized data controllers. This complements the Government's Better Regulation agenda, which is based on five key principles of regulation – transparent, accountable, proportionate, consistent and targeted.

The tier criteria are based on established criteria used by the Department for Business, Innovation and Skills (BIS) (previously the Department for Business, Enterprise and Regulatory Reform) for determining the size of an organisation. The criteria are outlined at **Annex A**.

The Regulations will define the two tiers of the new notification fee system and the fee payable by each tier. The fee payable by tier 1 data controllers will remain at £35 per year. Tier 1 data controllers are those who do not meet the conditions of tier 2; charities; and those who are a 'small occupational pension scheme'.

A 'small occupational pension scheme' is a type of occupational pension scheme used for less than 12 members, and is also known as a 'small self-administered scheme'. The scheme is often used by small family businesses and is usually set up through a large pension company. The trustees of the scheme are classed as data controllers and must notify the ICO. It is common place for the trustees of a particular small occupational pension scheme to register as a data controller with the ICO, and because the large pension company is a trustee it will in most cases relegate the scheme to having to register in the higher tier. This is considered inequitable for what is, essentially, a small business managing its own pension fund. As such, all small occupational pension schemes will be eligible for tier 1.

The fee payable by tier 2 data controllers will be £500 per year. Tier 2 will encompass all data controllers with 250 or more members of staff and a turnover of £25.9 million or more, as well as all public authorities with 250 or more members of staff.

The fee levels have been determined by research undertaken by the ICO. A summary of the ICO's advice to the Ministry of Justice on setting the fee levels is at **Annex C**.

Government proposes that data controllers undertake a self-assessment process to nominate which tier they fall within, based on the specified criteria. Government does not consider it necessary or particularly beneficial that the Commissioner make this assessment. The ICO will have the capacity, under provisions of the Coroners and Justice Bill, to verify that a data controller has paid the correct notification fee and is registered in the correct tier. Once those amendments are given effect, providing false information in relation to fees will be a criminal offence under section 5 of the Perjury Act 1911 and the equivalents of that offence in Scotland and Northern Ireland.

### **Policy objectives**

The policy objectives of changing the current flat notification fee structure to a tiered structure are to:

- provide necessary income for the ICO's current and future data protection responsibilities
- more accurately reflect the costs to the ICO of regulating data controllers of different sizes
- strengthen public confidence in the data protection framework.

## Intended outcomes

The intended outcomes of this proposal are:

- An effective and appropriately resourced data protection regulator

The DPA provides the ICO with a range of powers to inspect and assess an organisation's data protection compliance. Since the DPA commenced in 2000, there has been a marked increase in awareness of data protection and the ICO's role, and a subsequent increase in the workload of the ICO. This accelerated following the loss of two discs containing the personal data of more than 25 million citizens in late 2007 by Her Majesty's Revenue and Customs. However the ICO's funding has not increased substantially to meet the increased demands.

The ICO will receive new powers and duties through the provisions of the Criminal Justice and Immigration Act 2008, and the provisions of the Coroners and Justice Bill. Additional funding is needed to ensure the ICO is resourced to fulfil its existing and future duties.

Information technology has also significantly advanced since the DPA came into force. The technology used by large data controllers, in particular, is increasingly more complex and the ICO requires different levels of expertise and adequately trained specialists to investigate these advanced information systems. Additional funding obtained through the new tiered notification fee structure will enable the ICO to recruit and train staff to the required level to investigate complaints and information systems of greater complexity.

- An equitable notification fee system

The notification fee collected by the ICO is a flat fee of £35 per year for all data controllers, irrespective of size. This sees a data controller who processes a minimal amount of personal information pay the same fee as a large multinational company or central Government department which may regularly process the personal data of millions of people.

The ICO has confirmed that the majority of its data protection regulatory resources is taken up by large data controllers, which is not reflected in the current fee structure. The ICO's analysis of the data controllers who receive the most complaints each year shows that the majority of these are large data controllers. The ICO also spends a greater proportion of its resources providing specific and tailored advice to large data controllers on their information systems and data protection policies.

This inequity has been noted by the House of Commons Justice Select Committee, the Data Sharing Review, and respondents to the Government's consultation on the powers and funding arrangements of the ICO. A tiered notification fee structure would therefore more accurately reflect the cost to the ICO of regulating different sized data controllers, which also complements the Government's Better Regulation agenda.

- Strengthen public confidence in data protection framework

An outcome of providing the necessary funding for the ICO to carry out its data protection responsibilities will be a stronger data protection regime in the form of the ICO's greater capacity for education, inspection and enforcement. This will lead to a greater understanding of and compliance with the DPA and fewer incidents involving data losses and breaches. In turn, this will contribute towards the strengthening of public confidence in the UK's data protection regime.

The effective use of the ICO's existing and enhanced regulatory powers will clearly signal to all data controllers that the Commissioner can and will take decisive enforcement action to ensure compliance with the DPA.

## **Rationale for change and reason for Government intervention**

The ICO's responsibilities are currently funded by a flat rate notification fee paid by organisations, regardless of size, under sections 18(5) and 19(4) of the DPA. There has not been a change to the fee, even to take account of inflation, since the DPA came into force in 2000.

The current flat notification fee structure does not accurately reflect the cost to the ICO of regulating data controllers of different sizes. Large data controllers take up a significantly larger proportion of the ICO's resources than small and medium sized data controllers, yet each pay the same notification fee of £35 per year. A tiered notification fee structure would address this imbalance.

A tiered notification fee structure would also provide the opportunity to increase the annual revenue of the ICO to ensure it is funded to fulfil its existing and future responsibilities. The workload of the ICO has increased significantly since the introduction of the DPA in 2000, and has resulted in the ICO's resources becoming increasingly stretched. **Annex B** shows that the number of data protection cases opened by the ICO has more than doubled since 2003/04 and the income of the ICO from notification fees over the corresponding periods has increased by a much smaller proportion.

The complexity of the ICO's workload has also increased. Technological advancements provide a constant challenge for the regulator to keep up, and the changing environment requires expert and adequately trained staff to carry out assessments on increasingly complex cases.

Additional responsibilities for the ICO have been brought forward in the Criminal Justice and Immigration Act 2008 and are currently being brought forward in the Coroners and Justice Bill. Additional funding is required to ensure the ICO is appropriately resourced to fulfil its existing and future data protection responsibilities.

Government intervention is required to change the notification fee regulations made under the provisions of the DPA. The Government needs to act to ensure that the notification fee accurately reflects the cost to the ICO of regulating different sized data controllers and to ensure that appropriate funding arrangements are in place to enable the ICO to carry out its current and future duties.

### **Main affected groups**

In March 2009 there were approximately 317,000 data controllers registered on the ICO's public register, ranging from Central Government Departments and their agencies to small private sector businesses.

Any organisation that processes data will need to be aware of the change to the notification fee structure. However the primary groups affected by the change will be data controllers who employ 250 or more members of staff and whose turnover is £25.9 million or more, and any public authority that employs 250 or more members of staff. Research conducted by the ICO has confirmed that approximately 4% of all registered data controllers will be in tier 2.

## **Part II: THE POLICY OPTIONS THAT HAVE BEEN CONSIDERED**

- (1) Retain status quo
- (2) Increase flat rate fee for notification
- (3) Introduce of tiered notification fee structure

Option 3 is the Government's preferred option as it will provide the ICO with the necessary additional funding, address the inequity in the current fee system to more accurately reflect the cost of regulating large data controllers, and minimise the impact on small and medium data controllers.

### **Option 1 – Retain status quo**

An advantage of this option is that there would be no additional financial burden on organisations.

The key disadvantage of this option is that the ICO would not receive additional funding required to carry out its existing and future duties. The ICO's capacity to meet the demands of the changing technological environment will be diminished and its ability to regulate effectively will be compromised. This option would also send the wrong message to the general public about the Government's commitment to data protection and would impact on public confidence in the UK data protection regime. It would also ignore the conclusions of the Justice Select Committee regarding the notification fee being inequitable and non-compliant with the Better Regulation agenda.

The risks of this option include a diminished profile of data protection due to a reduced capacity for the ICO to effectively use the breadth of its powers, which could result in greater non-compliance. Without the required additional funding there is a risk that the ICO will be unable to investigate a growing number of complaints in a timely manner and a potential increase in the risk of data protection breaches and data loss incidents.

### **Option 2 – Increase flat rate fee for notification**

The additional funding required could be raised by increasing the flat rate fee for all data controllers to around £50. The key advantage of this option is that it would raise the necessary funding to enable the ICO to fulfil its existing and future responsibilities under the DPA.

The disadvantage of this option is that it would not address the conclusions of the Justice Select Committee on the inequity in the current fee structure, and would not comply with the Better Regulation agenda. This option would not reflect the actual costs associated with regulating data controllers of different sizes. An increased notification fee for all data controllers would also mean an increased burden on small businesses currently required to register with the ICO and may act as a disincentive for small data controllers to register.

This option carries the risk that small and medium sized data controllers could view an increase in their annual fee as unwarranted and disproportionate, and be discouraged from registering with the ICO. There is the added risk that not addressing inequities in the fee system could affect the confidence of data controllers in the data protection regime, which could impact on compliance levels and the broader public confidence in data protection.

### **Option 3 – Introduce a tiered notification fee structure**

This option has a number of key advantages, including:

- the ICO would have the necessary resources to fulfil its current and future responsibilities
- the notification fee would be more equitable and more accurately reflect the cost of regulating different sized data controllers, and in doing so address the conclusions of the Justice Select Committee
- public confidence in the data protection regime will be strengthened through the actions of a fully resourced and effective regulator.

The disadvantage of this option is that it would see large data controllers pay a significantly higher fee than currently, and will represent an overall increase in costs to data controllers of £4.7 million. It is important to note that large data controllers will not be subsidising small and medium-sized data controllers – the difference in fees payable by small/medium and large data controllers reflects the ICO's costs of regulating these data controllers.

The ICO would also need to procure and introduce the information technology for the new notification fee system, which will result in an initial one-off cost estimated at £1.5 million. This would be recovered from the new fee structure during the first two years and the full amount of the additional funds would be available to support the ICO in year three onwards.

This option carries the risk that some data controllers may try to avoid paying the higher fees associated with tier 2 by placing themselves in tier 1 when registering with the ICO. While the Government considers that the number of organisations who would look to act fraudulently in this manner will be limited, once the relevant provisions of the Coroner and Justice Bill are implemented the ICO will have the power to check that a data controller has correctly registered and take appropriate action.



## **Analysis of costs and benefits**

### **Option 1**

This would be cost neutral, as the status quo would remain. No additional costs or benefits would be generated. This would also mean that the ICO would not be able to upscale its operations to meet increased demands and workload, and would be faced with insufficient funding to carry out its existing and future responsibilities effectively.

### **Option 2**

An increase in the flat rate fee to £50 for all data controllers would raise the additional funding required by the ICO to fulfil its responsibilities and there would not be a need to establish a new notification system. However, all data controllers would incur the cost of the fee increase, including small and medium sized businesses, despite the difference in cost to the ICO of regulating these data controllers. This option does not address the inequities of the existing fee structure.

### **Option 3**

An additional £4.7 million is required to enable the ICO to carry out its existing and future duties effectively. Costs to the ICO include procurement of a new tiered fee system at approximately £1.5m, expansion of office accommodation at approximately £0.75m, and project management costs, recruitment, education and training at approximately £0.25m. Costs to large data controllers who meet the conditions of tier 2 will total £4.7 million, or £500 per large data controller per year.

Benefits of changing the notification system include enabling a more streamlined online notification process, full capacity of the ICO to carry out its regulatory existing and future duties, and an equitable notification fee that more accurately reflects the costs to the ICO of regulating different sized data controllers.

### **Options conclusion**

The Government considers that option 1, doing nothing, is not viable as it does not address the issues raised by the Justice Committee or the Data Sharing Review and would lead to a shortfall in data protection funding for the ICO whereby the regulator would need to determine which functions it could carry out effectively with its available funding. Similarly option two does not address the inequities of the existing arrangements as it will simply increase the fee payable by all data controllers. The Government's preferred option is option 3, which will provide the necessary funding for the ICO to carry out its existing and future duties as well as ensure an equitable fee regime that more accurately reflects the cost to the ICO of regulating different sized data controllers.

### **Administrative burdens and simplification**

The requirement for data controllers to register with the ICO will not change under any of the options. In accordance with the Government's Better Regulation agenda there is no additional burden on small or medium sized data controllers.

### **Enforcement, sanctions and monitoring**

Option 1 will not provide the ICO with the funding required to fulfil all of its future duties effectively. Options 2 and 3 will ensure that the ICO is resourced to effectively carry out its existing and future duties, including enforcement, sanctions and monitoring responsibilities.

### **Competition assessment**

No measurable competition impact is foreseen on any of the options.

### **Small firms impact test**

Option one will have no more effect on small firms than the existing arrangements. Option two would affect small/medium-sized businesses as they would be required to pay a marginally higher annual notification fee. The preferred option three does not impact on small or medium-sized firms.

### **Legal aid/judicial impact**

There could be a potential impact on legal aid and the judicial system where the Perjury Act 1911, and its equivalents in Scotland and Northern Ireland, is relied on to prosecute data controllers who provide false information. However we consider that there would be a negligible number of prosecutions and the impact on legal aid and the judicial system will be minimal.

### **Equality assessment & human rights**

The options are compliant with the Human Rights Act, with no impact on race, disability, or gender of individuals.

### **Public authorities**

Option 1 will have no more impact on public authorities than the existing arrangements. Option 2 would impact all public authorities as they would be required to pay a marginally higher fee irrespective of size. Option 3 will see an increase in annual fee payable from £35 to £500 per year for large public authorities, but will have no impact on smaller authorities with fewer than 250 members of staff.

## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	Yes
Disability Equality	Yes	Yes
Gender Equality	Yes	Yes
Human Rights	Yes	No
Rural Proofing	No	No

# Annexes

## Annex A

### Criteria for determining the size of an organisation

The Companies Act 1985 classifies the size of a company or group according to whether it satisfies two out of three criteria relating to *turnover*, *number of employees*, and *balance sheet total*. The calculations for the balance sheet total are relatively complex, and if all three criteria were adopted, data controllers would most likely use turnover and number of employees to determine their tier. For administrative simplicity, criteria for notification fee tiers are based on turnover and number of employees only.

The Regulations refer to members of staff, rather than employees, in order to capture the various employment arrangements of data controllers. As public authorities do not necessarily have a turnover, only the number of members of staff is used as an indicator of the data controller's size.

## Annex B

### Number of data protection cases opened (complaints) by the ICO (2003/04-2007/08)

Year	No of cases received
2003/04	11664
2004/05	19460
2005/06	22059
2006/07	23988
2007/08	24851

### ICO income from notification fees (2003/04-2008/09)

Year	Income from notification fees
2003/04	£8.8m
2004/05	£9.2m
2005/06	£9.7m
2006/07	£10.2m
2007/08	£10.8m
2008/09	£11.3m

## Annex C

### Summary of ICO advice to the Ministry of Justice on setting a higher notification fee for large enterprises

The ICO provided Government with a detailed business case on the rationale for changing the fee structure, and evidence to support the recommended fee levels. Key arguments presented by the ICO are summarised below, along with extracts from the business case.

- The ICO requires additional funding to fulfil its existing and future responsibilities, including procurement of a new IT system to streamline and simplify registration, hiring and accommodating new staff, and carrying out the additional responsibilities that have been brought forward in the Criminal Justice and Immigration Act 2008 and are currently being brought forward in the Coroners and Justice Bill.

“The total level of funding has been agreed at £16 million. During 2008/2009 the ICO received some £11.3 million. The increased funding would be allocated to staff who would, amongst other things, undertake the inspection work that the new legislation empowers the ICO to do. How much work the ICO is able to undertake will depend on how much funding can be devoted to this area.

“However, in order to support this front line work, the ICO will need to invest in two areas that could be termed its infrastructure. Firstly, a significant amount of the expenditure from the additional fee income will be used to procure a new IT system to support the requirement for the ICO to keep a publicly available register of those data controllers required to notify.

“The aim will be to have a much easier process for data controllers which will include complete on line notification and payment (currently only partially available). It will also be designed to enable improved, targeted communications with data controllers. This will mean that the ICO will be able to target specific sectors by sending them advice relevant to their business. For example we could send doctors specific guidance on the ramifications of the new health service computer system.

“The system would also enable organisations to undertake some form of self audit which would feed in to the ICO’s risk assessment of which data controllers to inspect.

“The outcome of this significant investment would be a simpler process for data controllers, and one which provided more value to the business notifying and to the ICO as a regulator. It should be emphasised that this would not simply be a like for like replacement of the existing nine year old system.

“The current budget estimates that the development of this system would cost £750,000 during 2009/2010. There would also be some additional costs in terms of staff time. There would be further significant costs related to procurement in subsequent years as well as annual costs for licences and maintenance of the system.

“The ICO’s second essential infrastructure investment relates to new accommodation. Current accommodation is filled to capacity and we cannot cope with any additional staff. In addition, the ICO’s second site in Wilmslow is to be vacated in July 2010. There will be some costs (in the region of £750,000) associated with the move and ongoing costs associated with the additional space we will need to house the extra staff.

“As indicated above, the rest of the money would be used to recruit staff to actually apply the new powers including the ICO’s inspection powers. They would be placed in Wilmslow and probably one regional office. The ICO’s current plans include five teams for inspection work together with the appropriate infrastructure. The teams would, when fully effective, anticipate conducting over 100 inspections each year. The ICO also anticipates that 10 cases would involve imposing fines for serious breaches of the data protection principles.”

- The annual fee currently paid by small and medium sized data controllers should remain at £35.

“The ICO believes that small and medium enterprises (SMEs) require significantly less resources to regulate than large ones. They generate fewer complaints and rarely require specific advice. They generally process less data and therefore any failings on their part present a lower risk of having significant adverse consequences. Few will meet the ICO’s future, risk based, requirements for an audit. The ICO will continue to produce general guidance and advice for all organisations, but anticipates that this will not be at an additional cost for SMEs. Although the ICO does deal with more complaints generally, we believe that our proportionate response to these issues improves our efficiency and enables us to handle them without the need to increase the fee to these enterprises. Given that the fee has been unchanged since 2000, the ICO believes that this means the cost to SMEs has reduced in real terms.”

- The majority of the ICO’s data protection resources are taken up by working with and regulating large data controllers.

“The ICO and MoJ believe that charging a higher fee to these large enterprises ensures a fairer system that more accurately reflects the costs to the ICO of regulating large data controllers. The ICO devotes significantly more time and effort to dealing with these large enterprises both in terms of the amount of advice and guidance we provide and the number of complaints we deal with. These large organisations benefit from the ICO’s expertise in relation to their own specific requirements, often by corresponding directly with us or by formal meetings. Smaller organisations are catered for by general guidance, one piece of which might cover all data controllers.

“Analysis of data controllers that the ICO has received 5 or more complaints about shows very clearly that some 90% of the enterprises on the list are large. It should be noted that this list does not mean that these enterprises are the worst at handling data. Clearly some of the bigger enterprises handled huge numbers of transactions and only a very small proportion are referred to the ICO.

“Whilst the ICO does not provide as much tailored advice to the smaller organisations, we do provide a significant amount of help in general terms both by way of guidance (eg the recent guidance on CCTV use) and they also make use of our helpline. In addition, we deal with complaints about these organisations. This provides valuable reassurance to the public, but also to the data controller, if something does go wrong in this area.

“The current notification fee was set in 2000 for SMEs. We are also very reluctant to increase the financial burden on these SMEs in today’s economic climate. The ICO therefore proposes to provide improved services to all data controllers without increasing the fee for over 95% of them.”

- While it is difficult to pinpoint the number of data controllers who will fall into tier 2, research indicates that approximately 4% of data controllers will meet the criteria for tier 2. This informs the final recommendation on the fee for the higher tier.

The ICO considered the results of four studies aimed at gauging the number of large data controllers on its register, which would help to determine the fee required for tier 2.

“In order to decide what level of fee to charge, two figures are required. The first is the amount that the ICO believes it needs in order to discharge all of its functions in the future. And the second is the number of large enterprises that will appear on the ICO’s Notification Register. This latter figure will enable government to set an appropriate fee for these large enterprises.

“Following discussions with the MoJ, a figure of £16 million of total fee income has been set for the cost of the ICO discharging all its functions. The ICO has now produced a budget for 2009/2010 which incorporates this figure on a pro rata basis (on the assumption that the new tiered approach to fee income is implemented 1 October 2009).

“The second figure has proved far more difficult to obtain.”

...

“The ICO currently has a register of some 317,000 data controllers. This increased during 2008/2009. The ICO and MoJ have done several pieces of work in order to estimate how many of these enterprises fall into the different categories based on the UK definitions of small, medium and large enterprises used by BERR.

“The purpose of the research was narrowed down to establishing the number of enterprises on the ICO register that employ 250 staff or more **and** have a turnover of over £25.9 million or more. For public sector enterprises the decision as to whether they fall into the upper tier will be based solely on the number of staff they employ. Charities of whatever size will not pay the higher fee.

“For each piece of research, a further calculation has been carried out to establish what the fee that large enterprises would need to be charged in order to provide the ICO with the appropriate level of funding. This is based on the assumption that the ICO register is 317,000, that all small and medium enterprises would pay £35 and that the total fee income would be £16,000,000.”

The ICO’s research indicated a range of figures, which was further analysed using a risk management approach.

“The results of this research showed a wide variation in the number of large enterprises. The most generous figure that the research produced was that just under 23,000 enterprises fell into this category. If this turned out to be the accurate figure, then these enterprises would have to pay a fee of £250 in order to provide the ICO with the income referred to above. At the other end of the scale, BERR’s figures indicate that only 7,070 large enterprises would fall into this category in which case the fee would be in the region of £729.”

...

“The worst case scenario would be if we set the fee at £250, but the actual number who notified at the higher fee was only 7,070, it would mean that the ICO’s total fee income would be £12,063,660. Conversely, if we set the fee at £729 and 22,824 notified, fee income would be £27,486,246. All the other scenarios are between these two extremes.”

...

“Clearly, whatever fee is recommended, there is a risk. The ICO accepts that the risk of setting the fee at too high a level would have more severe consequences than a fee that meant that funding fell below the identified amount, provided there was a satisfactory mechanism in place to review the fee level in January 2010 with a view to making an adjustment to come into force on 1 April 2009.

**On balance, the ICO believes that a reasonable estimate of the total number of data controllers on the ICO’s register that can be classed as large enterprises using the definitions referred to earlier is 10,500. This means that the ICO recommends that the fee for these large enterprises should be set at £500.** At this fee, if there were 10% more large enterprises than predicted ie 11,550, it would mean total fees of £16,465,750. At 10% fewer (9,450) it would bring in £15,489,250. The ICO considers that this is a reasonable range of scenarios and neither produces over or under-funding.

The figure that we have arrived at is based on all the available evidence. Until we have actually seen how this translates into organisations paying the higher fee, we cannot be certain of its accuracy.

The fee level must, therefore, be reviewed in the light of a full year’s notifications at which point it can be adjusted as appropriate.

## Annex D Equality Impact Assessment Initial Screening – Relevance to Equality Duties

The EIA should be used to identify likely impacts on:

- Disability
- Gender (including gender identity)
- Race
- Age
- Caring responsibilities (usually only for HR policies and change management processes such as back offices)
- Religion and belief
- Sexual orientation

1. Name of the proposed new or changed legislation, policy, strategy, project or service being assessed

Replacing the existing flat notification fee structure with a tiered structure. Under the Data Protection Act 1998 (DPA), all data controllers must notify the Information Commissioner's Office (ICO) of their intention to process personal data before doing so, and be listed on the ICO's register of data controllers. To remain on the register, a data controller must renew their registration each year by paying an annual notification fee, which is currently £35. The proposal seeks to introduce a tiered notification fee structure in place of the current flat fee structure.

2. Individual officer(s) & Unit responsible for completing the Equality Impact Assessment:

Belinda Lewis  
Head of Information Policy Division

3. What is the main aim or purpose of the proposed new or changed legislation, policy, strategy, project or service and what are the intended outcomes?

### **Aims/objectives**

The objectives are to provide necessary income for the ICO's current and future data protection responsibilities, and more accurately reflect the costs to the ICO of regulating data controllers of different sizes.

### **Outcomes**

The intended effects are that the ICO will be fully funded to carry out its existing and future data protection responsibilities and an equitable notification fee structure in accordance with the Better Regulation agenda. These will in turn contribute to a more robust data protection regime and greater public confidence in the handling of personal information.

4. What existing sources of information will you use to help you identify the likely equality on different groups of people?

- Current Impact Assessment of amending the ICO's notification fees under the DPA
- Ministry of Justice Consultation on the Information Commissioner's inspection powers and funding arrangements under the Data Protection Act 1998 (16 July 2008)
- Outcomes of the Ministry of Justice Stakeholder Event on improving the data protection framework (28 August 2008)
- ICO Business Case for amending the notification fee structure (2009)



5. Are there gaps in information that make it difficult or impossible to form an opinion on how your proposals might affect different groups of people? If so what are the gaps in the information and how and when do you plan to collect additional information?

No, there is no impact on different groups of people. This decision has been made after considering various sources of information, listed above at Q.4.

6. Having analysed the initial and additional sources of information including feedback from consultation, is there any evidence that the proposed changes will have a **positive impact** on any of these different groups of people and/or promote equality of opportunity?

Please provide details of who benefits from the positive impacts and the evidence and analysis used to identify them.

There are no positive impacts on the different groups listed. The change of legislation affects all data controllers who register with the ICO and no distinction is made between groups. As such there are no adverse or positive affects on the groups listed following the change of fee structure.

7. Is there any feedback or evidence that additional work could be done to promote equality of opportunity?

If the answer is yes, please provide details of whether or not you plan to undertake this work. If not, please say why.

No. The tiered fee structure being imposed will have an impact on all data controllers who register with the ICO, and there are no disadvantageous affects on one particular group.

8. Is there any evidence that proposed changes will have **an adverse equality impact** on any of these different groups of people?

Please provide details of who the proposals affect, what the adverse impacts are and the evidence and analysis used to identify them.

No. After fully considering the existing sources of information and following the consultation process, no adverse impacts were identified.

9. Is there any evidence that the proposed changes have **no equality impacts**?

Please provide details of the evidence and analysis used to reach the conclusion that the proposed changes have no impact on any of these different groups of people.

A flat fee structure is already in place, and we are seeking to introduce a tiered structure which will see large data controllers pay a higher fee than small and medium-sized data controllers. The criteria for the upper tier do not distinguish between any of the above named different groups of people.

10. Is a full Equality Impact Assessment Required?

Yes/**No**

(If no, please explain why not)

NOTE - You will need to complete a full EIA if:

- the proposals are likely to have equality impacts and you will need to provide details about how the impacts will be mitigated or justified
- there are likely to be equality impacts plus negative public opinion or media coverage about the proposed changes
- you have missed an opportunity to promote equality of opportunity and need to provide further details of action that can be taken to remedy this

No. The flat fee structure is already in place, and we propose to create a higher tier for those that qualify. The criteria for qualifying for the higher tier does not adversely impact on any of the named groups of people.

11. If a full EIA is not required, you are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equality impacts. Please provide details of how you will monitor evaluate or review your proposals and when the review will take place.

We plan to review the new fee structure on an ongoing basis, with a commitment to review within two years of implementation. If any unfair treatment of certain groups is identified prior to then, we will work to rectify this as soon as practicable.

## 12. Name of Senior Manager and date approved

(Note - sign off at this point should **only** be obtained if:

- there are no equality impacts
- the changes have promoted equality of opportunity

You should now complete a brief summary (if possible, in less than 50 words) **setting out which policy, legislation or service the EIA relates to, how you assessed it, a summary of the results of consultation a summary of the impacts (positive and negative) and, any decisions made, actions taken or improvements implemented as a result of the EIA**, including the review mechanism. The summary will be published on the external MoJ website.

This EIA relates to the replacement of the existing flat notification fee structure with a tiered fee structure. Under the Data Protection Act 1998 (DPA), all data controllers must notify the Information Commissioner's Office (ICO) of their intention to process personal data before doing so, and be listed on the ICO's register of data controllers. To remain on the register, a data controller must renew their registration each year by paying an annual notification fee, which is currently £35. The proposal seeks to introduce a tiered notification fee structure in place of the current flat fee structure. In seeking to introduce an upper and lower tier, the analysis was based on the criterion for the upper tier, which does not disadvantage any of the above named different groups of people. In conclusion, there are no adverse nor positive impacts on any of the different named groups.

Name (must be grade 5 or above): Belinda Lewis

Department: Ministry of Justice

Date: 2 July 2009

Note: If a full EIA is required hold on to the initial screening and when the full EIA is completed send the initial and full screening together. **If a full EIA is not required send the initial screening by email to the Equality, Diversity and Human Rights Division for publication**