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# A reflection on the priorities of a data protection authority

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## ABSTRACT

Eric Howe, the first Data Protection Registrar, was setting up his Office about the same time as the first appearance in 1985 of this journal, whose distinguished editor Professor Saxby is now retiring. That is this author's excuse for looking back to the early years of United Kingdom data protection and reflecting on what a data protection authority is actually for. As this article hopes to make clear, using the early United Kingdom experience as an example, Data Protection Authorities are faced with an unclear role running the risk of creating false expectations among the general public. The author concludes that representations to government are often minimally effective and that with the limited resources available a DPA should give priority to encouraging compliance by data controllers and assisting individuals with a complaints resolution service.

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*“Role clarity is essential for a regulator to understand and fulfil its role effectively. The role of the regulator should be clearly defined in terms of its objectives, functions and co-ordination with other entities. These should be clear to the regulator, but also to the regulated bodies, citizens and other stakeholders.”<sup>1</sup>*

*“The integration into the parliamentary organisation also underlies the essential difference between the Data Protection Commissioner and nearly every other state agency created during the last decades. Its task consists not of helping government enforce its policies but of preventing both government and private institutions from overstepping the boundaries guaranteeing the democratic structure of society.”*

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## 1. His Master's Voice

In his 1985 Thomas Jefferson Lecture, Professor Spiros Simitis – one of the distinguished fathers of data protection and first Commissioner for the German state of Hesse - told us that there were four essentials for an efficient regulation of personal data processing of which the fourth was that ‘there must be an independent authority to enforce data regulations.’<sup>2</sup>

This view was based on the specific constitutional position of the German data protection commissioners, but can one generalise this view of the role of data protection authorities? Is it practical and realistic for those authorities to prevent ‘both government and private institutions from overstepping the boundaries guaranteeing the democratic structure of society’ and should that be their principal task? If Professor Simitis is unrealistic, what tasks might a data protection authority attempt?

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<sup>1</sup> P 31 OECD, *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, (Paris, OECD Publishing, 2014).

<sup>2</sup> Spiros Simitis ‘Reviewing Privacy in an Information Society’ 135 U. Pa. L. Rev. 707 (1987).

According to David Flaherty in 1986:

*'It is the task of the data protection office to articulate the privacy interests at stake, as elusive as they may be on occasion. It is not the task of data protectors to draw the suitable balance between personal privacy and competing values.'*<sup>3</sup>

Does that not sound too much like a campaigning body: a type of institutionalised lobbyist or pressure group? Can it be the correct approach for an organisation established by statute with enforcement power? Data protection enforcement or prosecution is of necessity a balancing act or rather a careful decision about which of several competing rights should prevail.<sup>4</sup>

What 'realistic solutions' (again borrowing from David Flaherty) might a data protection authority achieve?

## 2. Why did the UK pass a data protection law and what is data protection?

From the end of the Second World War, there had been a growing demand for the legal protection of personal privacy. At first, this focussed on protection against tyrannous states and that resulted in instruments such as the Council of Europe Convention on Human Rights<sup>5</sup> (ECHR). However, there was also a growing desire for protection against invasions of privacy by private organisations and individuals. The parliamentary consequence had been a series of private members' bills throughout the 1960s culminating in a bill introduced by Brian Walden on 26 November 1969 the direct consequence of which was the establishment in May 1970 by the Labour Government of the Younger Committee,<sup>6</sup> to examine the need for protection against privacy intrusions by individuals and the private sector. Younger was excluded from examining privacy intrusions by public bodies and the Conservative Government upheld this policy decision when it was returned to power in June 1970.

Younger saw the demand described above partly as a consequence of the pressures of modern industrial society on 'home and daily life' and partly as the result of intrusions by the mass media – a continuing unresolved problem. Thirdly, they said, '... the new public concern on this subject is the direct result of new technological developments.'

## 3. The Younger conclusions

A small minority of the Younger Committee thought the time had come to enact a clear privacy right. Nevertheless, the majority preferred to recommend a series of detailed privacy pro-

<sup>3</sup> David Flaherty *On making Data Protection Effective* Paper presented to the National Forum on Access to Information and Privacy, Ottawa, Canada 6-7 March 1986.

<sup>4</sup> See Professor François Rigaux, 'La vie privée, une liberté parmi les autres', *Proceedings of the 19th International Conference of Privacy and Data Protection Commissioners*, Brussels 17-19 September 1997.

<sup>5</sup> Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series 5.

<sup>6</sup> paras 13 – 20 Report of the Committee on Privacy Chairman, the Rt. Hon. Kenneth Younger Cmnd. 5012 (London, HMSO, July, 1972).

tecting measures for the media, banking, employment, universities and credit reference. The proposals included the licensing of private detectives, the outlawing of surreptitious surveillance by technical devices and a new tort of disclosing or using information unlawfully obtained. The committee particularly recommended the establishment of a standing commission to look at computer privacy issues, and that computer users adopt a code of ten principles that are the origin of many of the current data protection principles.<sup>7</sup>

## 4. The government response to Younger

Governments – perhaps preoccupied by the Miners' Strike, the three-day week and 'Who governs Britain?'<sup>8</sup> – took over three years to respond to those recommendations. At last, following the second 1974 General Election, the Labour Home Secretary, Roy Jenkins, brought forward the White Paper, *Computers and Privacy*,<sup>9</sup> which addressed both public and private sector computing. Although the White Paper gave a confident and reassuring view that there was no current evidence of abuse, the government nevertheless concluded that:

*'... the time has come when those who use computers to handle personal information, however responsible they are, can no longer remain the sole judges of whether their own systems adequately safeguard privacy. ... The Government have therefore decided that the right course is to introduce legislation involving two elements: first the establishment of a set of objectives, to set standards governing the use of computers that handle personal information; and second the establishment of a permanent statutory agency to oversee the use of computers, in both the public and private sectors, to ensure that they are operated with proper regard for privacy and with the necessary safeguards for the personal information which they contain.'*

In the meantime, the government proceeded to set up a non-statutory committee under the chairmanship of Sir Norman Lindop. The committee's tasks were to advise the government on the form of future legislation, to develop the Younger Principles, to take account of the need for exceptions, to prepare the way for the statutory authority, and to consult the computer industry and other stakeholders.

## 5. The Lindop Committee and its proposals

The Committee's very thorough piece of work resulted in a report to Parliament in December 1978.

The committee concluded that a data protection law, rather than establish rights, ought to provide a framework for balanc-

<sup>7</sup> Annex A reprinted from Table I to the Home Office White Paper *Computers and Privacy Cmnd. 6353* (London, HMSO, December 1975) as reprinted as Appendix 12 to the Report of the Lindop Committee see Note 10.

<sup>8</sup> See for example the summary history at p 25 *The Times Guide to the House of Commons February 1974* (London, Times Newspapers Ltd, 1974).

<sup>9</sup> *Computers and Privacy Cmnd. 6353* (London, HMSO, December 1975).

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