WEBINAR

SHOOSMITHS

Employment webinars series 2024 | Protecting employee data

This webinar will begin at 10:00

FOR WHAT MATTERS

Connect with your speakers on LinkedIn

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SHOOSMITHS

Protecting Employee Data

Protecting your employee brand

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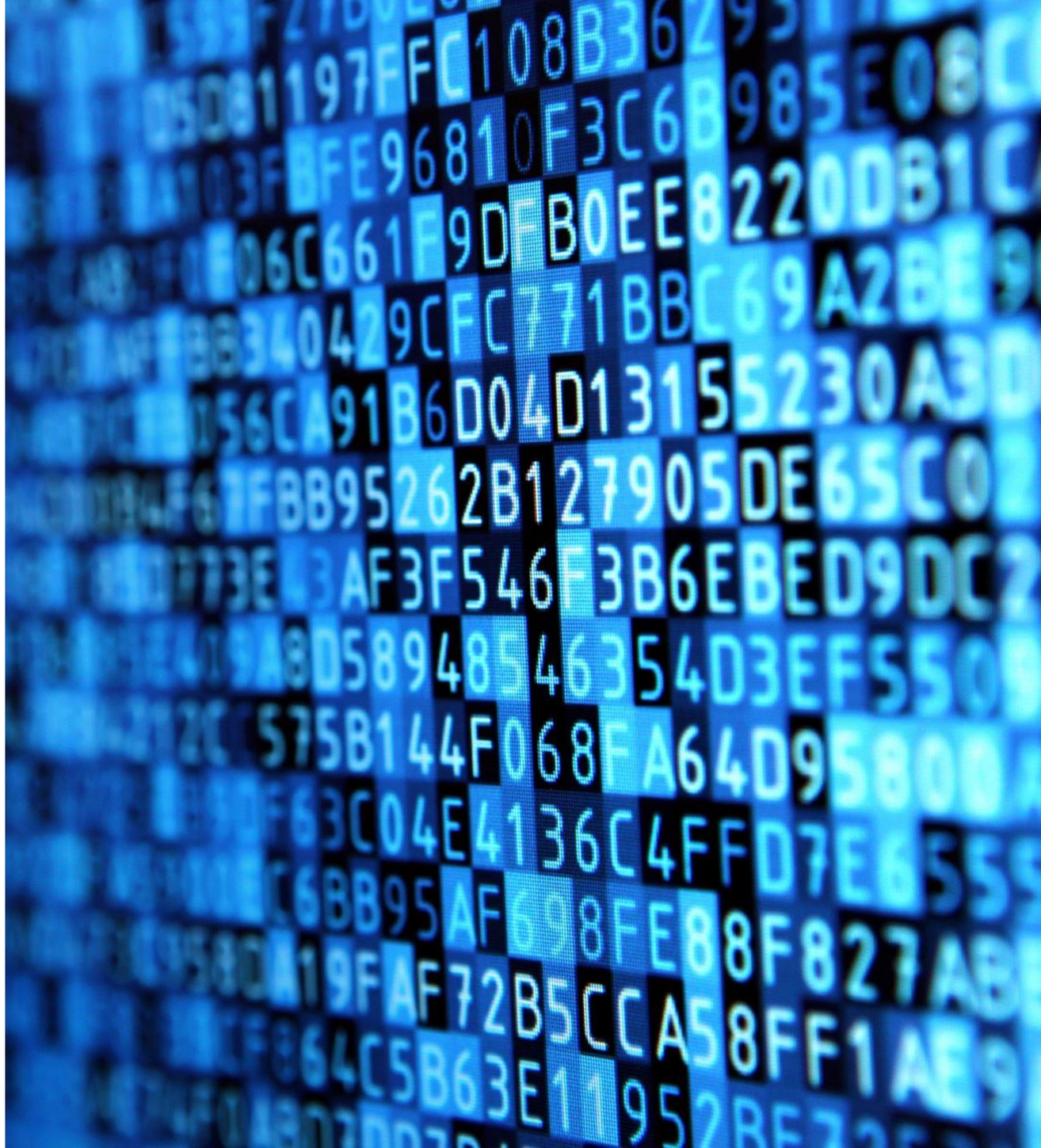
FOR WHAT MATTERS

Agenda

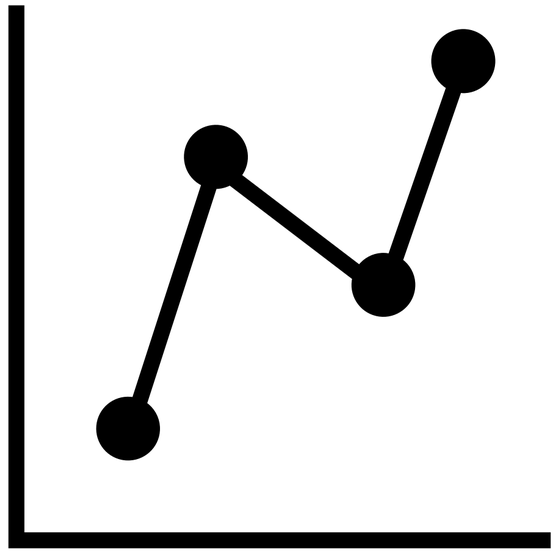
- ICO 3 year plan ‘ICO25’
- Recap of key data protection principles
- Employee monitoring and use of AI
- Handling employee DSARs effectively
- Controlling the use of social media



ICO Approach

ICO25

- ICO approach
  - Safeguarding vulnerable
  - Empowering organisations and employees
  - Emphasis on trust



Data Protection: Key Principles

Accountability

Fair and lawful

Purpose limitation

Storage limitation

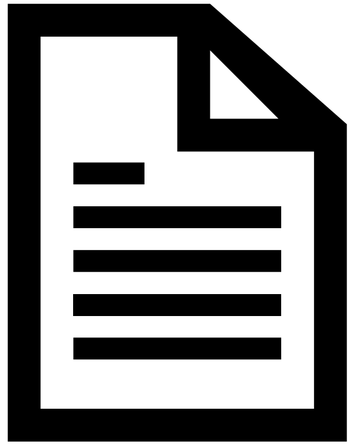
Data minimisation

Integrity and confidentiality

Accuracy

Transparency

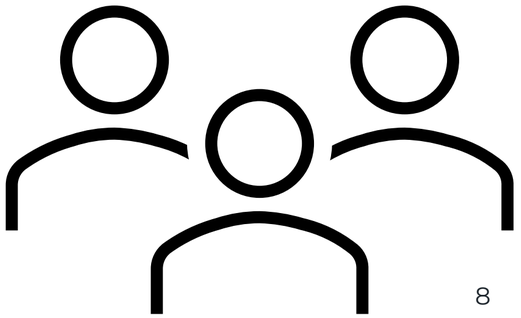
New Guidance



- The Employment Practices Code consisted of 4 parts:
  - Recruitment and selection
  - Employment records
  - Monitoring at work
  - Information about workers' health
- Replaced by ***Employment practices and data protection: monitoring workers*** and ***Information about Workers Health*** to provide greater certainty and protection to employees on their data protection rights
- ICO has also issued additional guidance on AI and Biometric Data

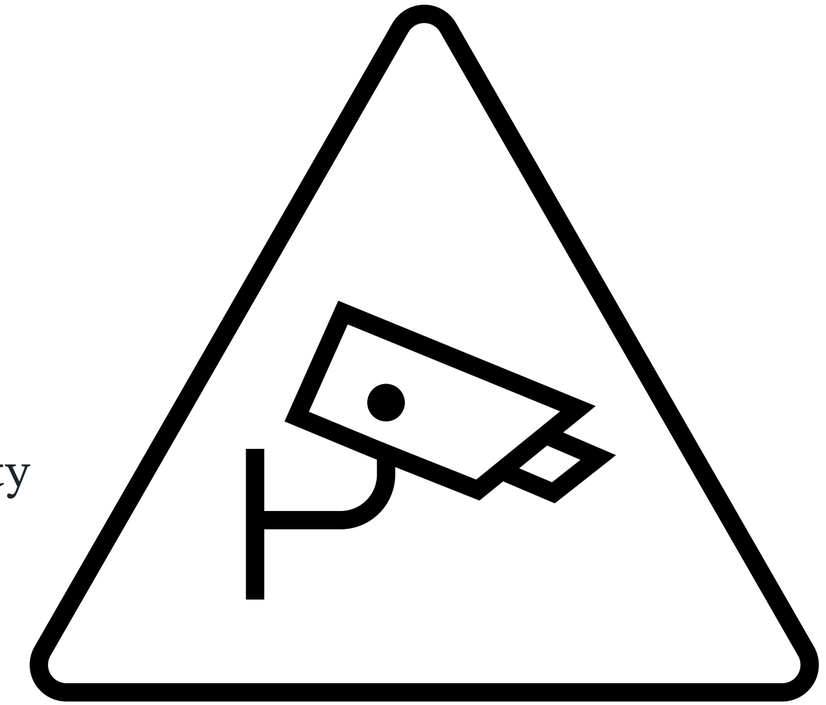
ICO Guidance: Employee Monitoring

- Aimed at employers and provides guidance on monitoring workers lawfully, transparently and fairly
- Employers encouraged to consider legal obligations and workers' rights **before** implementing any monitoring in the workplace
- Scenarios for different ways of worker monitoring
- Data protection checklists provided as a quick overview/guide to help employers think about what needs to be considered



Employee Monitoring

- Purpose?
- Legal basis?
- Necessary, justified and **proportionate**?
- Processed **fairly**, lawfully and in transparent manner
- Data Protection Impact Assessment (**DPIA**)
- **Inform** employees – limited exceptions (covert monitoring)
- Human Rights Act 1998 – reasonable **expectation of privacy**
- **Artificial intelligence** (e.g., biometric monitoring and productivity monitoring)



Biometric Data : ICO Guidance

- Biometric data is "personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data" (Article 4(14), UK GDPR).
- Biometric recognition : when biometric data is used to uniquely identify someone
- ICO guidance explains how data protection law applies to biometric data in biometric recognition systems
- Aimed at organisations that use, or are considering using, biometric recognition systems and for providers of these systems

Using Biometric Data for Monitoring: ICO Guidance

- To process biometric data lawfully:
  - identify a lawful basis and a separate condition for processing special category biometric data before you begin processing
  - complete a DPIA before you use a biometric recognition system
  - Ensure systems in place to correct inaccurate information
  - Update privacy notice
  - Ensure appropriate security measures, such as encryption or access restrictions

Biometric Data: Enforcement Action

- The ICO took enforcement action taken against **Serco Leisure**
- Biometric data of more than 2,000 employees at 38 leisure facilities was unlawfully processed
- Employees were not offered a clear alternative
- By 19 May 2024 Serco must:
  - stop using facial recognition technology to monitor employee attendance
  - destroy all biometric data and all other personal data that Serco is not legally obliged to retain

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Handling employee DSARs effectively

FOR WHAT MATTERS

Recent developments and top tips

- What is a DSAR?
- What is the right of access?
- How to recognise a DSAR
- Initial considerations
- Timings
- When you can refuse finding and retrieving data
- Exemptions
- Redactions
- How data should be provided
- Preparation for and practical steps

Recent developments

- What we are seeing
- What we are doing!
- New guidance from the ICO “Subject access request Q and A’s for employers”
- ICO Portal…now easier than ever to make a DSAR
- ICO Guidance 2023
- Updated guidance on timescales…
  - Day of receipt – day one (not the day after)
  - e.g. DSAR received on 14 May has to be responded to by 14 June

What is a DSAR?

- A DSAR is a data subject access request which can be requested by employees who exercise their right of access
- When a DSAR is requested, an individual is only entitled to their own personal data – not to information relating to others

What is the right of access

Gives the individuals the right to obtain:

i. Confirmation you are processing their data
ii. A copy of their personal data
iii. Other supplementary information

How to recognise a DSAR

How are requests made?

- In writing, by email, or other electronic means
- Can be made on social media
- Can be verbal

Scope of request

- Framed widely
- Does not need to refer to the GDPR or DPA
- No right to see ‘documents’, only their personal data

Requests made on behalf of others

- Via a third party

Initial considerations

- Individuals are only entitled to **their own** personal data (unless they are acting on behalf of another individual)
- Check identity of person making request
- Make an initial assessment
- Clarification of a request
- Charging fees

How long have you got to respond

- You must comply with a SAR without undue delay and at least 1 month of receipt of the request
- Time limit begins from the day you receive the request until the corresponding calendar date the next month
- If the corresponding date falls on a weekend or public holiday you will have until the next day to respond
- If clarification is requested the time limit for responding is paused until clarification is obtained

Refusing to comply with a SAR

A request can be refused if:

- An exemption applies
- The request is manifestly unfounded or excessive

When is a request manifestly unfounded or excessive:

- Repetitive requests may be excessive
- Manifestly can be interpreted as “obviously” or “clearly”
- Excessive is likely to be interpreted with the principle of proportionality
- The individual’s purpose and motivation may be relevant
- You are able to charge a reasonable fee or refuse to act
- Do not be too quick to say that a request is unfounded or excessive though!

Finding and retrieving relevant information

- Businesses should make reasonable and proportionate efforts to retrieve information
- Consider if other information is needed from the individual to help with locating information
- How to retrieve information from differing sources:
  - Electronic records not easily available
  - Archived information and back-up records
  - Deleted information
  - Information contained in emails
  - Information stored in different locations
  - Information stored on personal computers
  - Personal data in big data sets
  - WhatsApp messages
  - Deleting or amending data

When do exemptions apply

There is no obligation to comply with a DSAR in relation to:

- **Confidential references**
- Publicly available information
- Crime and taxation
- **Management forecasting or management planning**
- **Negotiations between the employer and employee**
- Regulatory activity
- **Legal advice and proceedings**
- Social work records
- Health and education records

Redacting data

- Can be used to protect the identity of another individual
- Can be used to remove information which is out of scope
- Seek advice on how to save documents to ensure there is no risk of the individual being able to delete the blacked-out sections
- Ensure to keep original non-redacted copies of documents

How should the information be supplied to the requester?

- How to decide what information to provide
- What format should we provide the information
- Do we need to provide remote access?
- Does the company have to explain the information supplied

What goes into the response?

- Supply a copy of the personal data concerning the individual
- In addition, you must also provide:
  - Purposes of the processing
  - Categories of personal data
  - Recipients or categories of recipient
  - Source of personal data
  - Retention periods
  - Existence of automated decision making (including profiling)
  - Transfers outside the EEA and safeguards
  - Existence of data subject rights
  - Right to lodge a complaint with ICO

How should business prepare for a DSARs

Ways in which businesses can prepare for SARs:

- Training
- Guidance for staff
- Appointing staff members to deal specifically with requests
- Asset registers
- Checklists
- Logs
- Retention and deletion policies
- Security
- Rectification of data to ensure data held is accurate. Incorrect information could lead to disputes and unlawful deduction.

Practical steps

- Use a data room to facilitate document review (creates audit trail)
- Diarise the deadline to reply
- Narrow the scope of request if possible
- Consider whether the request is manifestly unfounded or excessive
- Consider extending the time to respond (this can be up to 3 months)
- Consider exemptions
- Wrap up in a settlement agreement
- If in doubt – seek legal advice!

DSAR: Case law

- ***FF v Österreichische Datenschutzbehörde and CRIF GmbH C-487/21***
  - the individual must be provided with a "*faithful and intelligible reproduction of all those data*"
- ***RW v Österreichische Post AG C-154/21***
  - where personal data has been, or will be, disclosed to third parties, the identity of the recipients must be disclosed to the individual on request

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Protecting your business social media

FOR WHAT MATTERS

Recent developments

- What we are seeing
  - Significant increase in queries
  - Issues arising both during and post-employment ending
  - Numerous requests for assistance with Social Media policies

Social Media policies – drafting considerations

- What other policies should your Social Media policy refer to?
- Do you allow any personal use of social media during work?
- How are you going to define prohibited use?
- Will employees be required to use social media for business use?
- Useful to include acceptable use guidelines
- Sensible to have ability to monitor
- Do you use for recruitment?
- What are the consequences of breach

NB: Data on Social Media can = personal data!

Your contacts

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