

The views expressed in this presentation are those of the author and do not necessarily reflect the opinions of the ITU or its Membership. This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union.

ITU-EC HIPCAR Project

Draft Model Legislative text

on

Privacy and Data Protection

Presentation at the

Second Consultation Workshop for

Working Group 1 – ITU-EC HIPCAR Project

Saint Kitts, 19-22 July, 2010



Objective

- To provide an overview of the Draft Model Legislative text for Privacy and Data Protection
- To highlight where particular positions agreed to in the Policy Building Blocks are given effect.
- To highlight suggested points of deliberation for the ready review and acceptance of the Draft Model Legislative text.

Methodology Overview

- There is much precedence in Privacy laws in the Commonwealth and beyond
 - Much case law precedence and ongoing discussion papers have been produced
 - EU-EPA encourages CARIFORUM to implement frameworks in line with provisions therein.
- HIPCAR Policy Building Blocks provide the direction on particular points of policy for CARIFORUM
 - Formed basis for amendment of precedent models to meet regional consensus
- Regional Precedent used to allow adoption of style of drafting conducive for ready adaptation to needs of the Beneficiary States.
 - Model text enabling in nature, deferring questions of procedure and standards to Regulations.

Key References

- EU Directive 95/46/EC
- EU Directive 2002/58/EC
- Data Protection Act, Malta
- Data Protection Act, UK
- Data Protection Act, Australia
- HIPCAR Regional Assessment Report, Privacy & Data Protection
- *HIPCAR Privacy and Data Protection Policy Building Blocks*
- Data Protection Act, St. Vincent and the Grenadines
- Data Protection Act, Bahamas
- Data Protection Bill, Trinidad and Tobago

Overview of Structure

- Model text comprises of 9 Parts, 80 sections
 - Preliminary
 - Obligations of Data Controllers
 - Rights of Data Subjects
 - Particular Obligations of Public Authorities
 - Special Exemptions
 - Review and Appeals
 - Office of the Data Commissioner
 - Contravention and Enforcement
 - Miscellaneous

Part 1 - Preliminary

- Section 3 – *Definitions*

- “**data**” and “**information**” (which are made equivalent) as it underscores a wide interpretation of applicable forms, formats and technologies (electronic or otherwise) in which the data can be presented or stored

- Policy Building Block 1.2

- “**data controller**” the definition of which is intended to have broad catchment of the term “persons”, including parties in both the public and private sectors.

- Policy Building Block 1.4

- Distinction between “**personal information**” and “**sensitive personal information**”, where the treatment of the latter is more closely prescribed.

- Policy Building Block 1.5

Preliminary

- Section 4 – Enactment Binds the State
- Section 5 provides clarity on the jurisdictional limits of the Legislative text recognising the multinational nature of certain businesses, particularly in the context of e-commerce
- Section 6 – ***Limits of Applicability***
 - non limitation of exiting powers exercised:
 - in the function of the Courts or
 - in tribunals established by the President.

Part 2 – Obligations of Data Controllers

- This Part consists of 16 sections.
 - **Section 8 (1)** provides for the recognition of data controllers by the Data Commissioner
 - The form of recognition – *registration or notification* - is subject to interpretation and regulatory strategy of the Beneficiary State.
 - Policy Building Block 3.1
 - Subsection **8 (2)** limits the information collected to only that necessary for the provision of service.
 - Policy Building Blocks 4.1, 4.3

Obligations of Data Controllers

- **Section 9 & 10** treat with how the data controller is to **collect** personal information: directly from the data subject after they are informed of the purpose of collection
 - identified circumstances are exempted from these obligations.
 - Policy Building Block 1.8
- **Sections 11 & 12** provide for the data controllers' adherence to data **retention and disposal** guidelines which may be established.

Obligations of Data Controllers

- **Section 13** makes the controller responsible for ensuring the accuracy of data stored, and works with **Section 28** to ensure Data Quality is maintained.
- **Section 14** makes the controller responsible for securing the data stored.
 - Responsibilities clarify where liabilities may lie in the instance of civil motions where a persons deems these obligations breached.

Obligations of Data Controllers

- **Sections 15 & 16** elaborate upon the premise that processing or use of information is limited to the purposes outlined at the time of collection
 - Section 15 outlines the reasons for processing personal information
 - Section 16 outlines the greater limitations on the processing of **sensitive** personal information.
 - Policy Building Blocks 5.1, 5.9

Obligations of Data Controllers

- **Section 17, 18 and 19** outline situations where personal information can be disclosed without prior consent of the data subject:
 - For purposes that are consistent with the purpose for which collection and processing was consented by the data subject,
 - For the undertaking of research and statistical analysis, where there is assurance of appropriate security arrangements;
 - For archival purposes, where the information meets particular criteria, or the data subject is deceased for a specified period.

– Policy Building Block 6.2

Obligations of Data Controllers

- **Section 20** limits data controllers from storing or processing information in any other jurisdiction where the Law is enforced or a jurisdiction with equivalent privacy protection laws.
 - Policy Building Blocks 6.2, 6.3
- **Sections 21 and 22** provides for the Data Commissioner's utilising a co-regulatory approach where such is deemed appropriate, through the development of sector-specific Codes of Conduct.

Part 3 – Rights of the Data Subject

- This Part consists of 6 sections.
 - **Section 23** provides the general right for an individual to access his own personal records, within a framework outlined in the Part.
 - Policy Building Block 6.5
 - **Section 24** provides the framework under which a data controller may refuse access to an applying individual, while ensuring that if the access is so denied, to all or part of a document, the onus falls on the data controller to justify the denial.
 - Policy Building Block 6.5

Rights of the Data Subject

- **Section 25** provides for the severance of exempt information from a document to be disclosed to a subject pursuant to a request
 - Policy Building Block 6.5
- **Section 26** recognises that a data subject may need to delegate particular rights to agents to act on their behalf (e.g. in the case of incapacity or where the subject is a minor)
- **Section 27** provides statutory time limit in which time a subject may expect a response from a controller
- **Section 28** provides for the data subject to request a correction to their personal information stored by a controller.

Part 4 – Particular Obligations of Public Authorities

- This Part consists of 6 sections which provide particular operational requirements of controllers who are public authorities.
 - **Section 29** obliges public authorities to create and maintain Privacy Impact Assessments (PIAs) on the compliance of their programmes to the Law.
 - PIAs form a key part of an *ex ante*, co-regulatory framework with the Data Commissioner
 - **Section 30** obliges public authorities to maintain centralised privacy information filing systems to facilitate ready audit of systems, while **Section 31** exempts archived information at the National Archives from the obligation of Section 30.

Particular Obligations of Public Authorities

- **Section 32** provides for public authorities to identify liaison officers to facilitate the internal evaluation of systems and function to compliance with the Data Protection Law
- **Section 33** facilitates the sharing of information between Ministries in accordance with guidelines established by, and/ or approval attained from the Data Commissioner
 - these are critical to the implementation of e-government services.
- **Section 35** obliges the Commissioner to publish reports of the status of the various mechanisms and instruments established to monitor the management of personal information public authorities

Part 5 – Special Exemptions

- This Part consists of 4 sections and provides provisions for amendments to the applicability of provisions in Part 2 to identified data controllers for specific purposes and circumstances
 - **Section 35** clarifies that a person may use personal information where that information is used for personal, or family affairs
 - **Sections 36 through 37** provide for exemptions from Parts 2, 3 and 4 where applicable in accordance with international best practice

Special Exemptions

- **Section 38** provides for exemption of applicability in relation to endeavours associated with the existing freedoms of expression, including in the pursuit of works in journalism, literature and art.
 - Adequate protection against defamation of character generally are already in place to provide some sort of protection to the data subject without the undue restriction of activity.

Part 6 - Review and appeals

- This Part consists of 10 sections and provides for a data subject to appeal and/ or seek review of a decision of a data controller with the Data Commissioner.
 - **Section 39** provides the general right of appeal of an individual who is dissatisfied by the outcome of a request made pursuant to sections 24 and section 29 to the Data Commissioner, who is empowered to resolve the dispute
 - Policy Building Block 5.8

Review and appeals

- **Sections 40 through 42** provide for the generic process by which an appeal is accepted by the Data Commissioner, from the timeframe from the time of the decision in question in which the appeal should be lodged, through to the notification to the data controller that appeal has been lodged
- **Sections 43 through 46** provide the general rubric through which the Data Commissioner may utilise alternative dispute resolution techniques in the resolution of the appeal
- **Section 48** provides for the appeal of the decision of the Data Commissioner to the Courts

Part 7 – Office of the Data Commissioner

- This Part consists of 23 sections and establishes the Office of the Data Commissioner – the independent oversight essential to oversee compliance by the data controllers, in both the public and private sectors.

Office of the Data Commissioner

- **Section 49** provides for the eligibility, appointment and removal of an independent Data Protection Commissioner in the same manner as and with similar criteria for eligibility a Parliamentary Commissioner or Ombudsman.
 - Provides for appointment of temporary Commissioner
 - Is there appropriate balance in the institutional positioning of the Commissioner?
 - Policy Building Blocks 1.6, 3.3, 3.12

Office of the Data Commissioner

- **Sections 50 through 54** establish the regulatory powers of the Office and entrenchment provisions associated with the office.
 - Provisions explicitly outline the independence of the Office.
 - Provides for tenure in office – should there be provisions on remuneration as well?
 - Policy Building Blocks 3.2 , 3.4, 3.10
- **Sections 55 through 57** establish the functions of the Commissioner and empower him as a regulator for the purpose of carrying out his investigative and enforcement roles, and provides for the delegation of such powers to agents
 - Policy Building Blocks 1.6 , 3.5, 3.6

Office of the Data Commissioner

- **Sections 58 through 59** establish a mechanism through which the Authority may request information pursuant to an investigation – the information notice
 - Policy Building Blocks 3.7
- **Section 60** obliges data controllers to reply truthfully to an information notice, while **Section 61** empowers the Commissioner to order the limitation of collection and processing activity in response to inadequate response to an information notice.

Office of the Data Commissioner

- **Sections 62 through 66** establish the appropriate process by which the Commissioner may undertake an audit or investigation
 - Provides for initiation of an investigation in response to a complaint, or on its own accord
 - Includes powers, and limitations thereto, of search and seizure pursuant to a warrant
 - Policy Building Blocks 3.8, 3.9
- **Sections 67 through 69** establish the mechanism and process by which the Commissioner may issue directions to data controllers deemed to operating in a manner not consistent with the Legislative text. Data controllers are herein obliged to respond or comply with instruction

Office of the Data Commissioner

- **Sections 70 and 71** establish further logistical conditions within which the investigations should be held, and provides for, where a breach is deemed to have occurred the appropriate action of the Data Commissioner in the referral of the record to the appropriate person.
- **Section 72** obliges the Data Commissioner to report on its activities to the Parliament, in line with Parliamentary best practice
 - Policy Building Blocks 3.11

Part 8 - Contravention and Enforcement

- **This Part** consists of 5 sections which outline the criminal offences associated with the breach of particular provisions of the Legislative text.
 - Policy Building Blocks 5.10, 6.6
 - **Section 73** defines the breach of section 9 as an offence, and outlines the different penalties associated with the offence where the breach is deemed to have occurred with personal information and sensitive personal information respectively. It is intended that the penalty for the breach of the latter information type will be more punitive

Contravention and Enforcement

- **Section 74** defines breaches to any of the provisions from Section 10 through 16 and 21 as offences, and outlines the standard penalty associated with these offences
- **Section 75** treats with the direct or indirect obstruction of authorised agents of the Data Commissioner in the exercise of their functions during an investigation and outlines the standard penalty associated with this offence.

Contravention and Enforcement

- **Section 76** treats with persons who are deemed to abuse the rights conferred by Part 3.
 - The offences created and the penalties outlined are to be disincentives to the vexatious abuse of these empowering provisions which would otherwise undermine the operational viability of the data controller, the Office of the Data Commissioner or both

Contravention and Enforcement

- **Section 77** seeks to treat with persons who breach oaths of confidentiality entered into in undertaking functions within the Office of the Data Commissioner. This is geared to limit such occurrences and ensure the continued public trust in the Office
- Breaches to provisions which are not explicitly outlined either in this Part of other prevailing sections may be treated by the Courts under civil law.
 - Policy Building Blocks 4.8, 5.10, 6.6

Part 9 - Miscellaneous

- **Section 78** provides protection for persons who, while within the employ of a data controller and becomes knowledgeable of actions by that party which run counter to the objectives of the text or the provisions therein, wilfully informs the relevant authority of such action.
- **Section 79** provides a general enabling provision through which the relevant Minister may enact Regulations necessary to effect or elaborate on particular provisions throughout the Legislative text

Miscellaneous

- **Section 80** clarifies the role of the Courts as the ultimate appellate forum where either party remains dissatisfied with outcome of any dispute resolution process undertaken by the Data Commissioner. This Section also reinforces the power of the Courts to impose civil penalties for breaches of the Law not deemed an offence by Part 8.

Suggested Points of deliberation

- Are there particular considerations with regard to the registration or notification of data controllers that should be addressed in **Part 2**?
- Can the particular obligations of public authorities outlined in **Part 4** be strengthened to facilitate smoother interaction between the public authority and the Data Commissioner?
- Are there situations or circumstances that may warrant provision for special exemptions that are not outlined in **Part 5**?
- Are there contraventions that should also be considered as criminal offences that have been overlooked in **Part 8**?

Questions?



Thank You.

Kwesi PRESCOD

Prescod Associates & Co.

PO Box 3228

Petit Valley

TRINIDAD & TOBAGO

Website: www.prescodassociates.com

e-mail: kwesiprescod@prescodassociates.com

Tel: + 1 868 633 2951

Mobile: + 1 868 688 4380

Fax: + 1 868 632 3606

Special acknowledgement to
Ms. Karen Stephen Dalton