Data Protection & Privacy 2022

Contributing editors
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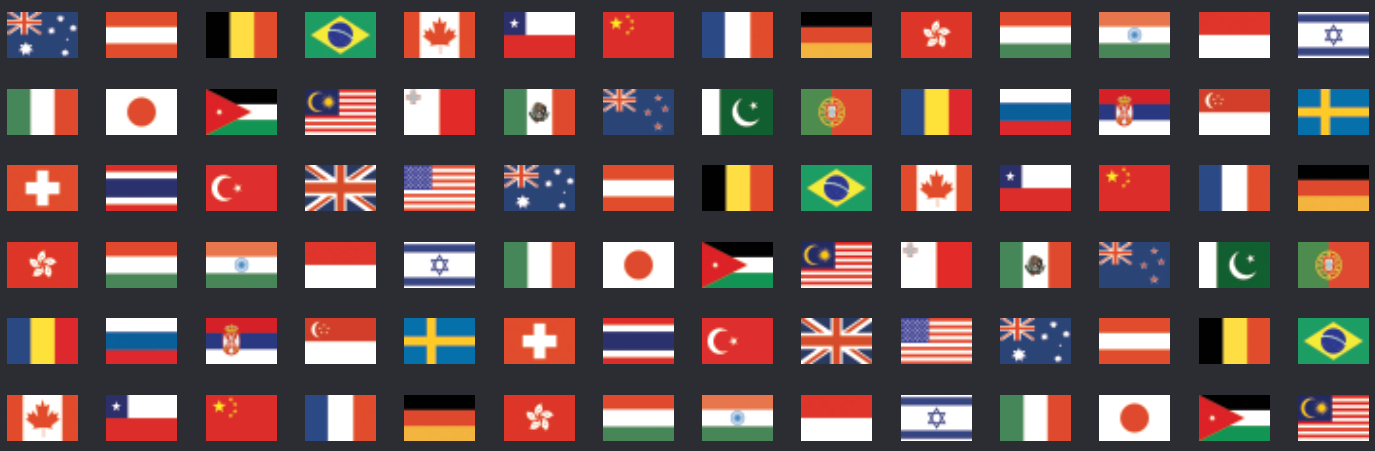
Hunton Andrews Kurth LLP



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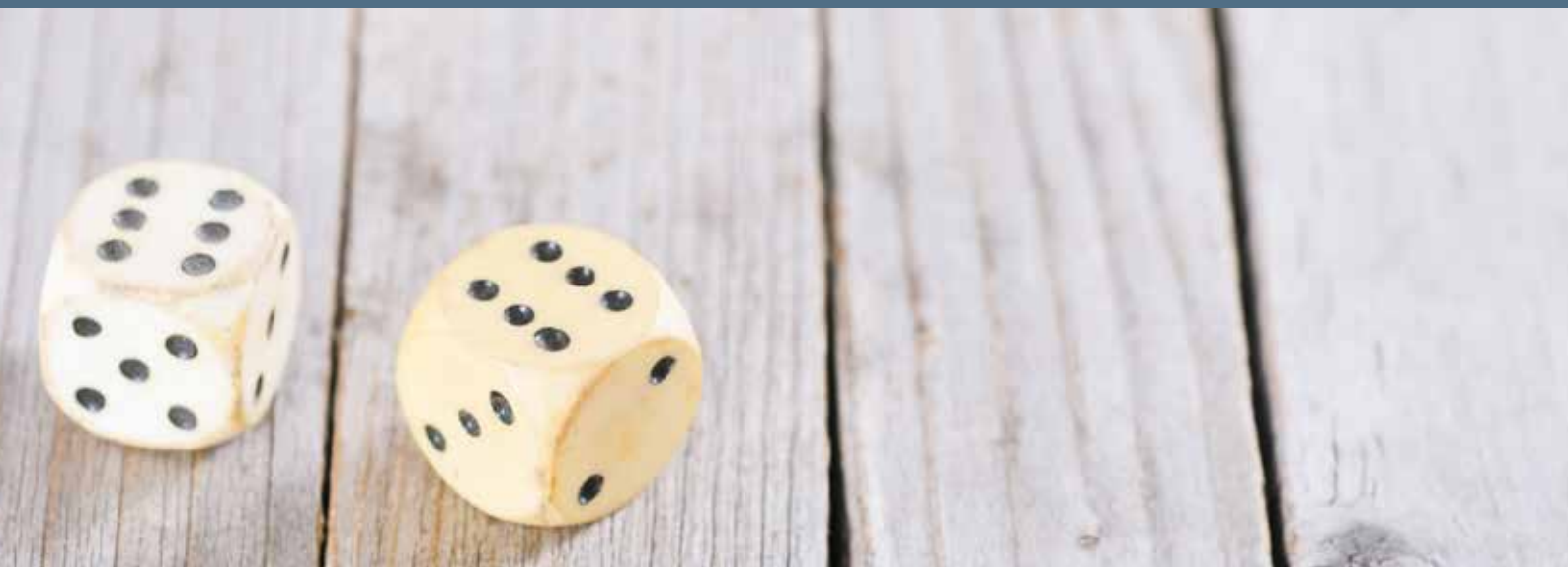

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2012
Tenth edition
ISBN 978-1-83862-644-0

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the tenth edition of *Data Protection & Privacy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Jordan, Pakistan and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Aaron P Simpson and Lisa J Sotto of Hunton Andrews Kurth LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
July 2021

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This article was first published in August 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

United Kingdom

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LAW AND THE REGULATORY AUTHORITY

Legislative framework

1 Summarise the legislative framework for the protection of personally identifiable information (PII). Does your jurisdiction have a dedicated data protection law? Is the data protection law in your jurisdiction based on any international instruments on privacy or data protection?

The primary legal instruments include the UK's Data Protection Act 2018 (DPA 2018) and Regulation (EU) 2016/679 (the General Data Protection Regulation) (GDPR) of the European Union. The United Kingdom is a signatory to Treaty 108 of the Council of Europe. The United Kingdom has no national constitutional privacy provisions but is bound by the EU Charter of Fundamental Rights.

In the 2016 referendum, the United Kingdom voted to leave the European Union. In March 2017, the UK government formally notified the European Union of the UK's referendum decision, triggering article 50 of the EU's Lisbon Treaty. This signalled the beginning of the process of leaving the European Union. The United Kingdom left the European Union on 31 January 2020 and entered a Brexit transition period that ended on 31 December 2020.

Following the end of the transition period, the GDPR no longer applies directly in the United Kingdom. However, UK organisations must still comply with its requirements, as the UK government enacted the Data Protection, Privacy and Electronic Communications (Amendments, etc) Regulations 2019 (EU Exit), which amended DPA 2018 and merged it with the requirements of the GDPR to form a data protection regime that works in a UK context post-Brexit. This new regime is known as the 'UK General Data Protection Regulation' (UK GDPR).

Following the end of the Brexit transition period on 31 December 2020, there was a degree of uncertainty over future trading arrangements between the United Kingdom and the European Union. On 24 December 2020, the European Union and the United Kingdom reached an agreement in principle on the EU–UK Trade and Cooperation Agreement (the Trade Agreement). From a data protection standpoint, the Trade Agreement included a further transition period of up to six months to enable the European Commission to complete its adequacy assessment of the UK's data protection laws. This further transition period began on 1 January 2021, and ends either:

- on the date on which an adequacy decision concerning the United Kingdom is adopted by the European Commission; or
- four months after the further transition period began, which shall be extended by two months unless either the European Union or the United Kingdom objects.

During this further transition period, personal data can continue to be exported from the European Union to the United Kingdom without the implementation of a data transfer mechanism, such as EU Standard Contractual Clauses. However, following the expiration of the further transition period, if an adequacy decision is not made transfers of personal data from the European Union to the United Kingdom will be prohibited unless EU data exporters take further steps to ensure adequacy for the personal data being transferred. Those steps include entering into the EU Standard Contractual Clauses.

Data protection authority

2 Which authority is responsible for overseeing the data protection law? Describe the investigative powers of the authority.

DPA 2018 and the UK GDPR are supervised by the Information Commissioner's Office (ICO). The ICO may:

- seek entry to premises subject to a warrant issued by a court;
- require the provision of information by service of information notices;
- by notice, require government departments to undergo a mandatory audit (referred to as 'assessment'); and
- conduct audits of private sector organisations with the consent of the organisation.

Cooperation with other data protection authorities

3 Are there legal obligations on the data protection authority to cooperate with other data protection authorities, or is there a mechanism to resolve different approaches?

Following the UK's exit from the European Union, the ICO no longer participates in the GDPR's 'one-stop shop' mechanism, under which organisations with a main establishment in the European Union may primarily be regulated by the supervisory authority of the jurisdiction in which the main establishment is located (lead supervisory authority).

DPA 2018 requires the ICO, concerning third countries and international organisations, to take steps to develop cooperation mechanisms to facilitate the effective enforcement of legislation relating to the protection of personal data, to provide international mutual assistance in the enforcement of legislation for the protection of personal data, to engage relevant stakeholders in discussion and activities, and to promote the exchange and documentation of legislation and practice for the protection of personal data.

Breaches of data protection

4 Can breaches of data protection law lead to administrative sanctions or orders, or criminal penalties? How would such breaches be handled?

The ICO has several enforcement powers. Where a data controller or a data processor breaches data protection law, the ICO may:

- issue undertakings committing an organisation to a particular course of action to improve its compliance with data protection requirements;
- serve enforcement notices and 'stop now' orders where there has been a breach, requiring organisations to take (or refrain from taking) specified steps, to ensure they comply with the law; and
- issue fines of up to the greater of €17.5 million or 4 per cent of annual worldwide turnover, depending on the nature of the violation of DPA 2018 and UK GDPR.

Several breaches may lead to criminal penalties. The following may constitute criminal offences:

- making a false statement concerning an information notice validly served by the ICO;
- destroying, concealing, blocking or falsifying information to prevent the ICO from viewing or being provided with the information;
- unlawfully obtaining PII;
- knowingly or recklessly re-identifying PII that is de-identified without the consent of the data controller responsible for that PII;
- altering PII to prevent disclosure of the information in response to a data subject rights request;
- requiring an individual to make a subject access request; and
- obstructing the execution of a warrant of entry, failing to cooperate or providing false information.

Criminal offences can be prosecuted by the ICO or by or with the consent of the Director of Public Prosecutions.

SCOPE

Exempt sectors and institutions

5 | Does the data protection law cover all sectors and types of organisation or are some areas of activity outside its scope?

Exemptions from the full rigour of the law apply in some circumstances and for some instances of processing. A wide exemption applies to the processing by individuals for personal and domestic use, but no sectors or institutions are outside the scope of the law. Recent European case law has clarified that this exemption applies only to purely domestic or household activities, with no connection to a professional or commercial activity. This means that if personally identifiable information (PII) is only used for such things as writing to friends and family or taking pictures for personal enjoyment, such use of PII will not be subject to the UK General Data Protection Regulation (UK GDPR).

The UK GDPR and the Data Protection Act 2018 (DPA 2018) apply to private and public sector bodies. That said, the processing of PII by competent authorities for law enforcement purposes is outside the scope of the UK GDPR (eg, the police investigating a crime). Instead, this type of processing is subject to the rules in Part 3 of DPA 2018. Also, PII processed to safeguard national security or defence is also outside the scope of the UK GDPR. However, it is covered by Part 2, Chapter 3 of DPA 2018 (the applied GDPR), which contains an exemption for national security and defence. Part 4 of DPA 2018 sets out a separate data protection regime for the intelligence services (eg, MI5, SIS (sometimes known as MI6) and GCHQ).

Communications, marketing and surveillance laws

6 | Does the data protection law cover interception of communications, electronic marketing or monitoring and surveillance of individuals? If not, list other relevant laws in this regard.

Electronic marketing is specifically regulated by the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) (as amended), although the UK GDPR and DPA 2018 often apply to the same activities, to the extent that they involve the processing of PII. Interception and state surveillance are covered by the Investigatory Powers Act 2016 and the Regulation of Investigatory Powers Act 2000. The interception of business communications is regulated by the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000.

Other laws

7 | Identify any further laws or regulations that provide specific data protection rules for related areas.

The law includes many provisions dealing with information; for example, the regulation of credit files is covered in the Consumer Credit Act 1974. Laws on e-commerce include provisions linked to the regulation of PII. Laws on defamation, copyright and computer misuse also affect data protection. However, there is no specific data protection sectoral legislation. The United Kingdom has a range of soft law instruments, such as codes of practice for medical confidentiality or the management of information held for policing, that apply in specific sectoral areas.

DPA 2018 requires the Information Commissioner's Office (ICO) to draw up and publish codes of practice that relate to data sharing, direct marketing, age-appropriate design and data protection, and journalism. A number of these codes are not yet in force and are in the consultation phase. However, the ICO's Age Appropriate Design Code came into force on 2 September 2020, with a 12-month transition period. As such, organisations are advised to conform to its requirements by 2 September 2021. In addition, the ICO's Data Sharing Code of Practice was laid before Parliament on 18 May 2021 and is due to come into force shortly. This code provides practical guidance for organisations regarding how to share personal data in a manner that complies with DPA 2018 and UK GDPR.

The PECR sits alongside DPA 2018 and the UK GDPR. They give individuals specific privacy rights concerning electronic communications. In particular, the PECR sets out requirements for:

- making marketing calls, sending marketing emails and texts;
- the use of cookies (and similar technologies) on individuals' devices;
- keeping communications services secure; and
- customer privacy regarding traffic and location data, itemised billing, line identification and directory listings.

PII formats

8 | What forms of PII are covered by the law?

The UK GDPR and DPA 2018 cover PII held in electronic form plus such information held in structured files, called 'relevant filing systems'. To fall within this definition, the file must be structured by reference to individuals or criteria relating to them, so that specific information about a particular individual is readily accessible.

Ultimately, whether a manual file is part of a relevant filing system is a matter of fact as well as law, and must be considered on a case-by-case basis.

Extraterritoriality

9 Is the reach of the law limited to PII owners and processors of PII established or operating in the jurisdiction?

Organisations that are data controllers or data processors fall within the scope of the law if they are established in the United Kingdom and process PII in the context of that establishment, or if they are not established in the United Kingdom but offer goods or services to individuals located in the United Kingdom, or monitor the behaviour of individuals located in the United Kingdom.

A data controller or data processor is 'established' in the United Kingdom if it is resident in the United Kingdom, is incorporated or formed under the laws of England and Wales, Scotland or Northern Ireland, or maintains and carries on activities through an office, branch, agency or other stable arrangements in the United Kingdom. Where a data controller or data processor is established in the United Kingdom, UK GDPR and DPA 2018 will apply regardless of whether the processing takes place in the United Kingdom or not.

Data controllers established outside the United Kingdom that are subject to the UK GDPR and DPA 2018 must nominate a representative in the United Kingdom.

Covered uses of PII

10 Is all processing or use of PII covered? Is a distinction made between those who control or own PII and those who provide PII processing services to owners? Do owners', controllers' and processors' duties differ?

The UK GDPR and DPA 2018 apply to data controllers (ie, those who decide the purposes and the means of the data processing) and data processors (who process PII on behalf of data controllers). As such, the data controllers are the main decision-makers and they exercise overall control over the purposes and means of the processing of PII. Data processors act on behalf of, and only on the instructions of, the relevant data controller.

LEGITIMATE PROCESSING OF PII

Legitimate processing – grounds

11 Does the law require that the holding of PII be legitimised on specific grounds, for example to meet the owner's legal obligations or if the individual has provided consent?

The UK General Data Protection Regulation (UK GDPR) requires data controllers to rely on a legal ground outlined in the UK GDPR for all processing of PII). Additional conditions must also be satisfied when processing sensitive PII.

The grounds for processing non-sensitive PII are:

- consent of the individual;
- performance of a contract to which the individual is party or to take steps at the request of the data subject before entering into a contract;
- compliance with a legal obligation, other than a contractual obligation (a legal obligation arising under the laws of a non-UK jurisdiction is not sufficient for the purposes of this ground);
- protection of the vital interests of the individual (ie, a life or death situation);
- the processing is necessary for carrying out public functions; or
- the processing is necessary for the legitimate interests of the data controller (or third parties to whom the PII is disclosed) unless overridden by the individual's fundamental rights, freedoms and legitimate interests.

Legitimate processing – types of PII

12 Does the law impose more stringent rules for specific types of PII?

Distinct grounds for legitimate processing apply to the processing of sensitive PII (also known as 'special categories of PII'). 'Sensitive PII' is defined as PII relating to a data subject's:

- racial or ethnic origin;
- political opinions;
- religious or similar beliefs;
- trade union membership;
- physical or mental health;
- sex life or sexual orientation;
- genetic data;
- biometric data (when processed to uniquely identify a natural person);
- commissioning or alleged commissioning of any offence; or
- any proceedings for committed or alleged offences, the disposal of such proceedings of sentence of any court.

Where a controller processes sensitive PII it must establish a ground for processing both non-sensitive PII (eg, consent and the performance of a contract, etc) and a separate condition for processing sensitive PII. The GDPR sets forth several conditions that may be considered in connection with the processing of sensitive PII, including:

- explicit consent of the individual;
- performance of employment law obligations;
- protection of the vital interests of the individual (ie, a life or death situation);
- processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim, and the processing relates solely to the members or former members of the body or to persons who have regular contact with it in connection with its purposes, and that the PII is not disclosed outside that body without the consent of the data subjects;
- the processing relates to PII, which is manifestly made public by the data subject;
- the exercise of public functions;
- processing in connection with legal proceedings, legal advice or to exercise legal rights;
- processing for medical purposes;
- processing necessary for reasons of public interest in certain specific areas; or
- processing necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

In addition to the conditions outlined in the UK GDPR, the Data Protection Act 2018 sets forth several additional conditions that also may be relied upon, including:

- processing necessary for monitoring and ensuring equality of opportunity or treatment;
- preventing or detecting unlawful acts;
- preventing fraud;
- processing to comply with regulatory requirements relating to establishing whether a person has committed unlawful acts or has been involved in dishonesty, malpractice or other seriously improper conduct; and
- in connection with administering claims under insurance contracts or exercising rights and complying with obligations arising in connection with insurance contracts.

DATA HANDLING RESPONSIBILITIES OF OWNERS OF PII

Notification

13 | Does the law require owners of PII to notify individuals whose PII they hold? What must the notice contain and when must it be provided?

Data controllers are obliged to notify individuals of:

- the data controller's identity and contact information and, where applicable, the identity and contact information of its representative;
- the contact details of the data controller's data protection officer, if it has appointed one;
- the purposes for which the PII will be processed and the legal basis for processing;
- the legitimate interests pursued by the data controller, if applicable;
- the recipients or categories of recipients of the PII;
- the fact that the data controller intends to transfer the PII to a third country and the existence or absence of an adequacy decision by the European Commission, and a description of any safeguards (eg, EU model clauses) relied upon and how individuals may obtain a copy of them;
- the period for which PII will be stored or the criteria used to determine that period;
- a description of the rights available to individuals;
- the existence of the right to withdraw consent at any time;
- the right to lodge a complaint with a European Union data protection supervisory authority;
- whether the provision of PII is a statutory or contractual requirement or is necessary to enter into a contract, as well as whether the individual is obliged to provide the PII and of the consequences of failure to provide such PII; and
- the existence of automated decision-making and, if so, meaningful information about the logic involved as well as the significance and envisaged consequences of the processing for the individual.

When PII is obtained from a source other than the individual concerned, the data controller must also inform individuals of the source from which the PII originated and the categories of PII obtained.

Notice must be provided at the time the PII is collected from the data subject. When PII is obtained from a source other than the data subject it relates to, the data controller must provide the data subject with the notice:

- within a reasonable period of obtaining the PII and no later than one month;
- if the data controller uses the data to communicate with the data subject, at the latest, when the first communication takes place; or
- if the data controller envisages disclosure to someone else, at the latest, when the data controller discloses the data.

Exemption from notification

14 | When is notice not required?

Where PII is obtained from a source other than the data subject, then provision of notice is not required if:

- the individual already has the information;
- the provision of such information would be impossible or require disproportionate effort (in which case the data controller shall take appropriate measures to protect data subjects, including making the relevant information publicly available);
- the provision of the information would render impossible or seriously impair the achievement of the objectives of the processing;
- obtaining or disclosure of the PII is required by UK law to which the data controller is subject; or
- where the PII is subject to an obligation of professional secrecy under UK law.

Control of use

15 | Must owners of PII offer individuals any degree of choice or control over the use of their information? In which circumstances?

Individuals have several rights concerning PII held by data controllers:

- to obtain confirmation of whether the data controller processes PII about the individual and to obtain a copy of that PII (also known as 'the right of access');
- to rectify inaccurate PII;
- to have PII erased in certain circumstances (eg, when the PII is no longer necessary for the purposes for which it was collected by the data controller);
- to restrict the processing of PII;
- to obtain a copy of PII in a structured, commonly used and machine-readable format, and to transmit that PII to a third-party data controller without hindrance, to the extent that it is technically feasible (also known as 'the right to data portability');
- to object to the processing of PII in certain circumstances; and
- not to be subject to decisions based solely on the automated processing of PII, except in particular circumstances.

Data processors are not required to comply with data subject rights requests but are required to assist data controllers on whose behalf they process PII to respond to any such requests.

Data accuracy

16 | Does the law impose standards in relation to the quality, currency and accuracy of PII?

The data controller must ensure that PII is relevant, accurate and, where necessary, kept up to date concerning the purpose for which it is held.

Amount and duration of data holding

17 | Does the law restrict the amount of PII that may be held or the length of time it may be held?

The data controller must ensure that PII is adequate, relevant and not excessive concerning the purpose for which it is held. This means that the data controller should not collect or process unnecessary or irrelevant PII. The Data Protection Act 2018 and the General Data Protection Regulation do not impose any specified retention periods. PII may be held only for as long as is necessary for the purposes for which it is processed.

Finality principle

18 | Are the purposes for which PII can be used by owners restricted? Has the 'finality principle' been adopted?

PII may only be used for specified and lawful purposes, and may not be processed in any manner incompatible with those purposes. The purposes must be specified in the notice given to the individual.

In addition, recent case law has confirmed the existence of a tort of misuse of private information. Under this doctrine, the use of private information about an individual for purposes to which the individual has not consented may give rise to a separate action in tort against the data controller, independent of any action taken under the Data Protection Act 2018 or UK General Data Protection Regulation.

Use for new purposes

19 If the finality principle has been adopted, how far does the law allow for PII to be used for new purposes? Are there exceptions or exclusions from the finality principle?

PII may not be processed for new purposes unless the further purposes are lawful (ie, based on a lawful ground). It may be processed for a new purpose as long as that purpose is not incompatible with the original purpose, but notice of the new purpose must be provided to the individual. Where a new purpose would be incompatible with the original purpose, it must be legitimised by the consent of the individual unless an exemption applies. For example, PII may be further processed for certain specified public interest purposes, including the prevention of crime or prosecution of offenders and processing for research, historical or statistical purposes.

SECURITY

Security obligations

20 What security obligations are imposed on PII owners and service providers that process PII on their behalf?

The Data Protection Act 2018 and the UK General Data Protection Regulation (UK GDPR) do not specify the types of security measures that data controllers and data processors must take concerning PII. Instead, data controllers and data processors must have in place 'appropriate technical and organisational measures' to protect against 'unauthorised or unlawful processing of [PII] and against accidental loss or destruction of, or damage to, [PII]'. In addition, the UK GDPR provides several examples of security measures that data controllers and data processors should consider implementing, including:

- the pseudonymisation and encryption of PII;
- the ability to restore the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
- the ability to restore the availability of and access to PII promptly in the event of a physical or technical incident; and
- a process for regularly testing, assessing and evaluating the effectiveness of the measures implemented.

Under the relevant provisions, in assessing what is 'appropriate' in each case, data controllers and processors should consider the nature of the PII in question and the harm that might result from its improper use, or its accidental loss or destruction. The data controller and processor must take reasonable steps to ensure the reliability of its employees.

Where a data controller uses an outsourced provider of services to process PII, it must choose a data processor providing sufficient guarantees of security, take reasonable steps to ensure that these are delivered, require the data processor to enter into a contract in writing under which the data processor will, among other things, act only on the instructions of the controller and apply equivalent security safeguards to those imposed on the data controller.

Notification of data breach

21 Does the law include (general or sector-specific) obligations to notify the supervisory authority or individuals of data breaches? If breach notification is not required by law, is it recommended by the supervisory authority?

The UK GDPR requires data controllers to notify the Information Commissioner's Office (ICO) of a data breach within 72 hours of becoming aware of the breach unless the breach is unlikely to result in a risk to the rights and freedoms of natural persons. In addition, data controllers must notify affected individuals of a breach without undue delay if the breach is likely to result in a high risk to the rights and freedoms of affected individuals. Data processors are not required to notify data breaches to supervisory authorities or affected individuals but must notify the relevant data controller of a data breach without undue delay.

In addition to notifying breaches to the ICO and affected individuals, data controllers must also document all data breaches and retain information relating to the facts of the breach, its effects and the remedial action taken.

INTERNAL CONTROLS

Data protection officer

22 Is the appointment of a data protection officer mandatory? What are the data protection officer's legal responsibilities?

The UK General Data Protection Regulation (UK GDPR) requires data controllers and data processors to appoint a data protection officer (DPO) if:

- the core activities of the data controller or data processor consist of processing operations that require regular and systematic monitoring of data subjects on a large scale; or
- the core activities of the data controller or processor consist of processing sensitive PII or PII relating to criminal offences and convictions on a large scale.

If appointed, a DPO is responsible for:

- informing and advising the data controller or data processor and its employees of his or her obligations under data protection law;
- monitoring compliance with the UK GDPR, awareness-raising, staff training and audits;
- providing advice concerning data protection impact assessments;
- cooperating with the Information Commissioner's Office (ICO) and other European Union data protection supervisory authorities; and
- acting as a contact point for the ICO on issues relating to processing PII.

Organisations may also elect to appoint a DPO voluntarily, although such an appointment will need to comply with the requirements of the UK GDPR.

Record keeping

23 Are owners or processors of PII required to maintain any internal records or establish internal processes or documentation?

Under article 30 of the UK GDPR, data controllers and data processors are required to retain internal records that describe the processing of PII that is carried out. These records must be maintained and provided to the ICO upon request.

For data controllers, the record must include the following information:

- the name and contact details of the data controller and, where applicable, the joint controller, and of the data controller's representative and DPO;
- the purposes of the processing;
- the data subjects and categories of PII processed;
- the categories of recipients to whom PII has been or will be disclosed;
- a description of any transfers of PII to third countries and the safeguards relied upon;
- the envisaged time limits for erasure of the PII; and
- a general description of the technical and organisational security measures implemented.

For data processors, the record must include the following information:
- the name and contact details of the processor and each data controller on behalf of which the processor processes PII, and of the processor's representative and DPO;
- the categories of processing carried out on behalf of each data controller;
- a description of any transfers of PII to third countries and the safeguards relied upon; and
- a general description of the technical and organisational security measures implemented.

DPA 2018 sets out several conditions for the processing of sensitive PII. To satisfy several of these conditions, data controllers must have an appropriate policy document in place. If a data controller processes sensitive PII under a condition that requires an appropriate policy document, the data controller must document the following information as part of its processing activities:
- the procedures for complying with the data protection principles in connection with the processing of the sensitive PII; and
- its policies regarding the retention and erasure of the sensitive PII, indicating how long such sensitive PII is likely to be retained.

Data controllers must review and retain the policy document when processing the relevant sensitive PII, and then for at least six months afterwards. The policy document must also be made available on request to the ICO without charge.

Where appropriate policy documentation is required, the data controller's records of processing activities under article 30 of the UK GDPR (as outlined earlier) must include:
- details of the relevant condition relied on, as set out in Parts 1 to 3 of Schedule 1 of DPA 2018;
- how processing satisfies article 6 of the UK GDPR (lawfulness of processing); and
- details of whether the sensitive PII is retained and erased following the appropriate policy documentation (and if not the reasons why not).

New processing regulations

24 | Are there any obligations in relation to new processing operations?

Data controllers are required to carry out a data protection impact assessment (DPIA) concerning any processing of PII that is likely to result in a high risk to the rights and freedoms of natural persons. In particular, a DPIA is required in respect of any processing that involves:
- the systematic and extensive evaluation of personal aspects relating to natural persons that is based on automated processing and on which decisions are made that produce legal effects concerning the natural person or that significantly affect the natural person;
- processing sensitive PII or PII relating to criminal convictions or offences on a large scale; or
- systematic monitoring of a publicly accessible area on a large scale.

A DPIA must be carried out concerning all high-risk processing activities that meet the criteria above before the processing begins. The DPIA must include at least the following:
- a systematic description of the processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the data controller;
- an assessment of the proportionality and necessity of the processing concerning the purposes;
- an assessment of the risks to the rights and freedoms of affected individuals; and
- information about the measures envisaged to address any risks to affected individuals (eg, safeguards, security measures, etc).

The UK GDPR also implements the concepts of data protection by design and data protection by default. In particular, this requires data controllers to implement appropriate technical and organisational measures in their processing systems to ensure that PII is processed under the UK GDPR, and to ensure that, by default, only PII that is necessary for each specific purpose is collected and processed. In addition, data controllers must ensure that by default PII is not made accessible to an indefinite number of persons without any intervention by the data subject.

REGISTRATION AND NOTIFICATION

Registration

25 | Are PII owners or processors of PII required to register with the supervisory authority? Are there any exemptions?

In the United Kingdom, data controllers are required to pay an annual registration fee to the Information Commissioner's Office (ICO). There is no obligation to do so if any of the following applies:
- no processing is carried out on a computer (or other automated equipment);
- the processing is performed solely for the maintenance of a public register;
- the data controller is a not-for-profit organisation, and the processing is only to establish or maintain membership or support of that organisation; or
- the data controller only processes PII for one or more of these purposes:
  - staff administration;
  - advertising, marketing and public relations;
  - personal, family or household affairs;
  - judicial functions; or
  - accounts and records.

An entity that is a data processor only is not required to make this payment.

Formalities

26 | What are the formalities for registration?

There is a three-tier fee structure in the United Kingdom. Data controllers must pay a fee according to the following criteria:
- if the data controller has a maximum turnover of £632,000 or no more than 10 members of staff, £40;
- if the data controller has a maximum turnover of £36 million or no more than 250 members of staff, £60; or
- in all other cases, £2,900.

The data controller must include in the fee application its name, address, contact details of the person who is completing the fee registration and contact details of the data controller's data protection officer if it is required to appoint one, the number of staff members it has, the turnover for its financial year, and any other trading names it has. Data processors are not required to pay the registration fee.

Penalties

27 | What are the penalties for a PII owner or processor of PII for failure to make or maintain an entry on the register?

PII must not be processed unless the data controller has paid the required fee.

If the data controller has not paid a fee when required to do so or has not paid the correct fee, it may be subject to a fixed monetary penalty of 150 per cent of the highest charge payable by a data controller (ie, £4,350). As previously noted, an entity that is a data processor only (and not a data controller) is not required to register or pay the fee.

Refusal of registration

28 | On what grounds may the supervisory authority refuse to allow an entry on the register?

The ICO has no power to refuse the application provided that it is made in the prescribed form and includes the applicable fee.

Public access

29 | Is the register publicly available? How can it be accessed?

The fee register is publicly available, free of charge, from the ICO's website.

A copy of the register can be downloaded from the ICO's website.

Effect of registration

30 | Does an entry on the register have any specific legal effect?

An entry on the register does not cause the data controller to be subject to obligations or liabilities to which it would not otherwise be subject.

Other transparency duties

31 | Are there any other public transparency duties?

There are no additional public transparency duties.

TRANSFER AND DISCLOSURE OF PII

Transfer of PII

32 | How does the law regulate the transfer of PII to entities that provide outsourced processing services?

Entities that provide outsourced processing services are typically data processors under the Data Protection Act 2018 and the UK General Data Protection Regulation (UK GDPR). Data processors are subject to direct legal obligations under the UK GDPR in respect of the PII that they process as outsourced service providers, but nevertheless, data controllers are required to use only data processors that are capable of processing PII under the requirements of the UK GDPR. The data controller must ensure that each data processor it selects offers sufficient guarantees that the relevant PII will be held with appropriate security measures and take steps to ensure that these guarantees are fulfilled. The data controller must also enter into a binding contract in writing with the data processor under which the data processor must be bound to:

- act only on the instructions of the data controller;
- ensure that persons that will process PII are subject to a confidentiality obligation;
- apply security controls and standards that meet those required by the UK GDPR;
- obtain general or specific authorisation before appointing any sub-processors, and ensure that any such sub-processors are bound by obligations equivalent to those imposed on the data processor;
- assist the data controller insofar as possible to comply with the data controller's obligation to respond to data subject rights requests;
- assist the data controller concerning the obligations to notify personal data breaches and to carry out data protection impact assessments (and any required consultation with a supervisory authority);
- at the choice of the data controller, return the PII to the data controller or delete the PII at the end of the relationship;
- notify the data controller immediately if any instruction the data controller gives infringes the UK GDPR; and
- make available to the data controller all information necessary to demonstrate compliance with these obligations, and allow the data controller (or a third party nominated by the data controller) to carry out an audit.

Restrictions on disclosure

33 | Describe any specific restrictions on the disclosure of PII to other recipients.

It is a criminal offence to knowingly or recklessly obtain or disclose PII without the consent of the data controller or procure the disclosure of PII to another party without the consent of the data controller. This prohibition is subject to several exceptions, such as where the action was taken to prevent or detect crime. The staff of the Information Commissioner's Office (ICO) are prohibited from disclosing PII obtained in the course of their functions other than in accord with those functions.

There are no other specific restrictions on the disclosure of PII, other than compliance with the general principles described earlier, and the cross-border restrictions.

Cross-border transfer

34 | Is the transfer of PII outside the jurisdiction restricted?

The transfer of PII outside the United Kingdom is prohibited unless that country or territory ensures an adequate level of protection for the rights and freedoms of the individuals concerning the processing of their PII.

Transfers are permitted where:

- the recipient is located in a third country or territory or is an international organisation, covered by UK adequacy regulations;
- the transfer is covered by appropriate safeguards; or
- one or more of the derogations applies.

The derogations include:

- where the data controller has the individual's explicit consent to the transfer;
- the transfer is necessary for a contract with the data subject;
- the transfer is necessary for legal proceedings;
- the transfer is necessary to protect the vital interest of the individual;
- the transfer is necessary for the compelling legitimate interests pursued by the data controller; and
- the terms of the transfer have been approved by the ICO.

There are provisional arrangements in place so that UK adequacy regulations include the European Economic Area and all countries, territories and international organisations covered by European Commission adequacy decisions valid as of 31 December 2020. The UK government intends to review these adequacy regulations over time.

European Commission findings have been made in respect of the use of approved standard form model clauses (standard contractual clauses) for the export of PII. Following the UK's departure from the European Union, transitional arrangements have been implemented that permit UK organisations to continue to rely on the European Commission-approved model clauses. The ICO and the UK Secretary of State must keep the transitional arrangements for the model clauses under review and can issue new updated UK approved model clauses to replace the European Commission-approved model clauses. The model clauses (or standard contractual clauses) must be entered into by the

data exporter (based in the United Kingdom) and the data importer (outside the United Kingdom). While the EU–US. Privacy Shield framework was invalidated, the Court of Justice of the European Union (CJEU) decision concluded that the standard contractual clauses are valid, provided the transferring organisation (the data exporter) determines that the country where the recipient organisation is located (the data importer) offers an 'adequate level of protection' for the personal data as required by the UK GDPR.

In addition to model clauses, organisations could previously rely on a self-regulatory scheme in the United States called the EU–US Privacy Shield, which replaced the Safe Harbor mechanism that was invalidated by the CJEU in October 2015. However, on 16 July 2020, the CJEU issued its landmark judgment in *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* (Case C-311/18) (*Schrems II*). In its judgment, the CJEU invalidated the EU–US. Privacy Shield framework. Accordingly, organisations can no longer rely on the EU–US. Privacy Shield framework to transfer PII from the European Economic Area or the United Kingdom to the United States and must find an alternative mechanism to transfer PII to the United States. Entities within a single corporate group can enter into data transfer agreements, binding corporate rules (BCRs), which must be approved by the ICO. Following the UK's departure from the European Union, new applications for UK BCRs must be submitted to the ICO using the UK BCR application forms. Organisations with existing authorised EU BCRs (ie, BCRs approved before Brexit by an EU supervisory authority) do not need to complete a new UK BCR application. However, they must still provide the ICO with a United Kingdom version of their BCRs.

Following Brexit, the UK government has confirmed that transfers outside the United Kingdom to the European Economic Area will not be restricted. As such, organisations that transfer PII from the United Kingdom to the European Economic Area will still be able to do so and do not need to take any additional steps. As part of the new Brexit trade deal, the European Union has agreed to delay implementing transfer restrictions for transfers from the European Economic Area to the United Kingdom until 1 July 2021 to enable the European Commission to complete its adequacy assessment of the UK's data protection laws. To this end, the European Commission published a draft data protection adequacy decision relating to the United Kingdom. If the draft decision is adopted, organisations in the European Economic Area will be able to continue to transfer personal data to organisations in the United Kingdom without restriction, and will not need to rely upon data transfer mechanisms to ensure an adequate level of protection. If no adequacy decision relating to the United Kingdom is made, organisations in the European Economic Area that are transferring PII to the United Kingdom will need to act to ensure the transfer of PII complies with the GDPR. In practice, this means that organisations transferring PII from the European Economic Area to the United Kingdom will need to ensure the European Commission has made a finding concerning the relevant transfers (eg, standard contractual clauses), or one or more of the derogations applies.

Notification of cross-border transfer

35 | Does cross-border transfer of PII require notification to or authorisation from a supervisory authority?

Cross-border transfers do not require a specific notification to the ICO nor authorisation from the ICO.

Further transfer

36 | If transfers outside the jurisdiction are subject to restriction or authorisation, do these apply equally to transfers to service providers and onwards transfers?

The restrictions on transfer apply equally to transfers to data processors and data controllers.

Onward transfers are considered in assessing whether adequate protection is provided in the receiving country. Onward transfers are covered in the European Commission-approved model clauses. Following the invalidation of the EU–US Privacy Shield framework in the *Schrems II* decision, organisations are no longer able to rely on the EU–US Privacy Shield framework to make onward transfers of PII.

Onward transfers are not controlled specifically where a transfer is made to a country that has been the subject of an adequacy finding by the United Kingdom. It would be anticipated that the law of the recipient country would deal with the legitimacy of the onward transfer.

RIGHTS OF INDIVIDUALS

Access

37 | Do individuals have the right to access their personal information held by PII owners? Describe how this right can be exercised as well as any limitations to this right.

Individuals have the right to request access to PII that relates to them. Within one month of receipt of a valid request, the data controller must confirm that it is or is not processing the individual's PII and, if it does so, provide a description of the PII, the purposes of the processing and recipients or categories of recipients of the PII, the relevant retention period for the PII, a description of the rights available to individuals under the UK General Data Protection Regulation (GDPR) and that the individual may complain to the Information Commissioner's Office (ICO) and any information available to the data controller as to the sources of the PII, the existence of automated decision-making (including profiling), and the safeguards it provides if it transfers PII to a third country or international organisation. The data controller must also provide a copy of the PII in an intelligible form.

A data controller must be satisfied as to the identity of the individual making the request. A data controller does not have to provide third-party data where that would breach the privacy of the third party and may reject repeated identical requests, or charge a reasonable fee considering the administrative costs of providing the information.

In some cases, the data controller may withhold PII to protect the individual (eg, where health data is involved, or to protect other important specified public interests such as the prevention of crime). All such exceptions are specifically delineated in the law.

In most cases, the organisation cannot charge a fee to comply with an access request. However, where the request is manifestly unfounded or excessive an organisation may charge a reasonable fee for the administrative costs of complying with the request. A reasonable fee can also be charged if an individual requests further copies of their data following a request.

Other rights

38 | Do individuals have other substantive rights?

Individuals have the following further rights:

- to rectify inaccurate PII;
- to have PII erased in certain circumstances, for example, when the PII is no longer necessary for the purposes for which it was collected by the data controller;
- to restrict the processing of PII;

- to obtain a copy of PII in a structured, commonly used and machine-readable format, and to transmit that PII to a third-party data controller without hindrance, to the extent that it is technically feasible;
- to object to the processing of PII in certain circumstances; and
- not to be subject to decisions based solely on the automated processing of PII, except in particular circumstances.

Compensation

39 | Are individuals entitled to monetary damages or compensation if they are affected by breaches of the law? Is actual damage required or is injury to feelings sufficient?

Individuals are entitled to receive compensation if the individual suffers material or non-material damage as a result of the contravention of the GDPR by a data controller or data processor. The Data Protection Act 2018 indicates that 'non-material' damage includes 'distress'.

Enforcement

40 | Are these rights exercisable through the judicial system or enforced by the supervisory authority or both?

Individuals may take action in the courts to enforce any of their rights.

The ICO has no power to order the payment of compensation to individuals. Therefore, an individual who seeks compensation must take action through the courts. All the other rights of individuals can be enforced by the ICO using its enforcement powers, including requiring the provision of information, and conducting audits.

EXEMPTIONS, DEROGATIONS AND RESTRICTIONS

Further exemptions and restrictions

41 | Does the law include any derogations, exclusions or limitations other than those already described? Describe the relevant provisions.

The Data Protection Act 2018 (DPA 2018), following the derogations permitted by the UK General Data Protection Regulation (UK GDPR), provides exemptions from certain obligations, including:

- exemptions from the obligations that limit the disclosure of personally identifiable information (PII);
- exemptions from the obligations to provide notice of uses of PII;
- exemptions from reporting personal data breaches;
- exemptions from complying with the data protection principles;
- exemptions from the rights of access; and
- exemptions from dealing with other individual rights.

The grounds for exemption include exemptions to protect freedom of expression, to protect national security and policing, to support legal privilege, to protect the actions of regulatory authorities and to protect the collection of taxes and the position of the armed forces.

Exemptions also apply to protect individuals who may be vulnerable, such as those who are suffering from mental illness.

Further exemptions apply where the PII is made publicly available under other provisions.

Specific exemptions apply to allow the retention and use of PII for research. Exemptions are also available under DPA 2018 for crime, law and public protection, and finance, management and negotiations.

All exemptions are limited in scope and most apply only on a case-by-case basis.

SUPERVISION

Judicial review

42 | Can PII owners appeal against orders of the supervisory authority to the courts?

Data controllers may appeal orders of the Information Commissioner's Office (ICO) to the General Regulatory Chamber (First-tier Tribunal). Appeals must be made within 28 days of the ICO notice and must state the full reasons and grounds for the appeal (ie, that the order is not under the law or the ICO should have exercised its discretion differently).

Appeals against decisions of the General Regulatory Chamber (First-tier Tribunal) can be made (on points of law only) to the Administrative Appeals Chamber of the Upper Tribunal, appeals from which may be made to the Court of Appeal.

SPECIFIC DATA PROCESSING

Internet use

43 | Describe any rules on the use of 'cookies' or equivalent technology.

It is unlawful to store information (such as a cookie) on a user's device or gain access to such information unless the user is provided with clear and comprehensive information about the storage of, and access to, that information, and has provided his or her consent. Consent must be validly obtained following the requirements of the Privacy and Electronic Communications Regulations (PECR). Any consent obtained must comply with the UK GDPR's standard for valid consent. Such consent is not, however, required where the information is:

- used only for the transmission of communications over electronic communications networks; or
- strictly necessary for the provision of a service requested by the user.

Electronic communications marketing

44 | Describe any rules on marketing by email, fax or telephone.

It is unlawful to send unsolicited electronic marketing (ie, via technologies such as text, fax or email) unless the opt-in consent of the recipient has been obtained following the requirements of PECR. However, an unsolicited marketing email may be sent to a recipient whose contact details were obtained in the course of a sale, or negotiation of a sale, of a product or service, provided that the unsolicited marketing relates to similar products or services, the recipient is given a simple and free-of-charge means to opt-out of receiving such marketing at the point their information is collected and in all subsequent marketing communications (and has not yet opted out). Any consent obtained must comply with the UK GDPR's standard for valid consent.

It is generally permissible to make unsolicited telephone marketing calls unless the recipient has previously notified the caller that he or she does not wish to receive such calls or the recipient's phone number is listed on the directory of subscribers that do not wish to receive such calls – the Telephone Preference Service. Any individuals may apply to have their telephone number listed in this directory. Separate requirements and separate rules around marketing to corporate subscribers (ie, an individual in his or her professional capacity) apply, and will need to be considered for business-to-business marketing.

Cloud services

45 | Describe any rules or regulator guidance on the use of cloud computing services.

There are no specific rules or legislation that govern the processing of personally identifiable information (PII) through cloud computing, and such processing must be compliant with the Data Protection Act 2018 (DPA 2018). The Information Commissioner's Office (ICO) has released guidance on the subject of cloud computing, which discusses the identity of data controllers and data processors in the context of cloud computing, as well as the need for written contracts, security assessments, compliance with DPA 2018 and the use of cloud providers from outside the United Kingdom. This guidance was published under the old law (ie, the Data Protection Act 1998). The ICO has confirmed that, while much of the guidance remains relevant, it intends to update the guidance in line with the UK GDPR.

UPDATE AND TRENDS

Key developments of the past year

46 | Are there any emerging trends or hot topics in international data protection in your jurisdiction?

There are no updates at this time.

Coronavirus

47 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Information Commissioner's Office (ICO) has released guidance to assist organisations, in particular employers, in processing personal data for covid-19 related purposes (eg, testing and return to work, etc). This includes guidance for employers and organisations that are:

- planning to use CCTV, thermal cameras or other surveillance methods as part of testing or ongoing monitoring of staff;
- planning on asking individuals if they have experienced covid-19 symptoms or are planning to introduce testing;
- required by the government to collect and retain customer and visitor information, for a limited period, for the purposes of a covid-19 contact tracing scheme; and
- collecting, storing and sharing personal information related to the covid-19 vaccine.

The ICO has made it clear that data protection does not stop organisations from asking individuals (eg, employees) whether they are experiencing any covid-19 symptoms or introducing appropriate testing, as long as the principles of the UK General Data Protection Regulation, in particular transparency, fairness and proportionality are applied. As such, organisations should only collect personal data that is reasonably necessary for its intended purposes. If the same result could be achieved without collecting personal data, a further collection should be avoided. Also, data collection should be kept to a minimum and permanent records should not be created unless necessary. Further, employers should be transparent with staff as to how the data is going to be used. For example, the collection of data related to symptoms could result in employees being refused entry to the workplace, and this should be clear to employees when their data is obtained.

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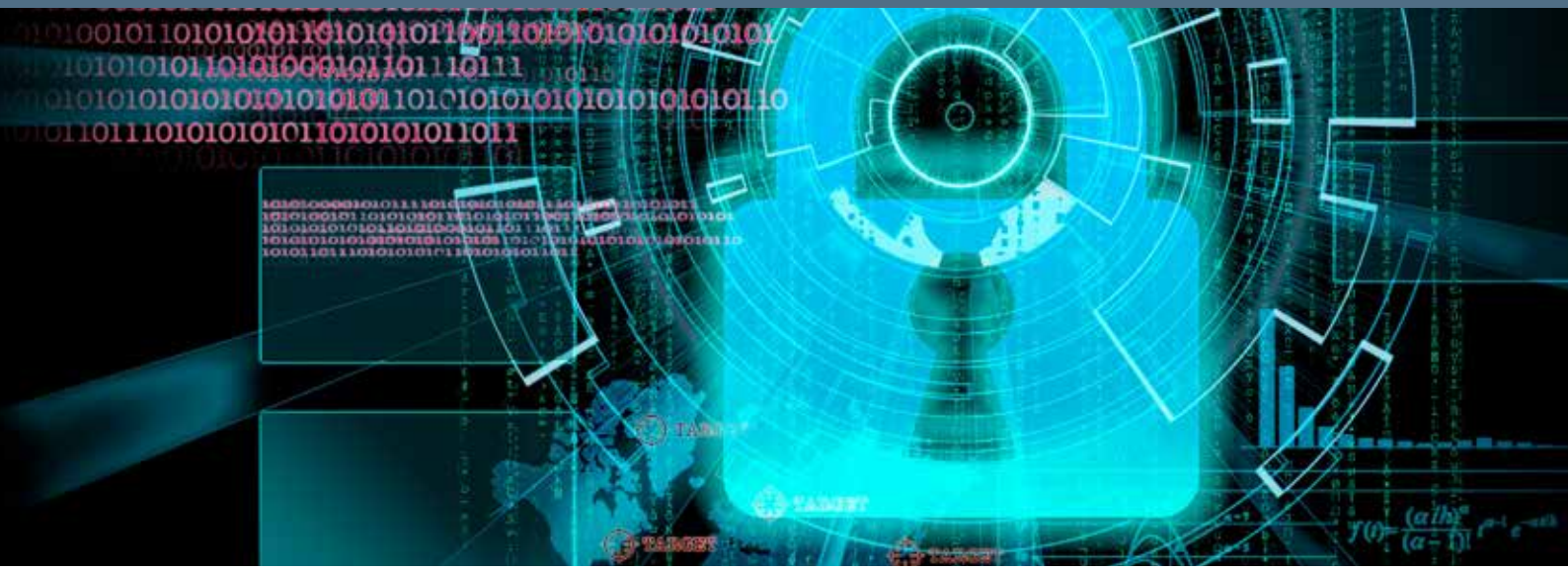

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ISBN 978-1-83862-644-0