

## Data protection: difficult role of the in-house lawyer

THE RISKS OF MISHANDLING AN ORGANISATION'S data protection responsibilities are rising, and there are compelling reasons for in-house lawyers to have a role in data protection (DP). These were the conclusions of guidance notes published on 20 January this year by the Commerce & Industry (C&I) Group's corporate governance committee.

The Data Protection Guidelines establish broad principles that should govern the role played by in-house lawyers. First, the guidelines noted, the importance of 'management buy-in and ownership' of 'this pervasive issue cannot be overestimated'. Senior management are

ultimately responsible for DP, and need both training and easy-to-understand legal advice that balances difficult areas of data protection law. Those areas include apparent conflicts with 'whistleblowing' legislation and, for public bodies, Freedom of Information Act requests.

Secondly, the guidelines say, 'enforceability' risks need to be managed; which means making sure that the organisation's contractual paperwork is compliant.

Thirdly, there are regulatory risks. With 'conflicting resource prioritisation and budget requirements and ambiguities in the legal position', in-house lawyers have 'an important role to play both in helping the business to take an informed decision as to risk', and 'to keep the board and management focused on reviewing the risk level regularly'.

The guidelines advise on taking appropriate action if senior managers are unwilling to deal with a breach of the DP rules. 'Serious breaches must not be covered up,' the authors warn. They add: 'You should appeal to the independent

non-executive directors... and if that fails, in extreme circumstances you may have to threaten to – or actually – "blow the whistle" internally and/or externally, and/or resign.'

The level of risk DP issues represent for companies is underlined in the guidelines by reference to high-profile examples, including the loss of the details of 25 million child benefit claimants by HM Revenue & Customs.

The role of the Information Commissioner's Office (ICO) in overseeing data protection is also explained. Although the ICO does not have a general power to audit organisations' processes, the government is considering giving it inspection powers. It can issue an enforcement notice against an organisation if it is aware of a breach, though the ICO has mostly relied on organisations giving 'undertakings'. It is also, of course, a criminal offence to fail to comply with an enforcement notice.

For more details, please visit the C&I Group website: [www.cigroup.org.uk](http://www.cigroup.org.uk).

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