

Identifying 'data controllers' and 'data processors' Data Protection Act 1998

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1. The Data Protection Act 1998 (DPA) is based around eight principles of 'good information handling'. These give people specific rights in relation to their personal information and place certain obligations on those organisations that are responsible for processing it.
2. An overview of the main provisions of the DPA can be found in The Guide to Data Protection [Guide to Data Protection](#).
3. This is part of a series of guidance, which goes into more detail than the Guide to the DPA, to help you as an organisation to fully understand your obligations, as well as promoting good practice.
4. This guidance explains how to determine whether, in processing personal data, you are acting as a data controller or a data processor for the purposes of the DPA.

Overview

In many cases deciding who is a data controller and who is a data processor will not be clear-cut. Relationships between parties involving the processing of personal data take many different forms. At one extreme one party provides very detailed instructions which the other party must follow. At the other extreme, though the first party initiates the data processing activity, by instructing the second party to carry out an activity on its behalf, the second party has almost total discretion as to how the activity (and the associated processing of personal data) will be carried out.

In determining whether a party involved in the processing of personal data is a data controller consideration should be given to the degree of independence that each party has in determining how and in what manner the data should be processed.

What the DPA says

5. In complex business relationships involving the processing of personal data it is often difficult to determine which party is a data controller and which is a data processor.
6. The Data Protection Act 1998 (DPA) defines these terms as follows:

“data controller” means, subject to section (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller.

7. In many cases deciding who is a controller and who is a processor will not be clear-cut and therefore there is often scope for differences in interpretation. This difficulty arises not as a function of the complexity of the definitions but rather as a result of the variety of different interrelationships that exist between organisations involved in the processing of personal data to any degree jointly with others.

Key consideration in determining who is a data controller - Degree of latitude/discretion/independence of the service provider

8. In practice there is a continuum in the relationships between two or more parties which involve the processing of personal data. At one extreme one party provides very detailed instructions which the other party must follow. In this relationship the party providing the detailed instructions (the client) is clearly the data controller and the party following the instructions (the service provider) is the data processor. The party following the instructions is tightly constrained in what it can do with the data. It has little or no freedom to exercise independence in determining how the processing is to be conducted and clearly acts purely as a data processor.

Example

ABC contracts with two separate service providers (i) to carry out its mail marketing campaigns and (ii) to run its payroll.

ABC gives clear instructions to each of the service providers as to the services they require (e.g. what marketing material to send out and to whom, and who to pay, what amounts, on what date etc).

Even though the two service providers have some discretion with regard to the way in which they will provide their services (including what software and other materials they will use) their tasks are clearly and tightly defined.

Although the mailing house service provider and the payroll service provider may offer advice (e.g. advising against sending mailings in August or advising on the use of particular payroll software) the service providers are clearly bound to act in accordance with ABC's detailed instructions.

9. At the other end of the continuum, though the first party (the client) initiates the data processing activity by instructing the second party (the service provider) to carry out an activity on its behalf, the second party has almost total discretion as to how the activity (and the associated processing of personal data) will be carried out.

Examples

- A client approaches a lawyer to provide legal advice;
- A sole trader employs an accountant to provide accountancy advice;
- A doctor is instructed to provide a medical report on an individual in connection with an insurance claim; or
- An independent child psychologist is instructed to provide a report on a child for use in court proceedings.

10. In these cases the client, whilst initiating the work (asking for the advice or commissioning the report), would not usually be answerable for the content of the work, responsibility for which remains with the professional service provider. A client receives legal advice and, regardless of whether or not he chooses to follow the advice, would not ask the lawyer to make amendments to the original advice. Similarly, the court might raise questions about elements of the psychologist's report but would not seek to amend it. With these types of expert/professional service providers responsibility for the content of the report/advice generally remains with the service provider.
11. A service provider who processes personal data to carry out a service using his expert or professional skill and knowledge (and in the case of many professionals, such as accountants and lawyers, in accordance with professional and ethical standards regulated by a professional body) is likely to be acting as a data controller. While the client provides the initial broad instruction to the service provider (and ultimately pays for the service), where the service provider is required to use a considerable degree of independence in determining the way in which he is able to provide the service in accordance with his professional obligations he is likely to exercise a sufficient degree of control over the processing of the personal data to be acting as a data controller.
12. In real life many relationships, including those involving professional service providers, lie between these two extremes. Inevitably, deciding at what point in the continuum someone ceases to be simply a processor and exercises sufficient control over the purpose and manner of the processing to be a controller will be an inexact science.

Different types of client and service providers

13. Given the wide variety of both types of client requiring services and types of services providers available to service their requirements, it is perhaps helpful in this guidance to consider broad groups of clients and service providers as follows:
14. **“Lay client”** – Where a person requires a service, knows who to approach to provide the service but has no specialist knowledge of what may be involved in the provision of that service or how the service is to be provided, he will be referred to in this paper as a ‘lay client’. Such a client is likely to give only very broad instructions as to the service required.
15. **“Professional client”** – Where a person requires a service and not only knows who to approach to provide the service but also has a clear understanding of what will be involved in the provision of the service and how he wants the service provider to fulfil his requirements, he will be referred to in this paper as a ‘professional client’. Such a client is likely to give detailed instructions as to the service required and how he wants the service to be provided.
16. **“General service provider”** – Where a person is able to provide services entirely in accordance with his client’s instructions and without the need to comply with any externally imposed obligations or requirements (other than compliance with the general law) he will be referred to in this paper as a ‘general service provider’. He may provide the service in response to very broad instructions from his client (where the service is very straight forward) or his client may provide very detailed instructions as to how the service is to be carried out. In both cases the client has clear understanding as to what is involved in the provision of the service and the general service provider has little or no flexibility or independence in how he provides the service.
17. **“Specialist service provider”** – Where a person requires specialist qualifications, licences or other authorisations in order to provide certain services and is obliged to provide such services in accordance with professional and ethical standards imposed by the body appointed to regulate the provision of those services, he will be referred to in this paper as a ‘specialist service provider’. In such circumstances the specialist service provider has been instructed because of his expert knowledge and generally has a considerable degree of flexibility and independence in determining how to provide the service.

18. While in many cases it will be very difficult to determine who is a data controller and who is a data processor it is nevertheless possible to set out some broad guidelines applicable to some common service provider relationships.

Broad guidelines for determining who is a data controller and who is a data processor

General service providers providing services to their clients

19. “The simple data controller / data processor relationship”
- One party (the client) gives instructions to another party (the general service provider) to carry out processing of personal data on its behalf.
 - The service in question is relatively straightforward.
 - At the outset of the relationship the client fully understands what is involved in the provision of the service but has simply chosen to delegate the task to another party.
 - The general service provider has very little flexibility or independence in determining how to provide the service.
20. In these circumstances the client is acting as a data controller and the general service provider, who simply follows the client’s instructions, is a data processor.

Example

A small business instructs a mailing house to send out marketing materials to clients listed on its client database.

21. The client data controller will be responsible (in accordance with section 4(4) DPA) for ensuring that the data is processed in compliance with the data protection principles. In accordance with the seventh principle the data controller shall ensure that the processing of personal data, carried out by the data processor on his behalf, is carried out under a contract. The contract shall provide that the data processor is to act only on instructions from the data controller and shall comply with security obligations equivalent to those imposed on the data controller under the seventh principle¹.

¹ See Principle 7, Part II, Schedule 1 DPA and Paragraph 12, Part II, Schedule 1 DPA

Specialist service providers providing services to their lay clients

22. “The lay client relationship with the specialist service provider”
- One party (the lay client) gives broad instructions to another party (the specialist service provider).
 - The service in question is complicated in that it involves the use of specialist/professional expertise.
 - At the outset of the relationship, whilst the lay client has determined in broad terms the service to be provided, the lay client may have little understanding of what will be involved in the provision of the service – The lay client instructs the specialist to carry out a service but relies on the specialist’s expert skill and knowledge to determine how that service will be provided.
 - In performing the service the specialist is required to operate in accordance with the legal, professional and ethical standards imposed by the professional/specialist body regulating the service in question and not solely on instructions from his lay client.
 - The specialist service provider has wide discretion and independence in determining how to provide the required service.
23. In these circumstances the specialist service provider is exercising sufficient control in determining how the service will be provided (in accordance with his professional obligations) to be operating as a data controller, and not merely a data processor, in relation to the provision of the service. The specialist service provider is required to process personal data in accordance with obligations imposed by external bodies, codes and professional requirements. The specialist service provider, whilst processing personal data for the broad purpose determined by his client, is using his expertise to determine how best to achieve that purpose whilst processing personal data in accordance with his professional obligations.
24. In these circumstances, while the specialist service provider will be a data controller in relation to the data being processed in connection with the service, the lay client is also a data controller in so far as he as initiated the activity that gives rise to the processing and the personal data will be being processed, at least in part, for his purposes.
25. Where the data controllers are processing personal data jointly with others the balance of responsibilities for complying with the data

protection principles is often best determined by considering the level of expertise of the respective joint data controllers.

26. Where the lay client instructs a specialist service provider it would be generally most appropriate for the specialist service provider (as the party holding, and to a large extent determining the content of, the personal data) to carry out the practical responsibilities of data controller in relation to the data.
27. In practice it would be odd if a lay client that instructed a specialist in good faith were to be liable for any failure by that specialist to process the personal data it holds in connection with the service in accordance with the data protection principles. The lay client is unlikely to have any practical control of the data in question and indeed may have very little knowledge of what personal data is being held by the specialist in connection with the service he has commissioned.
28. It is usually expressly stated (possibly in the agreement for services) or implicitly agreed (from the balance of power between the parties) that the specialist will take responsibility for the practical elements of compliance with the data protection principles (such as handling subject access requests). This would appear an appropriate arrangement given the differing degrees of control over the data exercisable by the two parties (taking into consideration the respective knowledge, expertise, control of IT equipment etc, of the lay client and professional service provider).
29. Even though the lay client and the specialist service provider are both data controllers it is entirely reasonable, where appropriate, for the parties (the lay client and the specialist service provider) to agree between themselves for one party to take primary responsibility for the practical elements of compliance with the data protection principles.
30. The allocation of data controller responsibilities for data processing is not normally a matter discussed or set out expressly in client/service provider agreements for services. However, in practice the professional service provider will usually simply take on responsibility for the practical obligations of data controller (such as ensuring the security of the data and responding to subject access requests). It would not normally be reasonable for the lay client to either appreciate, or be fully responsible for, the obligations of the data controller in relation to the personal data being processed in connection with the provision of the service.

31. In the absence of any agreement between the parties as to respective data protection responsibilities, or any implied allocation of responsibilities arising from the respective positions of the parties, joint data controllers will be equally liable for any breaches of data protection responsibilities.

Example

Mrs A consults XYZ solicitors to arrange her divorce. Mrs A provides considerable personal data about herself and others to XYZ in order that they may provide the requested service.

Mrs A is a lay client in that, whilst she knows the service she requires, she has little idea of how the service will be provided and how the personal data she has provided will be processed in connection with the provision of the service. Mrs A has determined her broad purpose for the processing – obtaining a divorce – and is therefore a data controller in relation to the personal data she has provided or that is obtained in connection with the divorce proceedings.

XYZ solicitors process personal data for their broad purpose of providing legal services in accordance with their professional obligations. On receipt of instructions from Mrs A XYZ will, in addition, process personal data for her more specific purpose of obtaining a divorce. It will be for XYZ to determine the manner in which the personal data supplied by Mrs A will be processed. XYZ are therefore also data controllers in relation to the personal data processed in connection with Mrs A's divorce proceedings.

Given that the personal data arising in connection with Mrs A's divorce proceedings is to be held by and processed by XYZ rather than Mrs A it would be appropriate for XYZ to handle the day to day data protection obligations of the data controller in relation to the data. XYZ will therefore ensure the security of the data and handle subject access requests for information contained in the data.

32. Further details of the respective responsibilities of data controllers in connection with processing of personal data in connection with the provision of services are discussed in below in the section concerning practical arrangements to be made between joint data controllers.

Specialist service providers providing services to professional clients

33. “The professional client relationship with the specialist service provider”
- One party (the professional client) gives detailed instructions to another party (the specialist service provider).
 - The service in question is complicated in that it involves the use of specialist/professional expertise.
 - At the outset of the relationship, the professional client determines not only the outline of the service to be provided but also gives detailed instructions as to how the service is to be performed. The professional client has a detailed understanding of what will be involved in the provision of the service.
 - The professional client is aware that, in performing the service, the specialist will be required to operate in accordance with the legal, professional and ethical standards imposed by the professional body regulating the service in question and not solely on client instructions.
 - Given the level of detail provided in the professional client’s instructions the specialist may appear to have little discretion or independence in determining how to provide the required service however the specialist service provider will always be required to apply his professional and ethical standards in connection with the provision of the service.
34. As the professional client determines the activity that gives rise to processing he will be acting as a data controller in relation to the data being processed. In these circumstances, although the specialist service provider is unlikely to be able to exercise much control in determining how the service will be provided (and consequently how and why personal data will be processed) he is always required to apply professional standards and ethics in the provision of his specialist services. Consequently, as the specialist service provider is not acting solely on instructions from the client but also in accordance with his externally imposed standards, the specialist is not operating solely as a data processor but will be a data controller in relation to the provision of the service jointly with the professional client.
35. In these circumstances, although the specialist service provider will be a data controller, it would not be unreasonable for the professional client and specialist service provider to agree between

themselves how to divide responsibilities for complying with the data protection principles.

36. As mentioned above, identifying which is the most appropriate party to take responsibility for complying with the data protection principles is often best determined by considering the level of expertise, knowledge and control of processing media of the respective joint data controllers.
37. Where a specialist service provider receives detailed instructions from a professional client the parties may agree between themselves (possibly in the specialist's standard terms and conditions) that many of the practical burdens of being a data controller (dealing with subject access requests, ensure data is up to date etc.) will be handled by the professional client. Further details about contractual allocation of responsibilities are set out below.

Detailed guidance in relation to particular groups of service providers

Accountants

38. The ICO has been involved in discussions with the professional body representing accountants regarding guidance to be given to its members concerning their data protection responsibilities.
39. In line with the advice set out above, where an accountant (a specialist service provider) provides services to the general public and small traders (lay clients) on the basis of very general instructions (such as "please prepare my tax returns") the accountant will be acting as a joint data controller with the client. This analysis reflects the reality of the relationship where the accountant is likely to hold all the relevant personal data and determine how it is processed while the lay client, although also a data controller, is unlikely to even know what personal data is being held in relation to the service being provided. In these circumstances it would be expected that the specialist service provider would handle the practical data protection obligations in relation to the data being processed.
40. A professional accountant (a specialist service provider) may be employed by an organisation on the basis of detailed instructions from the client's in-house accountant (a professional client), for example, to carry out a detailed audit. In such circumstances, as set out above, while the professional accountant is a joint data controller, it may be more appropriate for his joint data controller -

the professional client - to take responsibility for the practical elements of compliance with the data protection principles. This practical approach sits comfortably with the reality of the provision of services to professional clients.

41. In many cases the professional client will retain the personal data being processed in connection with the service and the accountant will simply be given access to such data. In these circumstances it is sensible for the obligations of the data controller to be satisfied by the client holding the data rather than the professional accountant who is merely given access to it or a secondary copy of the business data in order to carry out the service.
42. Where a specialist service provider and professional client are acting as joint data controllers in relation to the data it is important to remember that they are not both processing the data for exactly the same purposes. The professional client will be processing the data for its broad business purposes and for its specific purpose of allowing the specialist service provider to conduct its professional tasks (such as audit). The specialist service provider will be processing the data in accordance with the professional codes, practices and obligations and for the specific purpose of carrying out the client's audit.
43. Where data is being processed by both parties for the common purpose (for example the conduct of an audit) it is reasonable for the parties to allocate differing responsibilities in relation to the data protection obligations arising in relation to the data as appropriate to their levels of expertise and physical control of the data. Where the specialist service provider is processing data for purposes other than the joint purpose then he will retain all the obligations of data controller in relation to the data.

Example

Where an accountant providing a service considers that, in connection with the data being processed, he has detected malpractice which, in accordance with his professional obligations, he is obliged to report to the appropriate authorities, he will need to satisfy the obligations of a data controller in relation to the processing of data giving rise to his concerns.

In these circumstances it is clear that the professional accountant is processing data in accordance with his own professional obligations rather than simply in accordance with client's instructions and will be acting independently in the

capacity of data controller. Where the specialist service provider is processing data in accordance with his own professional obligations or his professional monitoring obligations he will always be acting as data controller and he cannot agree to hand over to, or share data controller obligations with, the client in relation such activities.

44. These guidelines on the respective roles of accountants acting for lay clients and for professional clients represent the 'default' position. With every service provision relationship that involves the processing of personal data consideration must be given whether these default arrangements are appropriate in the particular circumstances of the individual case.

Solicitors

45. It has been suggested to the ICO that solicitors instructed to act on behalf of their clients will not be data controllers in respect of the personal data they process in connection with the provision of that service. This argument is based on the view that, as he does not completely control the content of the data processed, the solicitor cannot be said to control the content of the personal data.
46. Simply because a client determines the purpose of the processing at a broad level ("please conduct my divorce proceedings for me") and may supply some of the personal data processed in connection with the service, it does not mean that the solicitor is not a data controller for such data.
47. As set out above, where a solicitor provides services to clients, because of his professional and ethical obligations, he will always be acting as data controller in relation to the personal data processed in connection with the provision of the service.
48. As for accountants, while solicitors will always be joint data controllers for the personal data they process in connection with the provision of their professional services, there are opportunities for lawyers and 'professional clients' to agree between themselves which of them should handle the practical data protection obligations of the data controller (such as dealing with subject access requests, ensuring that data is up to date and ensuring the data is secure).
49. It would not usually be appropriate for lawyers to agree with their lay clients that the lay client should handle the practical obligations of data controller in relation to the data being processed in connection with the provision of the legal service.

Contracting for services on the service provider's standard terms

50. Many organisations that offer services provide the client with a set of standard terms and conditions setting out the basis on which the service will be provided. It has been suggested that, in providing standards terms and conditions, the service provider is determining the purpose and manner in which the personal data used in connection with the service is to be processed.
51. Simply because the service provider suggests the detailed terms of business does not mean that it is a data controller in respect of personal data processed under contract for their clients. Whether the service provider is a data controller or not will depend on how much discretion it has in providing the service.
52. If the client gives instructions to a service provider to carry out a service on his behalf and the service provider acts entirely on those instructions and has little or no independence in how it performs the service, the client is the data controller and the service provider is the data processor even under a contract containing the service provider's standard terms and conditions.
53. The client does not cease to be a data controller simply because the processing service is being provided on the service provider's standard terms and conditions. The client will retain control of the processing in that, on receipt of the draft service agreement, it should satisfy itself that it agrees with the proposed terms and, if not, it should either seek to alter them or decide not to use the service provider in question. In agreeing to the terms the client has effectively agreed, if not determined, the purpose and manner of processing of its personal data.

Practical arrangements to be made between joint data controllers

54. As the client and the service provider may both be data controllers in relation to the data processed in connection with the service, the ICO recognises that there should be a degree of flexibility for clients and service providers to make practical arrangements as to how data protection obligations are to be satisfied.
55. Practical considerations such as who physically holds the data, who is processing it on a daily basis and the level of expertise of the respective parties, may influence how parties determine how responsibilities are to be allocated.

56. Where the client is the data controller and the service provider is the data processor it is clear that the client will have all the responsibilities of data controller. In these circumstances it is open for the client to ask the processor to satisfy his obligations to comply with subject access requests on his behalf. Responsibility for compliance always lies with the data controller but he may delegate the practical performance of some of his data protection obligations.
57. Where the client and the service provider are both (joint) data controllers, while they are both liable for compliance with the data protection principles, they may agree between themselves who is in practice to be responsible for which elements of compliance.
58. Where a lay client instructs a specialist service provider the default position should be that the specialist will deal with all matters of data protection compliance on behalf of the joint data controllers. The specialist is likely to physically hold the data and understand the data protection obligations whilst the lay client is unlikely to have any idea as to what is being held and how it is being processed.
59. Where a professional client gives detailed instructions to a specialist service provider it may be more appropriate for the parties to agree, possibly in the agreement for services, that the professional client (as the party likely to be holding the data and involved in the day to day processing) will be responsible for compliance with the data protection principles in relation to the data being processed for their joint purpose of carrying out the agreed service.
60. In deciding to allocate data protection responsibilities to the professional client it is important that it is reasonable in all the circumstances for the specialist service provider to do so. The specialist should take steps to satisfy himself that the professional client is in a position to be able to satisfy the data protection compliance obligations of the joint data controllers. If the specialist is not able to so satisfy himself he should either refuse the instructions or be prepared to fully satisfy the data protection obligations of data controller in relation to the data processed in connection with the provision of the service.
61. Where responsibilities have been allocated between the client and service provider it is important that there is clarity as to which party is responsible for which activity. It is unwise for data controllers to agree to share responsibility for data protection compliance (particularly for tasks that are time sensitive such as responding to subject access requests). Unless there is a clear understanding as to

which party will perform which data controller task there is a real danger of confusion and of non-compliance with the DPA.

62. Whilst both joint data controllers are legally responsible for compliance with the data protection principles, where the parties have made reasonable arrangements as to each party's defined responsibilities, if one party fails in its obligations the ICO would usually only seek to take enforcement action against the party that is in breach of his agreed obligations.

Example

Where one joint data controller (A) holds the personal data being processed on its IT system and the parties have agreed that (A) will therefore handle subject access requests, if (A) fails to comply with a subject access request the Commissioner would not seek to take action against the other data controller (B) (although he is legally responsible for compliance with the Act) where the allocation of responsibilities was reasonable and (B) is not at fault in respect of the non-compliance.

If, however the Commissioner were to receive evidence that (B) had received the subject access request but failed to pass it to (A) to act upon, then regardless of the agreement between the parties allocating responsibility for handling subject access requests to (A), the Commissioner may nonetheless find that (B) had failed in its obligations as data controller.

For the avoidance of doubt it is perhaps wise for joint data controller to ensure contractual clarity as to the division of responsibilities.

Conclusion

63. Where a client instructs a service provider to carry out a service on his behalf (which involves the processing of personal data), in general the client, as the party determining the broad purpose of the processing, will be a data controller in respect of such data.
64. Where the service provider has little or no flexibility in providing the service and acts entirely on instructions from the client he will be a data processor in respect of the data being processed.
65. Where the service provider is either (i) given considerable flexibility or independence in determining how to satisfy the client's broad

instructions or (ii) is providing the service in accordance with externally-imposed professional or ethical standards, he will be acting as a joint data controller, rather than a data processor, in relation to the service data.

66. Where the client and service provider are joint data controllers they may, where appropriate, agree between themselves which of them is to satisfy the data protection obligations of data controller in connection with the service data. For example, the parties may agree that all subject access requests and all security arrangements relating to the service data will be handled by only one of them. Such arrangements should reflect the reality of the relationship between the parties (e.g. who physically holds the data and who has the appropriate expertise or resources to satisfy data protection obligations) and should provide clarity as to respective responsibilities for both the joint data controllers and data subjects.

More information

67. This guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
68. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
69. If you need any more information about this or any other aspect of freedom of information or data protection, please [Contact us: see our website www.ico.gov.uk](#).