



**OFFICE OF THE
INFORMATION
COMMISSIONER**

GUIDANCE: TRANSITIONAL PROVISIONS



Guidance Note

Transitional Provisions

Data Protection (Jersey) Law 2018 ('DPJL')
Data Protection Authority (Jersey) Law 2018 ('DPAL')

THIS DOCUMENT IS PURELY FOR GUIDANCE AND DOES NOT CONSTITUTE LEGAL ADVICE OR LEGAL ANALYSIS. IT IS INTENDED AS A STARTING POINT ONLY, AND ORGANISATIONS MAY NEED TO SEEK INDEPENDENT LEGAL ADVICE WHEN RENEWING, ENHANCING OR DEVELOPING THEIR OWN PROCESSES AND PROCEDURES OR FOR SPECIFIC LEGAL ISSUES AND/OR QUESTIONS.

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INTRODUCTION

1. The DPJL is based around seven principles of 'good information handling'. These principles give people (the data subjects) specific rights in relation to their personal information and place certain obligations on those organisations that are responsible for processing it.
2. The Data Protection Authority (Jersey) Law 2018 (DPAL) establishes the Data Protection Authority (the Authority (which will replace the Office of the Information Commissioner). The Information Commissioner (the Commissioner) is the Chief Executive Officer of the Authority.
3. This is part of a series of guidance, which goes into more detail than the Guide, to help organisations fully understand their obligations, as well as to promote good practice.
4. The DPJL and AL both provide for certain periods of transitional relief during which data controllers (and where applicable, processors) can bring their existing systems into compliance with the new laws. This guidance explains about the various transitional provisions.

OVERVIEW

- This guidance applies to data controllers (and in certain circumstances, processors), as defined under Art.1 (1) of the DPJL. It focuses on key transitional provisions.
- The DPJL and DPAL come into force on 25 May 2018. However, certain data is exempt from full compliance until 25 May 2019 (this relief applies to processing which was already underway immediately before 25 May 2018) and certain other requirements are subject to transitional relief.
- The purpose of transitional relief is to facilitate a progressive move by data controllers (and where applicable, processors) to the regimes created by the DPJL and DPAL.
- Processing not falling within the scope of the transitional provisions will be subject to the provisions of the DPJL and DPAL immediately and will not be eligible for transitional relief. Data controllers may find that within their overall processing activities, processing of some personal data attracts transitional relief whereas some will not. Different requirements may therefore apply to different data. Data controllers therefore need to ensure that their working practices and systems take account of this. Where this causes practical difficulties, data controllers may find it simpler to observe the requirements of the DPJL and DPAL immediately.
- Data controllers should be taking a proactive approach to bring their systems, documentation and procedures in line with the requirements of the DPJL and DPAL as soon as possible rather than postponing compliance with the new regime until expiry of any transitional relief.

The DPJL

5. Art.86 of the DPJL provides for certain savings and transitional arrangements and such are set out at Schedule 5. Similarly, Art.88 of the DPJL sets out that certain other parts of the DPJL come in to force later than the commencement date.

6. The transitional arrangements are as set out at Sched.5. This guidance note focuses on the following:

- a. Processing underway at time of commencement of the DPJL;
- b. Request for information and copy of personal data;
- c. Right to compensation for inaccuracy, loss or unauthorised disclosure; and
- d. Application for rectification, blocking, erasure or destruction.

7. The other provisions of the DPJL which come into force at a point other than the commencement date and which are dealt with in this guidance note) are:

- a. Part 5 of the DPJL (that in respect of data protection officers) comes into force on 25 November 2018; and
- b. Arts.17 and 18 which come into force on 25 May 2019.

Processing underway at time of commencement of the DPJL (Art.86, Sched 5, para.2)

8. Transitional relief only applies during the relevant transitional period for so long as, and to the extent that, processing of personal data are subject to processing already underway (as to which, see below). Therefore, if the controller introduces new practice or systems involving processing which is not already underway and which are applied to personal data, then transitional relief will be lost even if this occurs before the expiration of the relevant transitional period. Personal data applies to information which may be either manual or automated.

9. In the first instance, data controllers must themselves decide whether processing was already underway at the time of commencement of the DPJL (namely, 25 May 2018). Where processing was already underway will be a matter of fact in each case. The term “*underway at time of commencement*” is not defined within the DPJL and the Commissioner recognises that it is not entirely clear from the DPJL what this means and that it is open to more than one interpretation.

10. Where data has been processed for a broad business purpose in line with consents obtained in accordance with the Data Protection (Jersey) Law 2005, the Commissioner takes the view that it is likely to be processing already underway, rendering it specified information.

11. In considering whether or not processing of data was already underway, data controllers may find it helpful to review their overall processing activities, asking a series of questions including:

- a. Is there something different about the processing?
- b. If so, what is different about it? In deciding this, consider what processing was undertaken before and what processing is being undertaken from 25 May 2018.
- c. If the processing is different, what is the effect of this in relation to the data controller’s overall processing activities? For example:
 - i. Is the processing already within a range of activities or business processes already undertaken by the data controller?
 - ii. Does the processing result in a new or different application of the data or part of the data?

- iii. Is the processing carried out in order to achieve a new objective?
 - iv. Does the processing produce or result in a new or different effect upon the data subject?
12. For transitional relief to apply, an additional factor must be satisfied, namely, that the processing must have been in existence at the time of commencement of the DPJL. Therefore, where the data controller previously carried out certain processing but this had ceased at any time up to midnight on the 24 May 2018, transitional relief will not be available. The commencement of new processing at any time before midnight on 24 May 2018 would be “processing underway”.
13. The intention of the legislature appears to be to cover processing systems that were live and in use before 25 May 2018. It does not apply to new data added to systems.

Example 1

What if I do one of the following from 25 May 2018?

- Amend existing personal data;
- Add personal data on existing data subjects;
- Add personal data on new data subjects;
- Carry out essential program and software changes to enable existing operations to continue.

It is unlikely that these things alone will mean that this is not processing underway.

Example 2

Will a change of legal entity of status of the data controllers mean in itself that processing is not processing underway? For example, the merger or take-over of one company by another?

Provided the processing to which personal data are subject remains the same, a change in legal entity alone will not mean it is not processing already underway. However, a common feature when a change of legal entity occurs is that the “new entity” takes on new or different functions or activities. If these involving processing which was not processing underway, transitional relief may not apply.

Relief under this provision has effect up to and including 25 May 2019.

Request for information and copy of personal data (Art.86, Sched 5, para.3)

14. Where a data subject (as defined under the 2005 Law) has made a request under Art.7 of the 2005 Law and which remains outstanding as at 25 May 2018, the data controller may deal with it as if it the Outstanding Request had been made under Art.28 of the DPJL, save for that the data controller has 40 days to respond to the request.
15. Any fee previously paid by the data subject to the data controller is not repayable.

Right to compensation for inaccuracy, loss or unauthorised disclosure (Art.86, Sched 5, para.4)

16. Where a claim for compensation under Art.13 of the 2005 Law remains outstanding as at 25 May 2018, it is to be treated as if Art.13 of the 2005 Law was still in force.
17. The Commissioner considers that in order to rely on this transitional provision there must be evidence that either:
- a. formal legal proceedings have been issued in accordance with the Royal Court Rules 2004 (as amended), or

- b. that the complainant has issued a letter before action in accordance with practice direction PD RC 17/01; or
- c. that the complainant and data controller are in an on-going dialogue regarding the complainant's claim for compensation.

Application for rectification, blocking, erasure or destruction (Art.86, Sched 5, para.5)

18. Where a claim for rectification, blocking, erasure or destruction under Art.14 of the 2005 Law remains outstanding as at 25 May 2018, it is to be treated as if Art.14 of the 2005 Law was still in force.
19. The Commissioner considers that in order to rely on this transitional provision there must be evidence that either:
 - a. formal legal proceedings have been issued in accordance with the Royal Court Rules 2004 (as amended), or
 - b. that the complainant has issued a letter before action in accordance with practice direction PD RC 17/01; or
 - c. that the complainant and data controller are in an on-going dialogue regarding the complainant's application.

Data Protection Officers - Part 5 of the DPJL (arts.24-26)

20. Art.24 of the DPJL sets out the circumstances in which a controller and processor must appoint a Data Protection Officer (**DPO**). A DPO must be appointed when:
 - a. Processing is carried out by a public authority (as defined in Art.1(1) of the DPJL);
 - b. The data controller/data processor's core activities involve systematic monitoring on a large scale;
 - c. The data controller/data processor's core activities involve large scale processing of special category data; or
 - d. It is required by the relevant law.
21. Further information on DPOs can found in the Commissioner's guidance.
22. However, these provisions do not come into force until 25 November 2018. That means that if an organisation would ordinarily fall within the above criteria and need to appoint a DPO, they do not have to do so until this date.
23. Notwithstanding the above, the Commissioner would urge all organisations that are likely to require a DPO to start the process of recruitment now and to engage that person in the preparations for and implementation of these new data protection regime.

Consultation with the Authority for high risk processing (Art.17)

24. The DPJL requires controllers to carry out data protection impact assessments (**DPIAs**) in cases of potentially high-risk processing activities and to consult the Authority in certain instances.
25. Art.17 of the DPJL sets out the steps that a controller must take where a data protection impact assessment indicates that any processing would pose a high risk to the rights and freedoms of natural persons, in the absence of measures taken by the controller to mitigate the risk. In such circumstances, a controller must consult the Authority before starting the processing and provide the Authority with certain information as stipulated in that article.
26. This provision does not come into force until 25 May 2019.

27. However, DPIAs will play an important role under the DPJL and the onus is on the data controller to assess the impact of the envisaged processing. Controllers should take seriously their obligation to carry out DPIAs and the Commissioner considers that in the transitional period controllers should use the lead-in time to:
- a. establish guidelines for what would constitute high risk processing operations that will likely require closer scrutiny by way of a DPIA;
 - b. establish policies, processes and templates for carrying out DPIAs including considering what training programmes, threshold analyses and escalation mechanisms will be required to allow individuals with access to personal data to be in a position to express their views as to whether a DPIA should be carried out and, if so, set out what that input should be;
 - c. establish processes for consulting with the Authority in relation to high-risk processing operations;
 - d. review key (ongoing and planned) data processing operations and identify those that will be subject to the DPIA requirement; and
 - e. start carrying out DPIAs as a matter of best practice and test-drive any policies and procedures prior to 25 May 2019.
28. Further information on DPOs can found in the Commissioner's full Guidance note.

The DPAL

29. The DPAL has certain transitional provisions set out at Schedule 2 thereof. They relate to:
- a. Registration;
 - b. Enforcement notices served under the 2005 Law; and
 - c. Requests for assessment under Art.42 of the 2005 Law.

Registration (Art.47, Sched 2)

30. The 2005 Law provided for a data protection register and a system of notification by data controllers. The DPAL introduces a new system of registration by which **all** data controllers and processors are obliged to inform the Commissioner of certain details about the processing of personal data carried out by the relevant organisation. The details provided will be used by the Commissioner to make an entry describing the processing in a register which is open to the public for inspection.
31. The principal purpose of having registration and a public register is transparency and openness. The public should know or should be able to easily find out who is carrying out processing of their personal data and other information about the processing, such as, for what purposes the processing is carried out. The DPAL places obligations on **all** data controllers and processors in order to achieve transparency.
32. Registration, therefore, serves the interests of data controllers and processors in providing a mechanism for them to publicise details of their processing activities and also serves the interests of data subjects in assisting them to understand how personal data are being processed by data controllers.
33. Further information on registration can found in the Commissioner's note on Registration.
34. Schedule 2 of the DPAL deals with the transition from notification to registration and the Data Protection (Registration and Charges) (Jersey) Regulations 2018 (the **2018**

Regulations) set out the amount to be paid by a controller or processor when registering with the Authority (save for where any exemptions apply).

35. Data Controllers

- a. Any data controller who, prior to commencement of the notification regime was registered under the 2005 Law is exempt from the prohibition against processing personal data without registration which is contained in Art.17 of the DPAL. The DPAL provides that this exemption lasts until the end of the data controller's original notification period.

Example

A data controller notified on 24 May 2018. The controller does not need to register under the DPAL until 24 May 2019 (their notification lasting for a year pursuant to Art.17 of the 2005 Law).

- b. Once the transitional exemption from registration ceases to apply, data controllers must register in accordance with the DPAL.
- c. If a data controller had lodged an application for notification under the 2005 Law but for which an entry in the register had not been created by the commencement date of the DPAL, will be determined by the Commissioner as if it were an application made under Art.17 of the DPAL.

36. Processors

- a. Processors do not need to register until 23 November 2018 (26 weeks from the day on which the DPAL comes into force).

37. Notwithstanding the exemption from registration afforded to existing notified data controllers and to processors who will be captured for the first time, such users may voluntarily register if they wish to do so. If they do chose to register voluntarily during the transitional period then the Commissioner considers that they will lose their entitlement to exemption from the prohibition against processing personal data without registration.

38. Fees

- a. The 2018 Regulations set out that the fee payable by a controller or processors is £50 until such time as the 2018 Regulations are rescinded and replaced.
- b. This fee is not payable by controllers if the only processing carried out by the controller is:
 - i. a class of processing specified in any of paragraphs 1-3 of the Schedule to the 2018 Regulations;
 - ii. processing that falls within none of those classes only because the processing takes the form of disclosure that is contrary to paragraph 1(d), 2(d) or 3(e) of the Schedule and the disclosure –
 - is required by or under an enactment, by any law or by an order of a court, or
 - may be made by virtue of an exemption in Part 7 of the DPJL.

Enforcement notices served under the 2005 Law

39. Where immediately before the commencement of the DPAL an enforcement notice is served under Art.40 of the 2005, the notice has effect as if it were made under Art.25(3) of the DPAL.
40. There is no definition of “immediately before” set out in the DPAL but the Commissioner considers that such would encompass enforcement notices served in the seven days prior to the commencement of the DPAL. In practice, this means that the contravention which is the subject matter of the enforcement notice under 2005 Law may be dealt with in the manner set out at Art.25(3) of the DPAL.
41. The Authority may also make an order on or after the commencement of Art.25 (3) or Art.26 (1) (25 May 2018) if the Commissioner has reasonable grounds for suspecting that, before that day, a data controller contravened the data protection principles as set in the 2005 Law.

Requests for assessment under Art.42 of the 2005 Law

42. If a request for assessment made to the Commissioner under Art.42 of the 2005 Law has not been “dealt with” by 25 May 2018, such will have effect as if the request had been made under Art.19 of the DPAL
43. There is no definition of “dealt with” under the DPAL. The Commissioner interprets this provision to mean that if the Commissioner has not, by 25 May 2018, notified the person who made the request in accordance with Art.42(4) of the 2005 Law, then the assessment will be dealt with in accordance with the provisions of Part 4 the DPAL.

Additional information

Additional guidance is available on our guidance pages with more information on other aspect of the DPJL.

This guidance has been developed drawing on the Commissioner's experience. It will be reviewed and considered from time-to-time in line with new decisions by the Commissioner and/or the Jersey courts.

It is a guide to our general recommended approach, although each individual case will likely be different and will be decided on the particular circumstances of the case.

If you need any further information about this, or any other aspect of the DPJL, please contact us or see our website www.OICJersey.org.

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