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Chair
Digital, Culture, Media and Sport Committee
House of Commons
London
SW1A 0AA

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By email to: cmscom@parliament.uk

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Dear Julian,

Follow up to the DCMS Committee

I am grateful to you and your Committee members for the recent opportunity to discuss a number of areas of my office's work. During the session I promised to write to the Committee to clarify a number of points raised during the course of the discussion.

Algorithmic transparency and artificial intelligence (AI) regulation

During my evidence session, I agreed to provide the Committee with some further information about our thinking and work in relation to algorithmic transparency and AI regulation.

I welcomed and appreciated the understandable interest of the Committee and other Parliamentarians in the potential benefits and risks to society around the use of AI. I also welcomed the opportunity to share my views on the future of AI regulation, as the use of AI becomes more prevalent in our daily lives – from decisions about medical insurance to its use in law enforcement. The use of AI has the potential to both enhance and undermine human rights, equality and privacy rights.

The good news from my perspective is that, insofar as AI relates to individuals, data protection law currently provides full coverage. By which I mean any handling of data about an individual – via an algorithm or an AI system – falls within the scope of ICO regulation.

What that means in practice for individuals is that they have the right under data protection law to seek a review of decisions about them when they are made solely using automated means, i.e. via an algorithm.

It also means that organisations engaging in the use of AI and algorithms must pay regard to all aspects of data protection law the same way any other organisation using less complex methods of data processing would. That includes privacy by design, being clear with individuals up front on how their data will be used, and conducting impact assessments of the data protection risks *before* setting out on certain initiatives.

In short, as far as regulatory reach is concerned, algorithms and AI are well addressed by the UK's current data protection regime. This is by virtue of the relatively recent law change, in 2018, which brought algorithms explicitly into the scope of our data protection law. The ICO continues to produce and prepare guidance and tools to assist organisations engaging in this area to get their compliance right from the outset. This includes our well-received ExplAIIn guidance which sets out clearly for organisations what steps they should take to be transparent and understandable about their use of AI to individuals.

The ICO's current existing oversight of AI and algorithms means that we are at the forefront in terms of our understanding of the implications of these new technologies. The ICO and other regulators across the UK are sharing our respective intelligence and insights to ensure a well-rounded awareness across regulators. With this awareness we are collectively in a better position to ensure that the benefits for society of AI and algorithms are realised, whilst the risks are understood and mitigated.

Investigation into data analytics for political purposes

The Committee was interested in certain aspects of the ICO's high profile investigation into data analytics in political campaigns, with questions arising more than once during my evidence session.

I am glad to see that the conclusions and recommendations arising from the investigation continue to be discussed and debated in Parliament. This truly was an investigation that broke through in terms of wider consciousness. I recognise that our final update on the investigation – submitted to your Committee on 02 October 2020 – could not have answered all remaining specific

questions by Committee members. It was useful to have an opportunity to hear some of these questions during the evidence session.

Sharing of evidence with other regulatory and law enforcement bodies

Committee members were interested to know to what extent the ICO's body of evidence was shared and utilised by other bodies, in the course of investigations in other jurisdictions.

The ICO did receive numerous requests for assistance and information sharing from overseas, from a mix of data protection regulators, law enforcement agencies and other statutory bodies. These requests numbered around 15 in total. In cases where formal requests for information were made and where there was an appropriate legal mechanism to do so then the ICO shared information.

With specific reference to the US Senate Intelligence Committee, initial enquiries were made to the ICO by the Senate Committee staff, but we are not aware that this was followed up on by way of formal request so no information sharing has taken place.

Individuals engaged with by the ICO investigation

The Committee asked questions about specific named individuals, and rather than provide inaccurate information during the oral evidence session I said I would check our records and write. As the Committee may be aware, whilst the ICO had a major modernisation of its regulatory powers in 2018, these changes did not include the ability to compel an individual to submit to interview.

Christopher Wylie provided information to the ICO in informal discussions; but he did not submit to a formal interview. Mr Wylie instead provided a witness statement covering a number of points of investigatory interest.

Brittany Kaiser was interviewed as a witness by the ICO during the initial stages of the investigation. More recently Ms Kaiser also provided additional documents. Having analysed that new material we determined that it does not change our findings or the conclusions in our reports - which were formed through analysis of documents, interviews with multiple parties and examination of digital evidence.

For the benefit of the Committee, our review of material established that the additional material appeared to be: material not relevant to our investigation of Cambridge Analytica and its activities in the UK; material that was relevant and we had already seen from our own evidence review; material that was similar (earlier or later drafts or from the same sequence of documents) and had been considered already, including draft but unexecuted contracts; and material that is covered by legal professional privilege.

Additionally, the Committee was interested to hear whether individuals had refused to be interviewed. Overall, it is important to point out that for the most part, individuals approached in the course of the investigation did submit to interview. It is already a matter of public record that Alexander Nix, a former director of SCL Elections Ltd, and Dr Aleksandr Kogan, founder of Global Science Research and an academic at the psychometric centre based at Cambridge University refused to be interviewed. In total, a further nine individuals similarly refused our request to be interviewed. Four individuals did not submit to interview but did provide witness statements.

Facebook's audit activity

The Committee asked if Facebook had contacted me after my October 2020 update as part of their audit work. We understand that this question related to a commitment by Facebook to audit the operation of apps on their platform.

I can confirm that Facebook have not contacted the ICO since October 2020 in respect of any such audit.

We did however provide to Facebook by March 2020, as part of the settlement of their appeal against the Monetary Penalty Notice issued to them on 24 October 2018, evidence relevant to that appeal process, some of which was obtained from the servers of Cambridge Analytica/SCL Elections Limited.

We have not heard from Facebook subsequently as to what if any action they may have taken as a result of receiving that evidence.

Whilst my answer to the Select Committee was of necessity constrained by the terms of the settlement agreement, we have published a press statement¹ which provides details of the key elements of that agreement.

Appeals against ICO action relating to political campaigning investigation

The Committee was interested in any ongoing appeals activity relating to certain actions taken by the ICO in the course of the investigation. Since the date of my appearance there has been an update on this, specifically the appeals against ICO monetary penalties and audit notices issued to Eldon Insurance Limited and Leave.EU; and in the case of Eldon an enforcement notice also. Both organisations had appealed on multiple grounds. The ICO had issued these fines and the audit notices issued on the basis of evidence and well-founded concerns. The legal appeals process has taken some time to progress towards conclusion; we recognise that a robust review and appeals system for administrative fairness is necessary.

Following an appeal hearing before the Upper Tribunal all five of the appeals brought by Eldon and Leave.EU against ICO action were dismissed.

The ICO remains keen to progress its actions, especially where they relate to undertaking an audit of the organisations.

WhatsApp sharing user data with Facebook and how this applies to the UK

The Committee were interested in the recently announced changes by WhatsApp to its privacy policy and terms of service. Specifically, the Committee was keen to understand whether the announced changes would have implications for the sharing of UK users' data with Facebook, the parent company of WhatsApp.

The ICO was contacted by WhatsApp in mid-January 2021 to inform us that they had no plans to expand their data processing plans with regard to UK user data. In practice what that means for individuals is that UK users of WhatsApp will not be required to agree to the sharing of data with Facebook to continue using the messaging service. We will continue to follow up with WhatsApp on this issue.

¹ <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2019/10/statement-on-an-agreement-reached-between-facebook-and-the-ico/>

The Committee asked how many users had left WhatsApp following the announcement of intended changes to its Privacy Policy and Terms of Service. The ICO does not have access to these figures and therefore I can only refer the Committee to recent news reports that point to the increase in the numbers of people downloading alternative messaging platforms following WhatsApp's announcement, including a recent BBC report.²

TikTok investigation

The Committee was interested in the ICO's investigation into TikTok, the social media sharing platform, whose compliance with data protection has been under examination.

The Committee asked whether my office could verify TikTok's statement that they are moving their UK user's data from Singapore and the US to Ireland. We are not currently in a position to verify this information. International transfers are within the scope of the investigation and will be included in our findings.

From a practical perspective for individuals, the ICO maintains memorandums of understanding with both Singapore and US regulatory counterparts. And we have an excellent collaborative relationship with our Irish counterpart agency. The ICO therefore can move to safeguard UK users' data regardless of jurisdiction, as we have the regulatory relationships in place already to do so. This should provide some reassurance to UK users.

British Airways (BA) fine

I would also like to take this opportunity to clarify my responses to questions about the fine issued against BA.

As I said in my evidence, the initial proposed fine of £183.39m was reduced to an eventual fine of £20m following representations from BA. One of the considerations taken into account by my office was the impact of the pandemic on BA; but this was not the major mitigating factor in the reduction. The remainder of the reduction was applied because of the additional information we received in submissions from BA, detailing the nature of the breach and

² <https://www.bbc.co.uk/news/technology-55634139>

mitigating factors, and thus should not be attributed to the effects of the pandemic.

It would also be helpful to clarify that the detail of the information that had been breached or compromised in the attack did not include BA customers' passport details.

I also explained that the attack on BA was a significant issue because it was "entirely preventable" in its totality. However, I should clarify that by this I meant that certain security measures could have prevented or mitigated the risk and/or certain stages of the attack.

Music Streaming

Finally, the Committee raised two issues in relation to the music industry and streaming. Firstly, a call by the music industry to standardise data when it comes to the rights to music so that musicians can be remunerated fairly and whether responsibility for regulating this fell to the ICO; and secondly concern that algorithms are being used to prioritise certain genres or record labels over others and whether the ICO or another regulator was responsible for how algorithms are applied in this way.

From what we understand, the Committee's concerns appear to reach beyond privacy and the regulation of personal data and relate to the wider functioning of the market. Given this, the Competition and Markets Authority (CMA) is likely to be the better placed authority with which to discuss these matters.

I hope this response is helpful. If the Committee has any further questions we would be happy to arrange a briefing. I look forward to continuing to engage with you and the Committee on areas of mutual priority during the remainder of my term.

Yours sincerely,



Elizabeth Denham CBE
UK Information Commissioner