

Data Protection Act (2021 Revision) – Section 40 Guidelines

Introduction

Section 40 of the Data Protection Act (2021 Revision) states that:

“A public authority that is drawing up administrative measures or rules relating to the protection of data subjects’ rights and freedoms with regard to data processing shall consult the Ombudsman on the content of such measures or rules”.

These guidelines set out the Ombudsman’s approach to such consultations under section 40.

1. What “administrative measures or rules” fall within the scope of section 40 of the Data Protection Act (DPA)?

In this context we interpret the term "administrative measures or rules" to cover:

- (i) proposals for new or amended legislation (act and regulation) with an impact on the processing of personal data (including requiring, allowing, restricting or prohibiting the processing of personal data), or
- (ii) codes of conduct or codes of practice that govern the processing of personal data, if the processing involved is complex or may pose risks to the rights and freedoms of individuals.

Consultation is particularly encouraged when the processing:

- (a) presents a certain novelty or complexity (e.g. utilizing new technology which may be invasive of privacy, such as automated number plate recognition or facial recognition), or
- (b) has a significant impact on data subjects' rights (e.g. due to the processing activity's risks).

2. What types of documents are within the scope of this provision?

In scope: acts, regulations, rules, codes of conduct, or codes practice.

Out of scope: internal policies and procedures, privacy notices, terms & conditions, contracts.

3. How should public authorities submit the content of those measures or rules for consultation?

Complete the s.40 consultation form and submit it to the Office of the Ombudsman by email (info@ombudsman.ky) along with a draft of the administrative measures or rules and a copy of any other supporting documents (e.g. project proposal or business case).

4. How soon will the Ombudsman respond to public authorities that submit these measures or rules for consultation?

The DPA does not impose any specific deadline for responding to the consultation. However, we will aim to provide our answer within a reasonable period of time, taking into account the specific circumstances of each consultation. As a general rule we will deliver our opinion within two months following receipt of the consultation form and supporting documentation. This period may be suspended until we have obtained any further information that we may have requested.

5. Until the consultation is complete, how should public authorities proceed with the measures or rules?

Any consultation should take place before such administrative measures or rules come into force. If a public consultation is also planned, there is no reason that this cannot commence as planned, even if we have not yet completed our review. In order to avoid confusion, administrative measures or rules that are in consultation should be marked as such.