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**CONTEXTS FOR THE DEVELOPMENT OF A DATA ACCESS AND
CONFIDENTIALITY PROTOCOL FOR UK NATIONAL STATISTICS**

Invited paper

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Contexts for the Development of a Data Access and Confidentiality Protocol for UK National Statistics

To understand the context of a National Statistics Protocol for Data Access and Confidentiality, one needs to be aware of the background political, legal, regulatory and statistical systems in the UK.

UK has a devolved political system. Special and distinct arrangements for the production of statistics exist in England, Scotland, Wales and Northern Ireland. The National Statistician is the UK Government's chief adviser on statistical matters, is the Registrar General for England and Wales, and is Head of the Government Statistical Service. There is an independent Registrar General for Scotland and for Northern Ireland. The National Statistician is responsible for statistics at the UK level and reports to the Economic Secretary to the Minister for National Statistics (the Treasury) in the UK parliament. The Chief Statistician for Scotland reports to the Minister for Finance within the Scottish Executive. The Head of the Statistical Directorate for Wales reports to the Finance Secretary in the Welsh Assembly Government. The Chief Executive of The Northern Ireland Statistics and Research Agency reports to the Minister for the Department of Finance and Personnel in the Northern Ireland Executive.

UK has a devolved statistical system.

National Statistics are a number of pre-defined outputs from the offices of the Registrars General, statistical divisions of government departments and devolved administrations, and all the products of the Office for National Statistics. The Office for National Statistics is the UK government's main survey taking body. It has a responsibility to develop and maintain at an operational level both the integration and integrity of Government Statistical Service (GSS) outputs. The GSS comprises the statistical divisions of government departments, each of which has a Departmental Head of Profession for Statistics. Statisticians in these departments are members of the GSS, which sets the professional standards for its members and provides training and qualifications. In Northern Ireland, the Northern Ireland Statistics and Research Agency (NISRA) is responsible for the statistical products of the Northern Ireland administration's departments and agencies. In Scotland, the Chief Statistician is responsible for statistics produced by or for the Scottish Executive. The National Assembly for Wales has its own statistical directorate.

UK has a Statistics Commission.

The Statistics Commission was established as part of the creation of National Statistics. It concerns itself with quality, priorities and procedures to provide assurance to Government Ministers that National Statistics are trustworthy and responsive to public need. It gives independent, public advice on National Statistics.

UK does not have a Statistics Act.

The UK instead has explicit and implied powers for certain public bodies to collect and process information to produce statistics, found in enactments that are numerous, diverse and not necessarily drafted with the intention that they be complimentary or coherent. Examples are:

- the Census Act (1920), a power to conduct the census in England and Wales, given to the Registrar General,
- the Population and Statistics Act (1958), requiring certain information to be provided to the Registrar General for statistical purposes at the time of registering a life event,
- the Statistics of Trade Act (1947), requiring traders to provide the appropriate department with certain information relating to their business, only for the purposes of statistics.

The Registrar General, or other department given powers by these statistical enactments, are usually subject to the common law duty of confidentiality or specific sections of the legislation. This prevents, for example, the transfer of identifiable Census data to other government departments for their statistical purposes.

Many National Statistics Institutions arrange access to confidential data for statistical researchers by asking them to sign their Statistics Act. The researcher subjects themselves to the conditions and legally enforceable penalties found in the Act. There is no equivalent to this available to the National Statistician, Registrars General in devolved administrations, or Heads of Department for Statistics, in the UK statistical system.

UK has a legal system founded on Common Law.

UK law is not a collection of decrees or directives, but a developing set of answers to real problems discovered by an independent judiciary in the courts. Legal order in the UK has the particular case, and not 'directives', as its paradigm. Cases build into Torts - civil 'wrongs' which may provide individuals with a cause for action for damages for breach of legal duty. Most important for the production of statistics is the common law tort of 'breach of confidence', which provides the public with a reasonable expectation that the information they provide to a government department is confidential between them and that government department. A government department must not disclose this information unless required to by statute, or there is an overriding public duty to disclose, or consent to the disclosure has been gained.

UK government departments must act within Administrative Law.

Administrative law governs the actions of all public bodies. A public body must have the lawful authority to carry out its intended functions. If not, its action will be *ultra vires* - beyond its administrative powers. Public bodies must therefore have statutory authority for sharing confidential data, and must use these powers only for the purposes for which they were given. This authority may be explicit or in some cases implied. Each government department, indeed each local authority, is a separate and distinct administration, and there is no presumption that information given to one department is available to any other. In the UK, you do not give your data to 'the government', you give it to one particular department, agency or authority. In the absence of either consent or enabling legislation (a 'gateway'), a public body which discloses confidential information to another would be *ultra vires*. As an example, this means that confidential personal benefits data collected by the Department for Work and Pensions can not be disclosed in that form to the Office for National Statistics for the production of statistics, unless there is consent for such a disclosure or a suitable 'gateway'. Consent for this disclosure has not been gained, and a suitable gateway has yet to be found.

UK has a Data Protection Act.

In common with other Member States, the UK has data protection legislation that determines how personal data should be processed. The Act is complex, but in its fundamentals can be expressed as 8 principles:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless conditions [listed in the Act] are met.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
4. Personal data shall be accurate and, where necessary, kept up to date.
5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
6. Personal data shall be processed in accordance with the rights of data subjects under this Act.
7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

When processing data for the purposes of statistics or research, there is exemption from the second part of the second principle, and from section 7 of the Act that gives data subjects the right of access to their data. Provided that they are being kept for a specified purpose, the data may be kept indefinitely.

UK has an independent regulator for information - an information 'watchdog'.

The Office for the Information Commissioner regulates public and private bodies for compliance with the Data Protection Act (1998) and Freedom of Information Act (2000).

The Commissioner is the UK's independent supervisory authority reporting directly to the UK Parliament. The Commissioner has a range of duties including the promotion of good information handling and the encouragement of codes of practice.

The Commissioner's Mission

"We shall develop respect for the private lives of individuals and encourage the openness and accountability of public authorities.

-by promoting good information handling practice and enforcing data protection and freedom of information legislation; and

-by seeking to influence national and international thinking on privacy and information access issues."

UK government policy is to seek improvement in public services through sharing data and enhancing privacy.

The Lord Chancellor's Department (LCD) is the department that has responsibility for data protection, privacy and data-sharing law and policy. It is in the process of preparing guidance on the interpretation of administrative powers and the key principles within the Data Protection Act 1998 with regard to how data sharing can and should operate within the existing legal framework. The Strategic Unit of the Cabinet Office published 'Privacy and Data Sharing - The Way Forward For Public Services' in April 2002. It suggested a large number of recommendations, which LCD is to perform since its adoption as Government policy in June 2002. The LCD is now investigating the need for new primary legislation to achieve this government policy, and must also encourage and conduct a public debate about privacy, the potential benefits of shared information.

UK does not have a population register.

The UK has a register of births, marriages, deaths, and adoptions maintained by the Registrars General, but there is no requirement to maintain changes of address on the registers between these events. The uses of the registers are limited by statute, common law, and the limited administrative powers of the Registrars General. Several government departments have very large databases of personal information, often using common unique identifiers, for example, National Health Service Number, or National Insurance Number, or Driver's License Number. The Office for National Statistics (with its General Register Office hat on) maintains the National Health Service Central Register for England and Wales, which it does this through the implied powers of the Registrar General, for the purposes of the National Health Service. NHS number is not used as a sampling frame by ONS (the Postcode Address File, maintained by the Post Office, is the one most used), but it is used to estimate migration and inform longitudinal studies. The NHSCR contains NHS number, name, sex, date of birth and current Health Authority of the patient, including previous values. No medical information is associated with this register. The mid-year population estimate for England and Wales (1998) was 2,900,000 less than the number of entries on the NHSCR.

There is also a NHSCR for Scotland, maintained by the General Register Office for Scotland.

The UK has a powerful privacy lobby, in the libertarian tradition.

Organisations such as 'Liberty' and 'Privacy International' are an effective lobby, and will campaign against anything the lobby sees as unwarranted state interference in everyday life. The lobby is particularly wary of purpose drift, where an enactment created for one purpose becomes used for others. In recent data sharing conferences organised by LCD, both Liberty and Privacy International questioned whether 'building trust' in public bodies is a legitimate aim at all, suggesting rather that scepticism and scrutiny is a sounder basis for the relationship between citizens and state. Both organisations are profoundly troubled by the prospect of a population register.

Therefore, producers of UK National Statistics need:

- To build public trust in statistical confidentiality, particularly because they depend to a large extent on consensual information gathering,
- To demonstrate that statistics is a cul-de-sac for confidential information and that processing data for National Statistics is not a threat to confidentiality or privacy.
- To make best use of existing information sharing gateways to improve statistical quality and accuracy,
- To investigate how the statistics departments of public bodies can take advantage of any new primary legislation to improve outputs, and to be involved in the drafting of such legislation.
- To co-operate with regulatory bodies to show full compliance with the word and the spirit of the law,
- To promote the National Statistics Code of Practice, and show that they can meet the challenges within it.
- To underpin the Code with protocols that provide standards and guidance for meeting its statements. One of the most important is the Protocol for Data Access and Confidentiality.

The Protocol for Data Access and Confidentiality, that underpins the NS Code of Practice.

The protocol is intended to bring the commitment to confidentiality and the provision of access to confidential data into the same context. An organisation with good data management practices, good standards of disclosure control, good risk management, and an ability to audit the use of all their information, will be able to maintain the confidentiality of the information. These same qualities are those that need to be present for safe, fair and lawful 3rd party access to data.

Throughout the protocol, it was necessary to refer to 'data used for the production of National Statistics' because the term 'National Statistics' defines some specific outputs of our devolved statistical system. There is no such thing as 'data owned by National Statistics', or even 'data used by National Statistics'... The public can provide data *for* National Statistics, but not *to* National Statistics.

The Data Access and Confidentiality Protocol is currently out for public consultation on the National Statistics website. It contains a glossary of terms.

The protocol consists of 10 principles:

- 1. The National Statistician will set standards for protecting confidentiality, including a guarantee that no statistics will be produced that are likely to identify an individual unless specifically agreed with them.**

This, to provide a statement that will build public trust that their confidentiality will not be breached. It also satisfies the 'relevant conditions' of the Data Protection Act for the use of the statistics and research exemptions. 'Individual' here means an individual statistical unit for which there is an obligation of statistical confidentiality.

- 2. Data ownership is non-transferable.**

The public know that information they give to a statistics department will always 'belong' to that department, and the conditions under which they agreed to give their information will be honoured by that department and no other.

3. Respondents will be informed, as far as practicable, of the main intended uses and access limitations applying to the information they provide for National Statistics.

Again, to satisfy the aims of building openness, transparency and trust. Also, for personal data, to satisfy the fairness conditions in the first principle of the Data Protection Act.

4. The same confidentiality standards will apply to data derived from administrative sources as apply to those collected specifically for statistical purposes.

A statement to ensure that all data used to produce National Statistics is treated equally.

5. Data provided for National Statistics will only be used for statistical purposes.

The 'cul-de-sac' principle. Once data has entered the statistical system, under normal circumstances it will not leave as anything other than non-disclosive, non-confidential statistical information. This principle ensures that respondents can trust the producers of National Statistics not to inform the tax authorities, for example, of information that may be of interest to them.

6. Where information identifying individuals must be given up by law, it will be released only under the explicit direction and on the personal responsibility of the National Statistician.

There are some very exceptional circumstances where statute or a court order requires the release of confidential statistical information. This principle reassures the public that this will be done only on the explicit direction of the highest authority in UK statistics.

7. Everyone involved in the production of National Statistics will be made aware of the obligation to protect respondent confidentiality and of the legal penalties likely to apply to wrongful disclosure.

For example, UK civil servants are individually liable to prosecution for breaches of the Data Protection Act.

8. For anyone involved in the production of National Statistics, obligations to confidentiality will continue to apply after the completion of their service.

The privileged information to which statisticians have access must not be used to breach confidentiality, whether or not they continue to be employed in a department that produces National Statistics.

9. Data identifying individuals will be kept physically secure.

An absolute standard for physical security. Also satisfies the 7th principle of the Data Protection Act.

10. Access to identifying data will require authorisation. This will be available only to people who have signed an undertaking to protect confidentiality. The Head of Profession for Statistics must further be satisfied the data will be used exclusively for justifiable research and that the information is not reasonably obtainable elsewhere.

This is perhaps the most comprehensive principle in the protocol. In the guide to putting the principles into practice, the following conditions need to be met for third party access:

Principles of access

- (a) *Access to identified or identifiable statistical sources will only be granted where it will result in a significant statistical benefit to a product or service that could reasonably be seen as a part of National Statistics.*
- i. *Identified micro-data will only be made available to organisations professionally responsible to or contracted to the National Statistician, or a Head of Profession – Chief Statistician in the devolved administrations – for purposes consistent with the aims of National Statistics, subject to this protocol.*
 - ii. *Identifiable, but not identified, data will, subject to the conditions in this protocol, be made available to organisations professionally responsible to the National Statistician, or a Head of Profession – Chief Statistician in the devolved administrations – for purposes consistent with the aims of National Statistics, and to other organisations whose work is consistent with the aims of National Statistics, and*
 - *who have a demonstrable need to access individually identifiable records to fulfil a stated statistical research purpose;*
 - *who comply with access arrangements as agreed by the responsible statistician and specified in this protocol;*
 - *who are able to satisfy the responsible statistician that all conditions pertaining to its use can be effectively maintained and fully audited.*
- (b) *Non-disclosive micro-data will be made available for purposes consistent with the aims of National Statistics and any dissemination of aggregated statistics should include information on the availability of underlying, non-disclosive micro-data. However, the responsible statisticians will be expected to monitor changes of use, new technology and other factors, which may require statistical sources to be reclassified as appropriate.*

In addition to these principles, there are certain arrangements to be in place:

Arrangements for access

- (c) *The responsible statisticians will keep an exact, up-to-date inventory of statistical sources and record the details of any access to micro-data provided to a third party. Records will include the information required by this protocol and will be subject to audit as required by the National Statistician.*
- (d) *Where access to confidential data is granted to anyone employed by or directly contracted to the responsible statistician, it will be restricted to those who need access to produce non-disclosive results and analyses, and who have specific permission from the responsible statistician to do so. The responsible statistician will maintain a register of those who have such permission. Access will be lawful and in compliance with the National Statistics Code of Practice, including requirements for physical security.*
- (e) *Where access to confidential data is granted to anyone not employed by or directly contracted to the responsible statistician, there will be a direct, written data access agreement between the responsible statistician and the access beneficiary for every statistical source accessed and for every different purpose.*

- i. *Where access is provided to those who are not employed by or under direct contract to the responsible statistician, but who are under the professional responsibility of the National Statistician, the signatory will be the Head of Profession.*
 - ii. *When the agreement includes those who are outside the professional responsibility of the National Statistician, the signatory will be an individual authorised to enter the organisation into a legally binding contract.*
- (f) *As part of the access arrangements, the responsible statistician will determine which parts of each statistical source are needed to achieve the stated statistical purpose for which the access is required. Remaining information will be removed, aggregated or coded prior to access.*
- (g) *In some cases, access to a statistical source may be sought by an organisation that already has information relating to the target population of this statistical source. In this case it must be clear whether any matching is part of the agreed access. If the individual records are to be matched, this must be explicit in the agreement, and the appropriate authority for such matching already obtained, otherwise the responsible statistician must be satisfied that matching will not occur, despite any apparent ability in the beneficiary organisation to undertake it.*
- (h) *responsible statisticians retain responsibility for the protection of statistical sources under their control, wherever they may be processed. To fulfil this role, the responsible statistician must be satisfied that the following conditions are met for each micro-data access request, with details recorded as part of the access agreement:*
- i. *The purpose of the access and any outputs resulting from it are lawful, compliant with the National Statistics Code of Practice and compatible with the aims of National Statistics.*
 - ii. *It will be possible for both sides to maintain the agreement.*
 - iii. *There will be no misuse of the statistical source, including unauthorised duplication, and that the agreed access will not erode the responsible statistician's guarantee of confidentiality or any other undertakings to survey respondent or person or organisation to whom the information relates, either during the research or once the research has been completed.*
 - iv. *It is clearly stated when the access is to begin and end.*
 - v. *The access is proportional to the needs and objectives of the research.*
 - vi. *The status of the statistical source in law and according to the National Statistics Code of Practice is clearly understood, by all who will have access to it.*
 - vii. *Access procedures are appropriate to the person or organisation being given access, and to the type of records – for example, where the information is personal and subject to the Data Protection Act (1998), or where it is 'sensitive' as defined in that act.*
 - viii. *Access, and any subsequent processing, will be lawful and fully compliant with the National Statistics Code of Practice.*
 - ix. *Any outputs deriving from the access satisfy the standards of disclosure control for the statistical source, as specified by the responsible statistician.*
- (i) *Those granted access may be charged to cover the cost of making the statistical sources non-disclosive, or for any other functions the responsible statistician needs to undertake to provide access, in accordance with the Protocol on Data presentation, Dissemination and Pricing.*

The future for confidentiality and data access for statistics in the UK.

The Statistics Commission have asked if statistics legislation would provide an even stronger commitment to the public for the confidentiality of their data when used for statistics. Perhaps such legislation would balance this extra commitment to privacy with the more widespread use of administrative data for statistics through new statutory gateways. Where any statistics legislation might fit within devolution, common law, administrative law, and data protection statutes is currently being researched. The Code of Practice and the Protocols were drafted with the thought that they could be a basis for any new statistical legislation. Proposals for a population register, whether consensual or non-consensual, might depend on new primary legislation, for many reasons common to the discussion above. Such legislation might allow the use of the register for statistical purposes such as constructing samples, weighting, etc.

Our immediate aim is to use the Code and protocols to demonstrate our worthiness of public trust as producers of National Statistics in a non-statutory environment.