

Editorial

Bridget Treacy gives her 2009 privacy predictions based on last year's events, for Volume 9, Issue 3 of Privacy & Data Protection

2008 was a year of change, contradiction and consolidation in privacy. We face the new year with privacy issues in a state of flux, making it difficult to prioritise. What issues from 2008 should influence our privacy "to do" lists for the new year?

Any predictions for the year ahead must take into account the likely impact of our global financial woes and ailing economy. Anecdotal evidence suggests that companies intend to continue to spend on privacy. Frequently, companies have little choice; the economic uncertainty has already produced a surge in litigation and regulatory investigations, many of them with implications across multiple jurisdictions. Many companies will be forced to confront the impossibility of choosing between compliance with EU data protection laws and US e-discovery requirements. Closer to home, many more organisations will initiate investigations as irregularities come to light. These organisations will need to think hard about the extent to which, if at all, they are permitted to access employee email as part of their investigation. We are likely to see challenges to the traditional assumption of many organisations that they may access staff email records at will.

A further, and perhaps more direct, result of our economic crisis is the increase in company administrations. In the event of a liquidation, the client database is often one of the more valuable assets yet, if it has not been constructed in anticipation of data protection considerations, the full value of this database may not be realised. Where the information assets of two organisations are being combined, data protection issues will be key as the businesses seek to reconcile differing data protection practices. Different data collection practices may even dictate how the business communicates its new business plans to its existing client base.

International data transfers will remain at the top of many privacy agenda for 2009, largely because there are no easy answers to ensuring compliant international transfers. For organisations which have taken the plunge and pursued Binding Corporate Rules ("BCRs"), 2008 produced a glimmer of hope that the approval process might move more quickly. However, early indications are that companies are becoming increasingly frustrated by attempts to obtain approval for their BCRs, and that the mutual recognition pact may be encouraging regulators to be even more conservative than before. Therefore, 2009 is considered by many to be the crunch year for BCRs.

Technological developments will also impact how personal data are transferred

internationally. The wider adoption of the cloud computing model, in which data is held in a cloud which transcends geographical boundaries, does not fit easily within our existing EU framework for data international transfers (see the article on pages 12 —13 of this edition).

The pace of technological development will continue unabated in 2009, and is likely to raise further privacy challenges. This year, attention focused on social networking sites, including *Facebook*, *MySpace* and *Twitter*; in 2009 we may well see further attention on behavioural targeting and data mining practices. Privacy impact assessments will become more widely used, but we may also be faced with the need to ask some fundamental questions about our current privacy framework.

The exoneration of SWIFT by the Belgian DPA ought not to stifle the debate about such fundamental concepts as the distinction between a processor and a controller, particularly in the context of outsourced services. Clear guidance is required, particularly as organisations will continue to create increasingly collaborative styles of working.

The concept of accountability is likely to feature as part of a move towards finding common ground across differing privacy frameworks. In the UK, the focus will be on ensuring senior executives are accountable to stakeholders for good information practices. At a more strategic level, accountability is a key part of the BCR debate.

In the UK, we will also see continued focus on data breach in the next twelve months. The anticipated implementation of the Commissioner's power to fine for serious breaches of the DPA, together with public outcry in the event of breaches, will ensure that data breach continues to be taken seriously. It remains to be seen whether the new US President will make privacy a priority, but the early indications are that there will be more interest in privacy from the White House than we have seen in recent years (see the article on pages 6 — 7 of this edition).

2009 will see a change at the top of the Information Commissioner's Office in the UK as Richard Thomas retires. Richard has achieved remarkable success in moving the privacy agenda to the mainstream. We do not know what the agenda of his successor will be, but given the number of privacy issues currently in play, we will all need to maintain a watchful eye on privacy developments this year.

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