



JOIC Revenue Model Consultation Paper No.1/2019

Proposed Revenue Model Under:

- Data Protection Authority (Jersey) Law 2018

A consultation on proposals to introduce a new registration model for the Jersey Office of the Information Commissioner, and new registration fees to support the work of the Jersey Data Protection Authority.



Please note that a number of terms and acronyms are defined in the Glossary of Terms included at the beginning of this paper.

The Jersey Office of the Information Commissioner (JOIC) invites comments on this consultation paper. Deputy Information Commissioner **Paul Vane** at the JOIC is co-ordinating responses raised by local businesses. Comments should reach the JOIC by no later than Tuesday 11th June 2019.

Responses should be sent to:

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If you require any assistance, clarification or wish to discuss any aspect of the proposal prior to formulating a response, please contact the JOIC directly.

It is the policy of the JOIC to make the content of all responses available for public inspection unless specifically requested otherwise.



GLOSSARY OF TERMS

AML	Anti-Money Laundering Legislation
DPAJL	Data Protection Authority (Jersey) Law 2018
DPJL	Data Protection (Jersey) Law 2018
GDPR	General Data Protection Regulation
JDPA	Jersey Data Protection Authority
JOIC	Jersey Office of the Information Commissioner
JFSC	Jersey Financial Services Commission
Minister	The Chief Minister
MLJO	Money Laundering (Jersey) Order 2008
Controller	Means the natural or legal person, public authority, agency or other body that, whether alone or jointly with others, determines the purposes and means of the processing of personal data, and where those purposes and means are determined by the relevant law, the controller or the specific criteria for its nomination may be provided for by such law.
Processor	Means a natural or legal person, public authority, agency or other body that processes personal data on behalf of the controller, but does not include an employee of the controller.
Processing	Means any operation or set of operations that is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.
Special Category Data	Means – (a) data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership; (b) genetic or biometric data that is processed for the purpose of uniquely identifying a natural person; (c) data concerning health; (d) data concerning a natural person's sex life or sexual orientation; or (e) data relating to a natural person's criminal record or alleged criminal activity.
UK ICO	United Kingdom Information Commissioner's Office
SCD	Special Category Data



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1 INTRODUCTION FROM THE INFORMATION COMMISSIONER



Jay Fedorak PhD

Information Commissioner
Commîns d'Informâtion

It is an essential element of the GDPR that the supervisory authority act with complete independence, remain free from external influence of any kind and take instruction from nobody. This is because the main purpose of the GDPR is to restore public trust in how public authorities and businesses manage personal data.

The public needs to have confidence that we will enforce the law adequately, fairly and without bias. For the regulator to be credible to the public, it must be seen to be free of any incentive to take sides in any case. The regulator requires a reputation for integrity, which it earns by ensuring that the public believes that it bases all of its decisions solely on its professional knowledge and expertise in the requirements of the law.

As part of transition to greater independence, the Jersey Office of the Information Commissioner is moving to a new funding model that is less reliant on government. This paper outlines the details of the proposal that we will be making to government after this consultation. This model will require the Government of Jersey to amend the Regulation to the Data Protection (Jersey) Law 2018. An amended regulation will come before the States Assembly later in the year for their approval.

The fundamental principles of the new funding model are:

1. To deliver just enough funding to enable us to fulfil our statutory responsibilities.
2. To strike an appropriate balance between the financial obligations of government and industry.
3. To distribute the cost burden fairly and proportionally based on data processing risk and ability to pay.
4. To keep it as simple as possible to understand and as easy as possible for Controller and Processors to register with the Regulator.

The simplest approach would have been just to raise the current flat fee to make up the necessary revenue, but charging everyone from the sole proprietor to the largest bank £400 did not seem fair. We examined the revenue models of similar organisations in Jersey and data protection regulators in other jurisdictions, including the UK and Guernsey. We initially consulted at length with government and a focus group of industry representatives.

We are proposing a model that we think is fair, reasonable and reliable. We are interested in your feedback. We want to know how we can make this proposal work better for you.



2 OVERVIEW AND BACKGROUND

Jersey has always prided itself on its high standards and reputation as a well-regulated jurisdiction.

Moreover, Jersey industry, particularly financial services, relies heavily on transfers of personal data with the UK, Europe and beyond. To preserve the free flow of personal data from the UK and Europe, Jersey has striven to meet the European standards for the protection of personal data. This is because European data protection regulations prevent transfers to jurisdiction lacking adequate data protection without administratively onerous contractual safeguards covering each transfer.

In 2005, Jersey improved its data protection regulation to meet the standard of the European Data Protection Directive of 1995. In 2018, it upgraded its data protection regime to meet the new standard of the European General Data Protection Regulation (GDPR) through the Data Protection (Jersey) Law 2018 (DPJL) and the Data Protection Authority (Jersey) Law 2018 (DPAJL).

The most fundamental change as the result of the introduction of GDPR is the requirement for the supervisory authority to provide independent effective oversight. This involves having the necessary statutory powers of enforcement, including the ability to issue punitive fines, and adequate resources to fulfil these functions in a timely manner. It also requires that the supervisory authority act independently, being free from external influence.

The new laws formalised principles of transparency and accountability for Controllers and Processors, introduced mandatory breach reporting, granted additional rights for data subjects and imposed additional administrative tasks for Controllers and Processors. The additional workload requires an increase in resources for the JOIC to remain a fit-for-purpose independent regulatory authority to that meets the expectations of the public, the States Assembly, industry and the European Commission.

In support of the new legislation, the Government of Jersey and States Assembly agreed to provide the Jersey Office of the Information Commissioner (JOIC) with additional resources necessary to fulfil its extended mandate and to render JOIC more independent operationally and financially. The Government of Jersey has concurred with the results of a report into the projected workload of the JOIC that estimates the required total budget of the JOIC to be approximately £1.5 million per year.

The DPAJL established a new Authority known as the Jersey Data Protection Authority (JDPA) to oversee the work of JOIC and to provide public accountability independent of government.

This consultation paper relates to the part of the plan involving financial independence. The objective is to develop a revenue arrangement similar to those that fund equivalent regulatory bodies such as the Jersey Financial Services Commission and the Channel Islands Financial Ombudsman.

Currently, JOIC receives about 15 percent of its revenue through a process of registration fees. The former Data Protection (Jersey) Law 2005 and Data Protection (Jersey) Law 1987 included a registration provision where Controllers were required to notify the Information Commissioner of their processing activities and be subject to registration fees. The Government of Jersey provides the remaining funding.

The same registration model and fee has been in place since 2005, the fee being set in secondary legislation at £50 for all Controllers (subject to limited exemptions), irrespective of size, value and nature of personal data processing. This provision has remained in place temporarily, pending the development of an appropriate fair and practical new model.



What is proposed?

This paper proposes a revenue model where two-thirds of the required revenue will come from the registration fees paid by Controllers and Processors, with the Government to provide the remaining third. The annual Government contribution will cover the following:

- The registration of all Government of Jersey departments
- The registration of all States Members and Parish Authorities
- JOIC regulation of the Freedom of Information (Jersey) Law 2011.

It is necessary to change the registration system for two reasons. With the need to increase the fee revenue, it would not be fair simply to increase standard fee for everyone at the same level. The second reason is that Recital 89 of GDPR requires the abolition of indiscriminate general registration requirements. It is necessary to replace the current registration regime with one that reflects risk to the rights and freedoms of individuals based on the nature of the business and type of processing activity. The current registration process makes no distinction between a sole trader business that processes non-sensitive, very basic personal data, such as a small shop with CCTV in operation, and a large multi-national corporation that processes large amounts of special category personal data, such as a large banking organisation.

The JDPa therefore proposes a new fee structure that recognises the requirements of GDPR (Recital 89). This structure includes a new registration process that will reduce the administrative burden of registration, by making it simpler, easier to understand and less time consuming.

Who will be affected?

This consultation paper seeks the views of registered Controllers and Processors on the proposed changes. Given the need to increase fee revenue, it is unavoidable that most Controllers will pay more than the current £50. However, some Controllers who currently pay the fee may be exempt from paying a fee under the new system. The precise rates for each Controller will reflect risk, fairness and ability to pay. We have tried to ensure that nobody will suffer financial hardship or pay a disproportionate share.



3 THE PROPOSED REVENUE MODEL

How are the proposed fees calculated?

The proposal seeks to implement a fee range from a minimum of £70 per annum to a maximum of £2,500 per annum. This compares to the current UK fee range of £40 to £2,900. Fees will be calculated based on a number of factors in order to draw distinctions between business types, assess the risk of processing and ability to pay.

To assess the appropriate fee the Controller or Processor will be taken through a series of questions when registering with the JOIC, which will seek to establish the following:

- The size of the organisation
- The local annual financial turnover of the organisation
- Whether the organisation is subject to the Money Laundering (Jersey) Order 2008
- Whether the organisation processes Special Category Data.

(i) Base fee – The size of the organisation:

The first part of the process examines the size of the organisation. This reflects similar criteria to that of the UK ICO and recognises risk on the assumption that the larger the organisation, the greater the risk is in terms of the processing of larger quantities of personal data.

Controllers and Processors will need to select one of 5 options below that best fits their organisation. Once selected, they will be automatically taken to the next step of the registration process. Charitable or not-for-profit organisations selecting option 1 below will be fee exempt and will not be further assessed, however they will still be required to register.

- 1** My organisation is a registered charity or a non-profit organisation
- 2** My organisation is a Parish Authority/States Member
- 3** My organisation is a small business of less than 10 people
- 4** My organisation has more than 10 people, but less than 50
- 5** My organisation has more than 50 staff

(ii) Turnover fee - The local annual financial turnover of the organisation:

The second part of the process examines the local annual financial turnover of the organisation in the previous financial year. Again, this reflects similar criteria to that of the UK ICO and recognises risk on the assumption that higher the turnover of the organisation, the greater the risk is in terms of the processing of larger quantities of personal data. It also provides an indication of the organisation's ability to pay, based on their higher affluence, thus distinguishing between smaller and larger organisations.



Controllers and Processors will need to select one of 4 options that best fits their organisation. Once selected, they will be automatically taken to the next step of the registration process.

- 1** My organisation had a turnover of less than £500K in the last financial year
- 2** My organisation had a turnover of more than £500K, but less than £5m in the last financial year
- 3** My organisation had a turnover of more than £5m, but less than £20m in the last financial year
- 4** My organisation had a turnover of more than £20m in the last financial year

(iii) Supervisory bodies fee - Whether the organisation is subject to the Money Laundering (Jersey) Order 2008 (MLJO)

There are a large number of organisations that are required to comply with local anti-money laundering legislation. The types of business covered by this legislation vary considerably and include (but are not limited to) all types of financial services business, money lending businesses, estate agents and debt collection agencies. Therefore in some instances, a tiered basis of fee calculation has been applied to recognise the unfairness of charging the same fee for all organisations that fall within the scope of the MLJO. For example, deposit-taking organisations may range in size from less than 10 FTEs to a few hundred.

After indicating a simple ‘yes’ or ‘no’ to the below question, applicants will need to select one the 8 options below that best fits their organisation. These categories resemble the same licence categories afforded by the JFSC and will therefore be familiar to those businesses. Once selected, they will be automatically taken to the final step of the registration process.

Is your organisation subject to Money Laundering (Jersey) Order 2008? No or Yes

Pick the option that best fits your organisation:

- | | |
|--------------------------------------|---|
| 1 Individual/Sole trader | 5 Registered Trust Company Business participating member |
| 2 Deposit -taker | 6 Registered Financial Service Business managed entity |
| 3 Only supervised for AML/CFT | 7 Category A Insurance Permit Holder |
| 4 Other regulated business | 8 Other persons caught by MLO but not required to register |



Public register of Controllers and Processors

The Law requires that the JDPa maintains a register of data Controllers and Processors. It does not require that this register is published, however the JOIC are of the view that the publication of an online register serves a number of purposes:

- Publication of a public register of Controllers and Processors on the JOIC website demonstrates that the JDPa has a strong regulatory framework and has oversight of all registered Controllers and Processors.
- Publication provides evidence to all Controllers and Processors that they have successfully registered their organisation and enhances their reputation as an organisation that takes data protection compliance seriously.
- Publication provides a comfort to data subjects that organisations appearing on the register are taking data protection seriously.
- Publication provides data subjects with an easy point of reference and point of contact for any data protection-related issues they have with the relevant organisation.
- Publication of a register of Controllers and Processors sits within the core principles of accountability and transparency, which are also key features of the GDPR, the core values of the JOIC and the key objectives of the Government of Jersey.



4 DATA VALIDATION AND TESTING

Data sources

No definitive list of all organisations who would be required to register and pay a fee under the DPJL currently exists. Whilst the JOIC holds a register of Controllers carried forward from the 2005 Law, this is by no means complete and has limited use in terms of the proposed model.

As such, and in order to provide additional accountability and transparency in the findings, we contracted an independent third party to examine the formulaic accuracy of the proposed model, identify any data quality issues with the initial underlying assumptions and propose alternate sources of information, and examine the structure and functionality of the model itself.

As part of this independent review, data was received from a number of relevant sources:

- The JOIC public register and expenditure forecast for 2020
- The JFSC
- The Government of Jersey Statistics Unit
- The Association of Jersey Charities (website)

The fee generation model was independently reviewed to align with an approach, key initial assumptions and relevant sources of data, mutually agreed by the JDPA and the Government of Jersey.

Further consultation with the JFSC was necessary to ensure any definitions and assumptions drawn in terms of financial services businesses were reasonable.

This proposal incorporates the comments and findings of the independent review. Notably, both the actual inputs and outputs of the model may change as a consequence of this Consultation period and actual registrations and fees charged may be materially different.

Testing

A number of testing examples are illustrated below.

Examples:

The 8 examples below are illustrative only to give an estimated indication of what different business sectors can expect to pay, based on their size, annual financial turnover and type of personal data they are processing. These examples are therefore not definitive and the fee will vary from business to business, even within the same sector.

Example 1: Small business/Retail sector

Based on a small retailer with less than 10 staff, an annual financial turnover of less than £500,000 and no additional fee for AML or SCD.

Organisation type	Estimated annual value
Small retail business (e.g. florist)	£70

Example 2: Mid-sized business/Leisure & Fitness sector

Based on a business of between 10 and 50 staff, an annual financial turnover of between £500,000 and £5million, who processes SCD.

Organisation type	Estimated annual value
Mid-size business (e.g. health & fitness centre)	£700



Example 3: Sole Trader/Education & Childcare sector

Based on a sole trader with an annual financial turnover of less than £500,000 who holds SCD.

Organisation type	Estimated annual value
Sole trader (e.g. GP)	£150

Example 4: Medium-sized business/Technology & Communications sector

Based on a medium-sized IT company with between 10 and 50 staff, an annual financial turnover of between £500,000 and £5million, with no additional fee for AML or SCD.

Organisation type	Estimated annual value
Mid-size business (e.g. IT company)	£550

Example 5: Mid-sized business/Retail sector

Based on a medium-sized high street chain retailer with between 10 and 50 staff, an annual financial turnover of between £5million and £20million, but no additional fees for AML or SCD.

Organisation type	Estimated annual value
Mid-size business (e.g. high street chain)	£750

Example 6: Large business/Financial and Professional services sector

Based on a large bank with over 50 staff, an annual financial turnover of over £20million, and an additional supervisory bodies AML fee.

Organisation type	Estimated annual value
Large business (e.g. bank)	£2,500

Example 7: Small business/Legal services sector

Based on a small law firm of less than 10 people, with an annual financial turnover of between £5million and £20million, and an additional fee for SCD.

Organisation type	Estimated annual value
Small business (e.g. law firm)	£650

Example 8: Medium-sized business/Financial and Professional services sector

Based on a trust company subsidiary, with between 10 and 50 staff, an annual financial turnover of between £500,000 and £5million, who is subject to AML.

Organisation type	Estimated annual value
Mid-size business (e.g. trust company subsidiary)	£1,350



5 CONSULTATION

Basis for consultation

The JDPA is issuing this Consultation Paper because, as key stakeholders, we value your opinion. We believe that you deserve an opportunity to be heard on a matter reflecting you and that some of you will have important information that could lead to us improving the model with respect to efficiency, effectiveness, or fairness.

Responding to the consultation

The JDPA invites comments in writing from Controllers and Processors on the content of this Consultation Paper and in particular the following:

- Whether you consider the proposed fee model to be fair
- Any potential adverse impact of the application of the fees on the economic interests of the Island
- Comments on the ease of use of the registration process.

Where comments are made by an industry body or association, that body or association should also provide a summary of the type of individuals and/or institutions it represents.

Comments should be received by the JOIC no later than Tuesday 11th June 2019.

Next steps

Following this consultation, the JOIC will publish feedback and the final draft of the proposal. We will present the proposal to the Government of Jersey for its consideration. If the Government agrees with the proposal, it will be necessary for the States Assembly to approve the changes to the current Data Protection (Registration and Charges) (Jersey) Regulations 2018 in order to implement the revenue model.



6 APPENDIX - LEGAL REQUIREMENTS

Legal Requirements

Legal requirements for registration of Controllers and Processors

The DPAJL sets out the registration provisions in Article 17 and states:

17 Registration of Controllers and Processors

- (1) A controller or processor established in Jersey must not cause or permit personal data to be processed without being registered as a controller or processor under this Article.
- (2) However, Regulations may make such exemptions from the requirements to register under this Article as the States think fit.
- (3) An application for registration made to the Authority must:
 - (a) include the fee as specified by the Authority
 - (b) be in a form and manner required by the Authority
 - (c) include any information required by the Authority.
- (4) Upon receipt of an application made in accordance with paragraph (3), the Authority must register the applicant as a controller or processor as the case may be.
- (5) The Authority must:
 - (a) maintain a register of Controllers for the purposes of this Law
 - (b) publish any such information as the Minister may by Order prescribe.
- (6) A person who contravenes paragraph (1) is guilty of an offence.

Further, Article 18 of the DPAJL sets out the requirement for registered Controllers and Processors to pay a fee, and states:

18 Registered Controllers and Processors to pay prescribed charges

- (1) Regulations may require registered Controllers, registered Processors or both, to pay a charge to the Authority in order to pay for the remuneration, salaries, fees, allowances and other emoluments, costs and expenses of:
 - (a) the establishment of the Authority
 - (b) the Authority's operations, including the exercise or performance of any functions of the Authority.
- (2) The Regulations must provide for:
 - (a) the amount of the charge, or the basis on which the amount of the charge is to be calculated or ascertained
 - (b) the periods in respect of which, and the times at which, the charge must be paid, or a means for ascertaining those periods and times
 - (c) the manner and form in which the charge must be paid.
- (3) The Regulations may:
 - (a) impose duties on the Authority, registered Controllers, or registered Processors in connection with the collection or payment of the charge
 - (b) confer powers on the Authority in connection with the collection of the charge
 - (c) exempt any person from paying the charge.



- (4) A person required by the Regulations to pay a charge must do so in accordance with the Regulations.
- (5) The Authority may recover any charge due and payable by any person to the Authority under the Regulations as a debt owed by the person to the Authority.

The current fees are set by Article 6 of the Data Protection (Registration and Charges)(Jersey) Regulations 2018, which states:

6 Requirement to pay annual charge

- (1) Subject to paragraph (2), registered Controllers and registered Processors must pay an annual charge of £50 on each anniversary of:
 - (a) the date of first registration under Article 17 of the Law, or
 - (b) in the case of Controllers to whom Regulation 5 applies, the end of the registration period.
- (2) A registered Controller is exempt from paying the charge in paragraph (1) if the only processing carried out by that controller is processing that:
 - (a) falls within any of the classes of processing set out in the Schedule, or
 - (b) would fall within one of those classes of processing but for paragraph 1(d), 2(d) or 3(e) of the Schedule and where the disclosure:
 - (i) is required by law or by order of a court, or
 - (ii) is permitted by Article 64 of the Data Protection Law.

Current exemptions from the registration fees are detailed in the Schedule to the above Regulations:

SCHEDULE
(Regulation 6(2))
CLASSES OF PROCESSING ATTRACTING EXEMPTION FROM CHARGES

1 Staff administration

Processing that:

- (a) is for any one or more of the purposes, in relation to the staff of the registered controller, of appointment, removal, pay, discipline, superannuation, work management and any other human resources matter
- (b) is of personal data in respect of which the data subject is:
 - (i) a past, existing or prospective member of staff of the registered controller, or
 - (ii) any person the processing of whose personal data is necessary for any of the purposes referred to in sub-paragraph (a)
- (c) is of personal data consisting of any one or more of the following in respect of the data subject:
 - (i) name
 - (ii) address
 - (iii) other identifiers
 - (iv) information as to qualifications
 - (v) information as to work experience
 - (vi) information as to pay
 - (vii) information as to any other matter the processing of which is necessary for any of the purposes referred to in sub-paragraph (a)
- (d) does not involve disclosure of the personal data to a third party otherwise than:
 - (i) with the consent of the data subject, or
 - (ii) in a case where it is necessary to make such disclosure for any of those purposes



- (e) does not involve keeping the personal data after the relationship between the registered controller and the data subject ends, except for so long as it is necessary to do so for any of those purposes.

2 Accounts and records

Processing that:

- (a) is for any one or more of the following purposes so far as they relate to the conduct of any business or activity carried on by the registered controller:
 - (i) keeping accounts
 - (ii) deciding whether to accept any person as a customer or supplier
 - (iii) keeping records of purchases, sales or other transactions in order to ensure that the requisite payments or deliveries are made or services provided by or to the registered controller in respect of those purchases, sales or other transactions
 - (iv) making financial or management forecasts
- (b) is of personal data in respect of which the data subject is:
 - (i) a past, existing or prospective customer, or supplier, of the registered controller, or
 - (ii) a person the processing of whose personal data is necessary for any of the purposes referred to in sub-paragraph (a)
- (c) is of personal data (other than personal data processed by or obtained from a credit reference agency) consisting of any one or more of the following in respect of the data subject:
 - (i) name
 - (ii) address
 - (iii) other identifiers
 - (iv) information as to financial standing
 - (v) information as to any other matter the processing of which is necessary for any of the purposes referred to in sub-paragraph (a)
- (d) does not involve disclosure of the personal data to a third party otherwise than:
 - (i) with the consent of the data subject, or
 - (ii) in a case where it is necessary to make the disclosure for any of those purposes
- (e) does not involve keeping the personal data after the relationship between the registered controller and the data subject ends, except for so long as it is necessary to do so for any of those purposes.

3 Non-profit associations

Processing that:

- (a) is carried out by a registered controller that is a non-profit association (as described in paragraph 10(a) of Schedule 2 to the Data Protection Law)
- (b) is for any one or more of the purposes of establishing or maintaining membership of or support for the non-profit association or providing or administering activities for individuals who are either members of the association or have regular contact with it
- (c) is of personal data in respect of which the data subject is:
 - (i) a past, existing or prospective member of the association
 - (ii) a person who has regular contact with the association in connection with any of the purposes referred to in sub-paragraph (b), or
 - (iii) a person the processing of whose personal data is necessary for any of those purposes



- (d) is of personal data consisting of any one or more of the following in respect of the data subject:
 - (i) name
 - (ii) address
 - (iii) other identifiers
 - (iv) information as to eligibility for membership of the association
 - (v) information as to any other matter the processing of which is necessary for any of the purposes referred to in sub-paragraph (b)
- (e) does not involve disclosure of the personal data to a third party other than:
 - (i) with the consent of the data subject, or
 - (ii) in a case where it is necessary to make the disclosure for any of those purposes
- (f) does not involve keeping the personal data after the relationship between the registered controller and data subject ends, except for so long as it is necessary to do so for any of those purposes.

Recital 89 of the GDPR

“Directive 95/46/EC provided for a general obligation to notify the processing of personal data to the supervisory authorities. While that obligation produces administrative and financial burdens, it did not in all cases contribute to improving the protection of personal data. **Such indiscriminate general notification obligations should therefore be abolished, and replaced by effective procedures and mechanisms which focus instead on those types of processing operations which are likely to result in a high risk to the rights and freedoms of natural persons by virtue of their nature, scope, context and purposes.** [emphasis added]. Such types of processing operations may be those which in, particular, involve using new technologies, or are of a new kind and where no data protection impact assessment has been carried out before by the controller, or where they become necessary in the light of the time that has elapsed since the initial processing.”

