NO2ID Response to "Better Use of Data" Consultation Paper

NO2ID, Box 412, 19/21 Crawford Street, LONDON W1H !PJ

Prepared by Guy Herbert, General Secretary – April 2016

General Remarks

We have been here before. Though it is not mentioned in this paper, the open policy exercise was continually keen to emphasise to civil society groups that Whitehall had learned from the debacle of the withdrawn cl.152 of the Coroners and Justice Bill in 2009. These proposals show it has **not** really grasped the fundamental objections to broad data-sharing. The ideology of paternalistic oversight, management by numbers, is intact and recognisably the same as that being promulgated by Tony Blair's e-Envoy in the 90s and proceding through the DCA "Information Sharing: vision statement" and the Walport-Thomas Review in the mid-00s.

The focus throughout is on purported, internalised, benefits. There is nowhere any acknowledgement that there may be costs and negative externalities, let alone to make any cost benefit analysis. Requests for the latter have been met with hand-waving.

That the crowning argument for these extraordinary powers is the need to make the collection of data under the Statistics of Trade Act 1947 less burdensome says something about how the government approach is not modernising, but stranded in the early 20th century. The huge power of data science is being conscripted to pursue policies already in existence, willy-nilly, rather than taken into account to make new policies fit for a free society in a technological age.

The powers themselves (while making ritual obeisance to Data Protection) show as much respect for privacy and citizens as free individuals as did the totalitarian central planners of the same era. They are profoundly dangerous. We suspect that they are potentially **far** worse for civil liberties and privacy in practice than the cl.152 Information Sharing Orders, because very general in application and moreover designed to be invoked by officials in pursuit of their own day-to-day functions, rather than through specific ministerial approval and order-making procedure.

Data-sharing as conceived here is a means for officials to escape the constraints of rule of law, not a limited or well-defined means to limited or well-defined ends. Our principled objections to the Coroners and Justice Bill, part 8. apply with at least equal force to these proposals, and I append to this response a copy of our 7-year-old parliamentary briefing on those proposals for comparison. The fiddling with procedures, grand apparatus of Codes of Practice and Privacy Impact Assessments, and the fostering of interest groups in pilot projects should not be allowed to obscure that.

> *"Localism, user input and collaboration are driving innovation and change in the online world. But the government's all-seeing, all-knowing concept of centralised state control demonstrates that government has not understood or reacted to these major changes...*
>
> *"At the same time, in the rest of our lives, technology is going in the other direction, enabling us to choose what data to store and share online. It is also best practice to minimise the amount of data acquired by service providers in the first place.*
>
> *"These are the principles on which government IT should be built. The potential benefits are huge. Giving control of personal data back to citizens will improve the quality and efficiency of public services, will be less expensive and will be far less intrusive."*

- Liam Maxwell [now HM Government CTO] in *It's Ours (*Centre for Policy Studies, 2009)

The Cabinet Office should decide which set of principles it is pursuing. The consultation could easily end in a more arbitrary and secretive version of cl.152 combined with a new, unacknowledged, but more powerful, National Identity Register.

Specific Remarks on the Consultation Paper

(numbers are paragraph numbers – which are in broken sequence)

The minister's introduction suggests that “increasing citizen's confidence in the government's use of their data...” is a necessary outcome of the policy. The process and consultation make us much less confident that the government's use of our data will recognise that it is ours at all. Rather it seems calculated to spread alarm among anyone concerned about personal information that government wishes to treat it as government's information, whenever expedient for government to do so.

5 states “These proposals are not about... collecting new data from citizens or weakening the Data Protection Act 1998” These claims are false, or so misleading as to be true lies. The Data Protection Act is side-stepped by a statutory exception, such as any of the proposals. Newly matched or re-purposed data **is** thereby made into a new collection of information on citizens – and that is the sole point of sharing it.

8 makes sweeping assertions for which no evidence is adduced.

9 encapsulates the grand planning assumptions underlying the project: “To understand the bigger picture and address the complex challenges that face the nation, public authorities need to work together.” Possibility, desirability and means are all assumed.

14 shows the unexamined assumptions at work: Why should we believe the 'legal barriers' of confidentiality and *ultra vires* are less important than the imperative to maintain a statistical series and make life easier for the ONS? Should ONS not first make the case that the statistic is worth more to the public than the costs of deriving it?

15 provides an alternative justification for data-collection and -sharing: Some people would like to have it. It is not normally considered adequate grounds for me to trample on your interests that I and my friends want to.

13 (bis) We do not think that the policy reflects these principles. Sharing in the fashion propsed is implicitly creating new databases, new relations between mass data. The whole point of the policy is to make sharing easier, less exceptional, and therefore less discriminate. Any new enactment will walk through or around the DPA. And maintaining a sanction over further disclosure misses the critical poin: what there is to worry about in the policy is the unfettered use of formerly confidential data that it legitimises within government.

16 (bis) – 26 is largely vacuous, without clarity as to proposed controls or the definitions of the entities discussed.

33. The distinctions made here are mistaken. Computer scientists and data protection lawyers will have more to say on this subject than NO2ID, but it is worth remarking that “de-identified data” is probably a spurious category, and that “anonymisation” is difficult and entirely context dependent. What is anonymous on its own, readily ceases to be so if shared.

51. As noted at 15 above, that stakeholders like a policy catering to them is neither surprising, nor an argument for imposing on others.

56-66 These are proposals to which NO2ID is bound fundamentally to be opposed, amounting as they do to the creation of a National Identity Register by merger.

“People will find it weird that the prime minister doesn’t want to stop and think about the dangers of a national identity register”

- David Cameron (House of Commons, 2007)

68 That gateways are specific and limited is a consequence of rule of law. Without endorsing any of the existing powers, we think that limiting official power to what is laid down by law has a high value.

77. A This concept of 'validation' is at odds with the widely understood concepts of identity verification being properly employed under sound technical and privacy principles by the Cabinet Office's own Verify scheme. B contradicts A – the validation is **not** binary if one answer automatically leads to further data transfers/leakage, and either could.

78 A (note) Throughout the discussion there is a hidden assumption that fraud is more likely than error, and that anomalies should lead to sanction. This is not anywhere justified.

78 B (note) Side-query: If the aim is **prevention** of fraud, why would one avoid stopping attempts by tipping-off potential fraudsters they were under investigation?

79. Unclear what the “principle of transparency” being promoted here is, and how the respective measures contribute.

84. Box. Not explained why the existence of a cumbersome paper procedure doesn't just require a better designed procedure, rather than pre-emptive mass matching and casting aside rules of confidentiality. Where people have a motive to share data to make a claim, you can just ask for their consent for that purpose.

94-95 The 'public benefits' ascribed here are vague and unquantified. And the outlined situations hint at the public choice problem in which the costs are borne by different sets of people from those who obtain the benefits. If a purported economic or social benefit to be gained from research could be lost by delay, it is hard to see how it could be the subject of policy.

101. Who agreed? Those participating (particularly civil society organisations participating) in the open policy-making process were assured that their participation would not be taken as endorsement of its premises or product.

113. A case of “we wouldn't start from here”. Policy should not assume that because a function exists it is entirely justified and should only be built upon, not weakened. NO2ID would like to see the powers more limited if they have to exist at all. The fact they have limitations doesn't bother us.

113 a. This comes under both “rule of law” and “sovereignty of parliament”. We submit that the ONS should accept them.

114. “The modern production of statistics” from data scarcely requires information sharing at all, and we suggest where statistics are actually necessary (which is disputed by many), it is the collection and sharing of data unnecessarily that are dispensed with, on cost and efficiency, as well as privacy, grounds.

Consultation Questions

Improving public service delivery

1. **Are there any objectives that you believe should be included in this power that would *not meet* these criteria?**

The question begs the question. We do not endorse he criteria, purposes or the power, so we can hardly offer reasons for them to be widened.

2. Are there any public authorities that you consider would not fit under this definition?

No. This is a broader definition than many would agree to, and seeking to make it catch-all is very telling concerning the notion that the proposals are modest.

3.Should non-public authorities (such as private companies and charities) that fulfil a public service function to a public authority be included in the scope of the delivering public services power?

No.

4.**Are these the correct principles that should be set out in the Code of Practice for this power?**

No. These are not any constraint in practice, merely ritual procedural exercises that will inevitably be internalised into check-lists for efficient disposal.

Providing assistance to citizens living in fuel poverty

5 Should the Government share information with non-public sector organisations as proposed for the sole purpose of providing assistance to citizens living in fuel poverty?

No. Not at all. Policy could and should be designed around citizen privacy; not to abridge privacy whenever existing policy conflicts with it.

6 Would the provision of energy bill rebates, alongside information about energy efficiency support, be appropriate forms of assistance to citizens living in fuel poverty?

Not a question we can have a view on.

7 Are there other forms of fuel poverty assistance for citizens that should be considered for inclusion in the proposed power?

No. There may be forms of fuel subsidy that are less intrusive, Have they been considered?

Access to civil registration to improve public service delivery

8 Should a government department be able to access birth details electronically for the purpose of providing a public service, e.g. an application for child benefit?

No. This is at odds with the effort taking place in other parts of government to use modern means of securely certifying personal attributes.

9 Do you think bulk registration information, such as details of all deaths, should be shared between civil registration officials and specified public authorities to ensure records are kept up to date (e.g. to prevent correspondence being sent to families of a deceased person)?

No. This is in effect a population register. In the chosen emotive example it is not problematic to obtain consent to propagate individual death records.

Combating fraud against the public sector through faster and simpler access to data

10 Are there other measures which could be set out in the Code of Practice covering the proposed new power to combat fraud to strengthen the safeguards around access to data by specified public authorities?

No. Because the power to obtain and collate personal information ad hoc is itself the problem, Codes of Practice tend to deal with edge cases, not the central ones where a power is used as intended but in doing so imposes the costs of suspicion and personal exposure on innocent members of the public.

11 It is proposed that the power to improve access to information by public authorities to combat fraud will be reviewed by the Minister after a defined period of time. This time will allow for pilots to be established and outcomes and benefits evaluated. How long should the

Fraud gateway be operational for before it is reviewed?
Not a question it is possible to answer. It is more important to determine the criteria on which it will be evaluated are clear prospectively, and take into account both costs and benefits properly, including externalities.

Improving access to data to enable better management of debt owed to the public sector

12 Which organisations should Government work with to ensure fairness is paramount when making decisions about affordability for vulnerable debtors who owe multiple debts?

We have no view.

13 How can Government ensure the appropriate scrutiny so pilots under the power are effectively designed and deliver against the objectives of the power?

State the objectives explicitly in advance and be determined to abandon schemes that to not meet their objectives or have unforeseen negative consequences.

14 It is proposed that the power to improve access to information by public authorities for the purpose of better managing debt owed to government will be reviewed by the Minister after a defined period of time. This time will allow for pilots to be established and outcomes and benefits evaluated. How long should the debt power be operational for before it is reviewed?

As Q11: Not a question it is possible to answer. It is more important to determine the criteria on which it will be evaluated are clear prospectively, and take into account both costs and benefits properly, including externalities.

Access to data which must be linked and de-identified using defined processes for research purposes

15 Should fees be charged by public authorities for providing data for research purposes, and if so should there be a maximum fee permitted which is monitored by the UK Statistics Authority?

Yes; no maximum. If research has a benefit to the researcher or those funding him, then it should have a price. Note however that most of the cost is borne by the citizens or other entities whose data is used. Perhaps they should set the price and be paid.

16 To ensure a consistent approach towards departments accepting or declining requests for disclosing information for research projects, should the UK Statistics Authority as the accreditation body publish details of rejected applications and the reasons for their rejection?

Is consistency obviously desirable? Does it in any case follow that such publication would create it?

17 What principles or criteria do you think should be used to identify research that has the potential for public benefit, or research that will not be in the public benefit?

None. The point of research is to expand knowledge – a benefit identified by the researcher. To allow officials to pre-judge purported 'public benefits' would likely bias research towards the theories popular among officials.

Access by UK Statistics Authority to identified data for the purpose of producing official statistics and research

18. Is two years a reasonable maximum period of time for the duration of a notice for the supply of data to the UK Statistics Authority for the purposes of producing National and official statistics and statistical research?

We have no opinion. But note our comment on 114.

19. If your business has provided a survey return to the ONS in the past we would welcome your views on:

(a) the administration burden experienced and the costs incurred in completing the survey, and

(b) ways in which the UK Statistics Authority should seek to use the new powers to further reduce the administrative burdens on businesses who provide data to the ONS for the purposes of producing National and other official statistics.

(a) it was a nuisance and a cost. And may not have produced useful information in any case since the questions had plainly been devised for crude sampling in another era in which service firms and NGOs formed a smaller part of the economy.

(b) There are none. Burdens may be made less visible, but the costs will still be borne by the subjects of investigation.

20. [Answered in the form that appears in the summary rather than the less clear one in the body of the paper] **What principles and factors should be considered in preparing the Code of Practice on matters to be considered before making changes to processes that collect, store, organise or retrieve data?**

That data use must be necessary. It must be duly considered whether the same statistics could be compiled without collecting or storing additional data or requiring sharing.

APPENDIX

NO2ID Parliamentary Briefing on the **Coroners and Justice Bill - 22 January 2009**

Prepared by Guy Herbert, General Secretary of NO2ID

1. Summary

Buried among the numerous complicated and controversial provisions of this legislation is a single clause, clause 152 in the first draft of the Bill, which is a profound threat to privacy, liberty and the rule of law. It is enabling legislation that converts the Data Protection Act into a machine for massively increasing the dealing by government in information of all kinds. It is designed to allow ministers to use a fast-track regulatory procedure to sweep away data protection, human-rights considerations, confidentiality, legal privilege, and ultra vires when they would stand in the way of any use, acquisition or dissemination of information in pursuit of departmental policy.

The availability of broad data-sharing along these lines would be a profound change in the way the country is governed, potentially altering the function of almost all other legislation. It should not be introduced at all, but certainly not without proper public debate. There has been no such debate.

It would be a disaster if the “information sharing order” (ISO in what follows) were to be successfully smuggled through parliament in this manner.

2. The Bill and NO2ID

The Coroners and Justice Bill contains numerous potentially controversial measures, on most of which NO2ID, as a single-issue campaign group, can have no view. We are concerned about information sharing and privacy in general, and reserve our comments relating to other parts of the Bill where there may be privacy issues involved. This briefing focuses solely on Part 8 of the Bill, which amends the Data Protection Act 1998, and principally on the single clause that creates ISOs. As well as multiplying the powers of all ministers, Part 8 increases the powers of the Information Commissioner. We are not persuaded by this quid pro quo, for reasons explained in section 8 below.

This briefing consists of 9 pages: 9 numbered sections (3pp) of general comments and a 7-page annexe with detailed notes on the legislative drafting. We are happy to discuss any points in it further.

3 The background

Reading the notes provided by the Ministry of Justice to accompany the Bill without prior knowledge of the subject, one might gain the impression that the concept of the ISO somehow springs from the Walport Thomas Review, when in fact that review was set up by the Ministry of Justice in order to re-present the idea of information sharing, which had become somewhat discredited after the HMRC data-disc scandal of November 2007. NO2ID has chronicled the move to ever more arbitrary information sharing powers, since we observed the Children Act 2004 expressly set aside all common-law and statute rules of confidentiality for what eventually became ContactPoint.

The developing philosophy of government by information management that we characterise as “the database state”, has become Whitehall orthodoxy without any

systematic public debate, and the ISO should be regarded as the outcome of a desire to manage the citizen centrally as a single file, rather than permit separate relationships with separate organs of state, and of an impatience with mediating institutions such as parliament and the rule of law. In this view, information sharing is seen as one-sidedly good for everyone. This is set out very clearly in a series of official documents on "Transformational Government" (The key ones are exhibited here: http://www.no2id.net/datasharing.php).

The Information Sharing: Vision Statement issued by the then Department of Constitutional Affairs in September 2006 identified the main 'barriers' to information sharing as data protection, the Human Rights Act, common law confidentiality, and *vires*.

4 Objections to information sharing provisions in principle

We think that the "barriers" are not random obstacles. They are principles that have evolved in the courts and been captured in statute precisely because they protect things in human life that are worth protecting.

NO2ID set out its views on the principles of information sharing in its evidence to the Walport-Thomas Review. Repudiating the implicit bias of that review, we said:

> "There are no intrinsic benefits of data-sharing (which is a name for a wide class of processes or acts, not a coherent thing), and we do not accept the implied trade-off between individual privacy and any generalised social benefit. While all social relationships depend on some form of communication of personal information, data-sharing is purely ancillary to the relationships and individual or collective enterprises it facilitates. … NO2ID regards privacy and personal control of personal information as primary goods, interfering with which requires specific justification in each case."

The Home Affairs Committee, in its report *A Surveillance Society? (Fifth Report of Session 2007-08)* said much the same thing in more diplomatic language:

> "The Government should give an explicit undertaking to adhere to a principle of data minimisation and should resist a tendency to collect more personal information and establish larger databases. Any decision to create a major new database, to share information on databases, or to implement proposals for increased surveillance, should be based on a proven need." (p.7)

We suggest that "proven need" requires direct oversight and scrutiny on each occasion, and that the proper place for the proof of need for a change in the law of the land is parliament. It is not necessary to agree with NO2ID on any particular case to accept that proposition.

The idea of proper oversight and a proven case for extensions of the database state is mocked by the "Henry VIII" clause before the House. Ministers would be enabled to remake the law ad lib by regulation; and be subject only to the most flaccid test – whether sharing contributes to the expedient pursuit of departmental policy.

5. Objections to information sharing provisions in practice

It is a truth that 'Information is power'. Arbitarily extended power is likely to be arbitrarily exercised, and there is little indication that ministers or departments have come to terms with the problems of handling, protecting or properly interpreting huge volumes of information. Every sharing power not only creates potentially oppressive direct use by the authorities (our of error, inadvertence or callousness, more likely than design – see our briefing on the Serious Crime Bill (now Act) for more detail: http://www.no2id.net/IDSchemes/NO2IDSeriousCrimeBillBriefingFEB2007.pdf), but also avenues for unauthorised access to information, and therefore identity theft, stalking, or

other persecution of individuals. Most obvious to the public in the light of the November 2007 child benefit records disaster, large scale sharing inevitably means large scale loss. Far from helping the public, as it purports to, joined-up government creates new risks, large costs, and the projected gains in 'efficiency' can seldom be quantified.

At its mildest, information sharing is a recipe for an enormous growth in bureaucratic empires and concomitant IT costs. Even ignoring the costs to liberty and privacy it should be very closely monitored for the sake of the public purse.

6.Information sharing provisions: Objections to process

The government's presentation of the clause 152 provisions is deceptive and disreputable. It is nearly the final clause in a long Bill stuffed with potential controversy. A timetable might well prevent it being discussed in the Commons at all.

It introduces an entirely novel principle and does it in a single clause. Yet all the surrounding language and publicity is designed to minimise the consequences of what is being done. A series of "safeguards" are suggested to be in place. But, examined closely, they are no such thing.

It is noticeable that by making ISOs orders under the Data Protection Act, they will carry the misleading label of "Data Protection" every time they are applied. It is calculated to be deceptive in operation, too.

7.Information sharing provisions: Political objections

Though ISOs are a major change to the way Britain is governed, there is no electoral mandate for them. No attempt has been made to make any argument for them from political principle. None of this has been cleared with the public.

There is reason to believe public opinion is overwhelmingly opposed.
NO2ID asked through ICM in December:

> Q. You may have heard that the government intends to collect information about citizens and store it on large computer systems which can then be used for a wide range of purposes. Do you think storing information and sharing it between different parts of government in this way is a... good/bad idea. -- 65% said a bad or very bad idea.

The Sunday Times/YouGov asked more directly in the second week of January:

> Q. The Government has announced new data-sharing laws to allow public bodies, including town halls, access to your personal data held by other government bodies. Ministers say this will reduce inefficiencies, while critics say it is in breach of data protection laws.
>
> Do you think this proposal will or will not give the Government too much access to your personal data? -- Will give too much power - 65%; Will not - 19%; Don't know - 17%

The public does not trust government with its personal information. When these proposals become known and understood, there will be anger at the way they have been pushed forward semi-secretly despite all the government's reassurances that more care is being taken after a series of data disasters.

8.Assessment notices and codes of practice

The ISOs will be said to be offset by increases in the Information Commissioner's powers. But nothing in the new powers serves to restrain ISOs themselves. As noted below in the

detailed analysis, the Commissioner has almost no say over the content of ISOs. The increased powers are little constraint on government departments doing what they want with information, because to the extent that the ISO or other statute disapplies them, then the principles of Data Protection simply will not. The need for minute compliance with the letter of Codes of Practice is unlikely to inhibit a public authority. And collectively the civil service has many more staff to generate ISOs than the Commissioner is ever likely to have to assess them.

Meanwhile there is just too much work for the Commissioner to do plausibly. Adding to powers is unlikely to make a significant difference when the ICO has limited resources in the first place and is responsible for handling complaints on behalf of the entire country. NO2ID believes that a change to data protection law that grants millions of individuals directly enforceable rights over information pertaining to them is more likely to change corporate and departmental behaviour, than granting punitive power to a limited number of ICO staff.

What is more, issuing guidelines and punishing data controllers for failing to follow them, likely misses the existing defects in the Data Protection Act (the European Commission suggests that it fails to implement as much as a third of the relevant directive correctly). It is irrelevant too to the more substantial problems for privacy and information security that are created by a cult of sharing. What is needed is careful, honest, reassessment of our problem, not window-dressing.

9.NO2ID's recommendations

Information sharing, privacy and data security are all matters of great public concern and profound political importance in an information age. They ought to be openly debated and significant changes made only in the open. Hasty fixes driven by the convenience of officialdom are (even leaving aside all the points above) unlikely to produce anything good. While we could afford to ignore clauses 151, 153, and 154 did they appear by themselves – as so much legislative displacement activity - parliamentarians should demand that the matters covered by Part 8 of the Bill are dealt with openly, in separate, fully timetabled legislation, and should make it absolutely clear that they will not permit such a broad enabling power as the ISO at all. Clause 152 is so dangerous that no conceivable amendment makes it tolerable in a democratic society. It should be struck out.

Guy Herbert
General Secretary, NO2ID
Box 412, 19-21 Crawford Street
LONDON
W1H 1PJ

Mobile: 07956 544 308
Email: general.secretary@no2id.net

[Annexe discussing statutory drafting of Coroners and Justice Bill in detail omitted]