

Issue & Analysis



Bartlett D. Morgan
(internet image)

On The
Right

Data commissioner needs independence

As we move towards building our digital economy, it is imperative that the fundamental building blocks be put in place. Comprehensive data protection legislation is one of those blocks and accordingly, the Government must be lauded for acknowledging this and moving to enact this critical piece of legislation, the **Data Protection Bill, 2019**.

The Data Protection Commissioner is the independent supervisory authority under the Bill. As drafted, there is no true independence of the Data Protection Commissioner built into the Bill. The Commissioner does not have any independence in respect of staffing and budgeting and there is no security of tenure. Importantly too, there are no provisions that expressly speak to the essential requirement for independence.

If there is no independence, the Commissioner will not be sufficiently insulated from undue pressure. This raises the possibility that the Commissioner may face additional difficulty in effectively carrying out the myriad of functions under the legislation, in the face of pressure exerted by external actors.

Amend the Bill to include provisions that allow for some element of:

Staffing independence – In doing so, the Data Protection Commissioner would hold some element of control over or input into which and how many persons are hired to support the work of the Data Protection Commissioner.

Budgetary independence – The sum effect of such a provision is that, in keeping with accepted best practices, a budget would be prepared and sent directly to Parliament for approval, not to a minister. Also, the Government would be statutorily obligated to adequately fund the office of the Data Protection Commissioner.

Security of tenure – Similar to a judge of the Supreme Court, unless mental incapacity or some other intervening circumstance occurs, the Data Protection Commissioner ought not to be removed from office for a defined period of years.

Appropriate salary – I would humbly suggest that given the importance and scope of the role of the Data Protection Commissioner, the salary ought to be set as the equivalent of a Supreme Court judge.

Functional independence - provisions expressly affirming the independence of the Data Protection Commissioner

In its current iteration, the Bill does not include an express provision for managing the timeframe within which it will come into effect. As drafted, the Bill will take effect immediately upon publication in the *Gazette*, in the

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normal way. If this occurs, it stands to reason that the vast majority of data controllers and processors in Barbados would be in de facto breach. More pointedly, without a lead-time, passage of the Bill becomes problematic from the perspective of business planning. If businesses have a set timeframe for implementation, they can better manage their resources to ensure compliance.

Also, without staggered implementation, the Data Protection Commissioner will not have an opportunity to properly get his office set-up and staff hired and trained. Importantly also, the Commissioner will not have an opportunity to sensitise the general public, as well as relevant stakeholder groupings about their rights and obligations, prior to those rights and obligations coming into effect.

Further, it is the prevailing practice to include provisions in data protection legislation expressly dealing with this process. Suggestion: Include in the Bill, an express provision for a grace period for the entry into force of those provisions of the Bill that impose obligations on data controllers and data processors. The prevailing standard appears to be two years, but it is respectfully up to Parliament to determine what period of time is reasonable and appropriate in the Barbadian context.

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