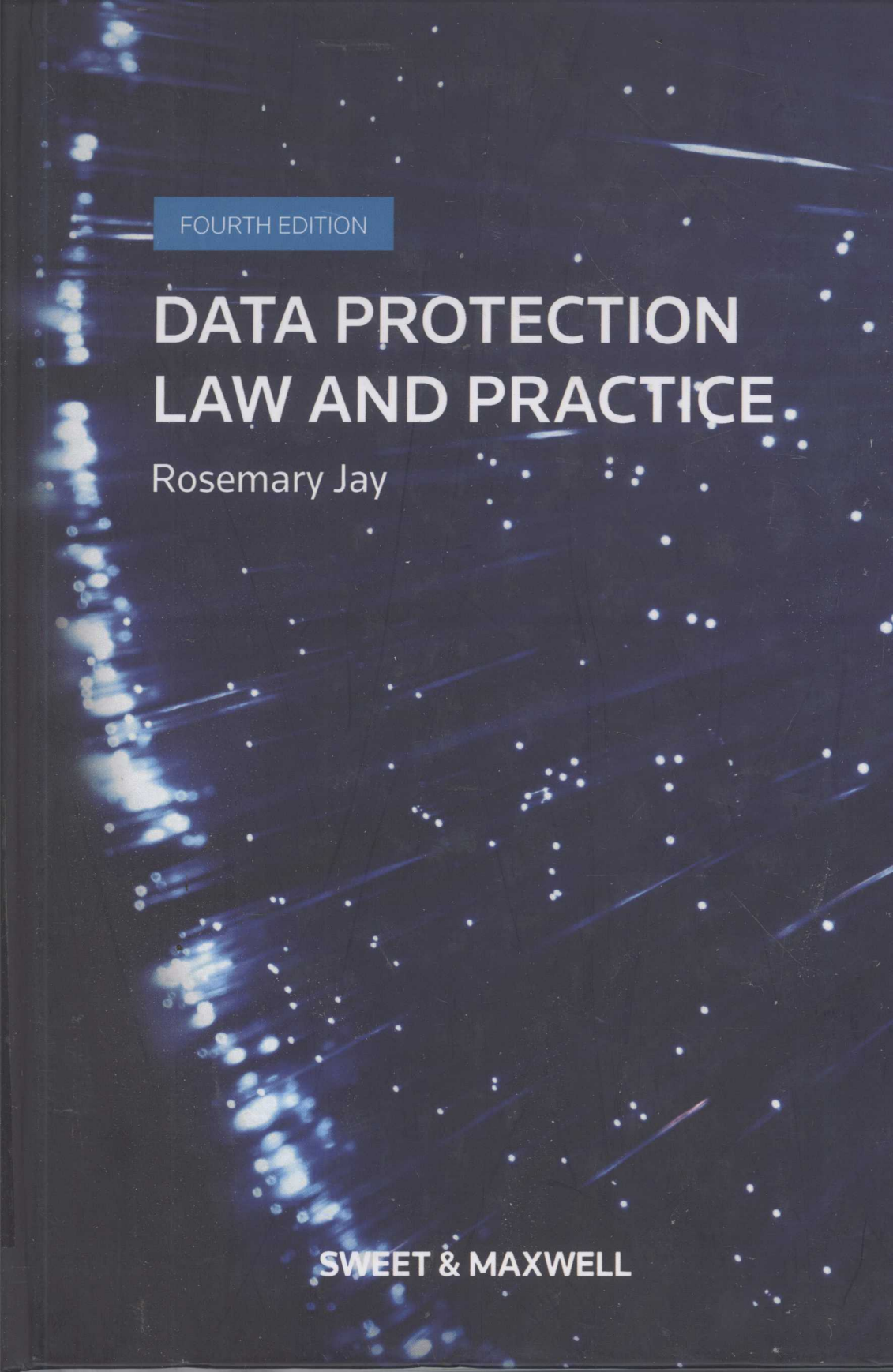




FOURTH EDITION

DATA PROTECTION LAW AND PRACTICE

Rosemary Jay

SWEET & MAXWELL

Data Protection

Data Protection Law and Practice

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Data Protection Law and Practice

Fourth Edition

Preface

I am delighted to have been asked to write a preface to this new edition, the fourth edition, of *Data Protection Law and Practice*.

Looking back to the date of the first edition in 1999 it is striking to realise the extent to which digital possibilities have transformed the way we organise our lives, at work and at leisure. As this has happened, more and more personal information is generated—and needs to be safeguarded. Businesses, public bodies, charities, local councils and organisations, government departments, schools and hospitals all hold and process our personal information. In this environment Rosemary Jay's updated and revised text is greatly to be welcomed.

It is also welcome that the text covers the practical implementation of data protection rules in many areas, for example data sharing, the use of data for research or the extent to which criminal records can be accessed. Good data protection practice can often be an enabler not an inhibitor—provided solutions are properly thought through at the outset. The smart use of data, within the rules, opens up possibilities for innovation and growth. To deliver these benefits users have to know and understand the rules and be able to apply them. Tools to help foster that knowledge and understanding are essential and the text provides clear explanations and assistance in many areas. Data protection now touches every area of our lives; if data protection was ever merely of interest to legal specialists that is certainly no longer the case.

One of the many changes in the legal landscape since the last edition of this guide concerns the powers of the Information Commissioner himself. The ICO now has the power to impose significant penalties for the most serious breaches of the law. Civil Monetary Penalties have a major reputational impact and are helping to focus minds. The clear explanations of these new powers in the revised text should prove a useful guide both for data controllers and those advising them.

The text helpfully flags the current proposals from the EU and, looking ahead, one can see that a fifth edition will be needed once the shape of the new EU data protection regime is settled. The same drivers that have forced change over the past six years will undoubtedly continue their dynamic effect.

As we look forward we can also see that the cost of getting things wrong will continue to increase—both for individuals and for organisations—as our dependence on digital services grows. For the data subject, breaches of privacy, identity theft and intrusion are serious threats. Individuals are increasingly aware of, and concerned about, their information rights. Data Controllers will face challenges as they consider how well they are responding to this changed

PREFACE

environment. Canny organisations will stay ahead of their customers' data protection concerns, since good DP practice will increasingly be expected—and sought out.

This book clearly represents a massive investment of work and time: an investment from which I am sure others will greatly benefit. The Duke of Gloucester's remark to Edward Gibbon comes to mind. 'Always scribble, scribble, scribble'. But Rosemary Jay has done more than scribble. This 'damn thick square book' is a significant achievement, covering the entire range of the topic and it is to be hoped that it will keep many a data controller from a data protection decline and fall.

Christopher Graham

Information Commissioner

November 2012

Introduction and Acknowledgements

It is a pleasure to see this 4th edition finally launched. It has been rather a long time in the making and there have been a lot of changes since the last edition. As a result there are several new chapters, including one on the Commissioner's enforcement powers which have increased significantly. The chapter on the European databases has been removed and much of the material incorporated into the chapter on the EU and international background. This is to give a better background to the section on proposals from the EU Commission that are being debated at the time of writing. Security now has a chapter of its own and the case law of the CJEU features in its own section. Most of the case studies have gone because the Commissioner's Office now produces material which is illuminated by case studies so the justification for having them in the text has diminished.

Given the many changes and the increased complexity of the area, completion of this edition has been a major task and thanks are due to many for their assistance.

In preparing this edition it has been particularly enjoyable to work with three fellow lawyers who have taken over responsibility for specific chapters. The book is much richer for their contributions. Sue Cullen, a Director of specialist training company Amberhawk, has re-written and much improved the chapter on the Freedom of Information Act 2000. Sue has particularly illuminated the development of the case law and its contribution to our understanding (or lack of it) of the term "personal data". William Malcolm, Privacy Counsel at Google UK, has contributed the chapter on Overseas Transfers, bringing to the topic the expertise of a lawyer in a global company intimately concerned with the processing of personal data. Ellis Parry, Global Lead Data Privacy BP, has very generously taken on two chapters, Research Exemptions and Subject Access. His expertise and contribution, particularly on the difficult area of research, is reflected in the real improvements to those chapters. Sue and William are ex-colleagues and I would like to also particularly acknowledge the contribution of another ex-colleague, Chris Pounder, also a Director of Amberhawk. Chris has been a staunch friend throughout the process. He has unearthed cases, provided material on security that I would never have found, had long discussions with Sue about the proper interpretation of specific provisions and, as if that was not enough, peer reviewed at least three chapters and greatly improved them in so doing. Special thanks also to a current colleague, Naomi McBride, for her work on the exemptions for legal proceedings and the material that she contributed to it.

Thanks must also go to all the other peer reviewers whose comments and contributions have been so helpful. To Anne-Christine Lacoste of the Office of

INTRODUCTION AND ACKNOWLEDGEMENTS

the European Data Protection Supervisor for her comments on the chapter on the European background, Dr David Erdos of Oxford University for his on the privacy chapter, Eric Metcalfe of Monckton Chambers who commented on the Interception chapter and Robin Callender-Smith, a deputy chair on the First-Tier Tribunal (Information Rights), who commented on the Tribunals chapter.

Special thanks must go to the ex-colleagues from the Office of the Information Commissioner who were kind enough to review chapters and make expert suggestions or comments; David Smith, Jonathan Bamford, Phil Jones (now of Promontary), Julia Parr and Dave Evans. Also to Jonathan Holbrook for his kind assistance with some quirky queries.

I am also grateful for the support of current colleagues at Hunton & Williams who reviewed and improved chapters, Anita Bapat, Bridget Treacy and Richard Thomas. Thanks also to Jaymini Philps who came in at the last minute to review some final crucial changes in one chapter.

No acknowledgement would be complete without a thanks to the editor, Anthony Brady, who has been endlessly patient and helpful.

As ever my personal thanks to my family, George, Laurence and Lizzie for putting up with me over the last 18 months.

There have been huge changes since the first Data Protection Act was passed in the UK in 1984. We stand on the threshold of another momentous change if the current proposed Regulation is passed. As such it would be nice to be able to fully acknowledge all those who have contributed to the development of the text over the years, as well as all those who have helped and inspired me in working in this challenging area. That of course is impossible; all I can do here is make a nod to all the contributions, support, help and encouragement received over the years I have worked in data protection and on this and previous editions. There are too many to mention individually but Shelagh Gaskill, an ex-colleague who died some years ago, should be mentioned by name for the seminal work that she carried out on understanding and applying data protection through the 20 years after the passage of the first Act in 1984. I have never dedicated the text to anyone before but would like to dedicate this, probably the last edition of this text on the 1998 Act and the Directive on which it is based, to her memory in recognition of her contribution in this field.

Rosemary Jay

October 2012

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