

## NOTES ON PART B3: WORKING GROUP DOCUMENTATION

The working group set up in 1999 developed both the processes for adopting conference resolutions and the credentials framework. The working group undertook a consultation exercise with Commissioners around the world which informed its deliberations. The Committee met once in Paris to discuss the proposed documentation in detail.

21ST INTERNATIONAL CONFERENCE ON PRIVACY AND DATA PROTECTION

CLOSED MEETING OF DATA PROTECTION COMMISSIONERS

WEDNESDAY 15 SEPTEMBER 1999

DISCUSSION ITEM: PROCESSES FOR ADOPTING CONFERENCE RESOLUTIONS

The International Conference has generally not debated or adopted conference resolutions in recent years. In earlier years, particularly when the conference was smaller and more homogeneous, resolutions were occasionally adopted. However, there is a desire by some Commissioners to have this premier international meeting of Privacy and Data Protection Commissioners to adopt statements of position or resolutions on privacy issues.

In the 1998 meeting the matter came to a head with the proposal of two resolutions. One related to a project to establish a national genetic database in Iceland, the other the publication of the "Starr report" on the Internet. Neither resolution was adopted. This did not indicate a complete lack of concern. Instead there was a serious questioning as to the process by which resolutions were to be raised and the suitability of the subject matter. Both resolutions concerned developments in particular identified countries, rather than general trends or developments. Some Commissioners knew insufficient about the Icelandic proposal and felt it was inappropriate for a resolution to have been put when there had been no detailed presentation on the facts of the case. There was also concern that many Commissioners had no chance to study the contents and drafting of the resolutions in advance. There was also limited time available in closed session to debate the wording of resolutions which had not been through a drafting committee process.

Accordingly, I was invited by our conference host to suggest a process which the Conference could follow for a presentation of resolutions in future cases. I take no view, in this paper, as to whether it is desirable for the Conference to adopt resolutions. However, if they are to be debated a process is needed, in my view, to ensure that:

- there is efficient use of limited conference time;

- the reputations of the International Conference and Commissioners are protected;
- any resolutions are of the highest quality in terms of expression, usefulness and enduring international value.

### **Suggested criteria and processes for Conference resolutions**

I offer the following guidelines.

1. The content of resolutions should be suitable.
2. The drafting should be carefully prepared in advance.
3. Proposals should have the support of more than one country.
4. Commissioners should have opportunity to consider proposed resolutions in advance.

By way of explanation:

1. *The content of resolution should be suitable:* Proponents should take care to ensure that matters raised are of sufficient importance to warrant the time of all Commissioners. Purely national matters should not be put forward. Consideration should be given to the usefulness of the resolution - will it offer useful and enduring guidance or contribute to public debate on important matters? Will the subject matter be divisive or unlikely to find consensus among Commissioners?
2. *The drafting should be carefully prepared in advance:* Proposing Commissioners, and their legal advisers, should carefully word resolutions to ensure that the meaning is clear and the resolution is concisely expressed. The resolution should not be unduly long taking into account its subject matter.

3. *Proposals should have the support of more than one country:* It is suggested that proposals be submitted with the support of the Commissioners from at least 4 countries. This will ensure that an attempt is made to obtain trans-national consensus before the matter is <sup>put</sup> ~~taken~~ before all Commissioners. Each of the proposing Commissioners should satisfy themselves that the content of resolutions is suitable and that the drafting is satisfactory. It is suggested that an attempt be made to obtain co-proposers with a variety of backgrounds (for example, from countries having different linguistic backgrounds and legal systems).

4. *Commissioners should have opportunity to consider proposed resolutions in advance:* Resolutions should be circulated by the proponents, or if agreeable the conference host, at least two weeks before the International Conference. Written comments should be taken to allow any redrafted resolution to be circulated at least 12 hours before the session at which it is to be discussed. Ideally, translations should be provided by the proponents of resolutions.

B H Slane  
Privacy Commissioner of New Zealand

= August 1999

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## MEMORANDUM

TO : BRUCE SLANE

FROM : BLAIR STEWART

DATE : 28 October 1999

SUBJECT : PROCESSES FOR ADOPTING CONFERENCE  
RESOLUTIONS

You would recall that we have the task of revising the paper presented to the last conference in light of comments made and any submissions received.

I have prepared an initial draft provision for your consideration. It seemed to me that we might usefully prepare a redraft and try it out on a couple of sound colleagues. In particular, Bruce Phillips and Fergus Glavey given that they entered into the discussion at the conference. Once a robust new version is ready, I suggest wider distribution rather than awaiting the next conference since the hosts have a history of failing to circulate materials in advance.

The redraft attached should simply be seen as a starting point. Although the new version is a reworking of the earlier document, there may be a case to start from scratch. I draw the following features to your attention as they mark changes from the earlier version.

1. The lead-in material is shortened by omitting most of what happened in 1998. The 1999 discussion is new. A listing of the five guidelines has been omitted.
2. I have reformulated the five guidelines into four. The first guideline has had the former fifth guideline added to it since this all seemed to be relevant to the suitability of the content of the resolution. It is explained that the guidelines are essentially voluntary in the sense that a conference host will not reject a resolution for failing to meet one of them. This was a point of misunderstanding I think. However, two items have been marked as mandatory procedural requirements. Failure to follow those would mean that the resolution is not put to the conference.
3. The first guideline has been changed by deleting "Purely national matters should not be put forward". This was contentious. I felt that a matter is not "purely national" if it uses a national incident to illustrate or foreshadow an international trend. If, the point is reinserted it may have to be explained.
4. A new idea in the fourth guideline is that it may be helpful to make background notes available. The idea is that if something like the Icelandic proposal is put forward that the proponents, not necessarily as part of the resolution itself, may circulate background reports at the conference to put others in the picture.
5. I dropped the suggestion that written comments should be taken to allow any redrafted resolution to be circulated at least 12 hours before the session at which it is to be discussed. This got a bit complicated. If something is inserted to replace it, it might be to the effect that proponents should engage informal discussions with other Commissioners during the conference, but before the resolution is put,



Privacy Commissioner  
Te Mana Matapono Matatapu

**22ND INTERNATIONAL CONFERENCE ON PRIVACY AND DATA PROTECTION  
STATEMENT BY BRUCE SLANE, PRIVACY COMMISSION OF NEW ZEALAND, IN  
RELATION TO GUIDELINES AND PROCEDURES FOR CONFERENCE RESOLUTIONS**

At the 21st International Conference I was asked to revise a paper on processes for adopting conference resolutions and to submit it to the 22nd Conference. The revised paper is attached.

However, I have concluded that there is a more significant issue to be addressed before the conference can sensibly deal comprehensively with the matter of resolutions.

The issue is, how does the international conference establish credentials for proposing, discussing and voting on resolutions and noting abstentions? In other words, who is a "data protection or privacy commissioner".

There is a case to establish a set of criteria from which participation in the closed session of the conference will flow as will any entitlement to propose and vote on resolutions. A suitable set of guidelines or criteria may also serve as a valuable international benchmark when new institutions are being established or existing ones reviewed.

I propose that a working group be established to study the matter and suggest to the 23rd Conference:

- a description of the features, functions, characteristics of a data protection agency suitable to be recognised at international level;
- a process whereby existing participants in the conference can be recognised for future participation and new applicants can be approved.

## 22ND INTERNATIONAL CONFERENCE ON PRIVACY AND DATA PROTECTION

## CLOSED MEETING OF DATA PROTECTION COMMISSIONERS

29<sup>TH</sup> SEPTEMBER 2000

## GUIDELINES AND PROCEDURES FOR CONFERENCE RESOLUTIONS

The object of these guidelines and procedures is to ensure that:

- there is efficient use of limited conference time;
- the reputations of the International Conference and commissioners are protected;
- any resolutions are of the highest quality in terms of expression, usefulness and enduring international value.

## Guidelines for Conference Resolutions or Common Positions

As these 4 guidelines are, for the most part, subjective they are not mandatory requirements. Proposed resolutions will not be refused inclusion on the agenda by the conference host for failure to meet any of them.

1. *The content of any resolution should be suitable and of enduring value:* Proponents should take care to ensure that matters raised are of sufficient importance to warrant the time of all commissioners. Consideration should be given to the usefulness of the resolution - will it offer useful and enduring guidance or contribute to public debate on important matters? Will the subject matter be divisive or unlikely to be adapted by consensus? The effort required to reach agreement would seem to be warranted if there was a continuing benefit internationally. Comments by way of resolution on matters of passing interest may tend to diminish the standing of the decisions agreed by such a process.
2. *The drafting should be carefully prepared in advance:* Proposing Commissioners, and their legal advisers, should carefully word resolutions to ensure that the meaning is clear and the resolution is concisely expressed. A statement should not be unduly long taking into account its subject matter.
3. *Proposals should have the support of more than one country:* Proposals should be submitted with the support of commissioners from several countries. This will ensure some trans-national consensus before the matter is put before all commissioners. The proposing commissioners should each satisfy themselves that the content is suitable and that the drafting is satisfactory. It is suggested some co-proposers with a variety of backgrounds (for example, including countries having different linguistic backgrounds and legal systems).
4. *Commissioners must have opportunity to consider proposal in advance:* Resolutions must be submitted in sufficient time by the proposer to enable the text to be circulated before the matter is to be discussed at the International Conference. It may be helpful to make translations and background notes available. Resolutions should be accompanied by a short supporting paper which sets out clearly the factual basis for

the proposal and the reasons for the recommendation. It should also note the advantages the proposers see in the proposal and any disadvantages.

### **Mandatory Procedural Requirements**

Proposed resolutions will not be accepted by the conference host for submission to the conference unless:

1. The resolution has a proposer and the support of 3 other commissioners.
2. The resolution is received at least 2 weeks before the conference, or at such earlier date (not exceeding 1 month) notified by the conference host to all participating commissioners.

*vienna \Guidelines and Procedures for Conference Resolutions*



PAVED



Privacy Commissioner  
Te Mana Matapono Matatapu

8 March 2001

Elizabeth France  
Information Commissioner  
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Office of the Privacy Commissioner

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Michel Gentot  
Président  
Commission Nationale de L'Informatique et des Libertés  
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FRANCE

Dear Commissioners

**WORKING GROUP TO ESTABLISH ACCREDITATION FEATURES OF DATA  
PROTECTION AGENCIES**

I write further to my letter of 21 December 2000.

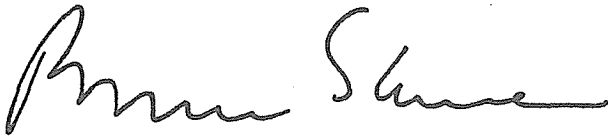
Since that letter I have had contact from two Commissioners, the most recent of which as a result of the item in *Le Journal*. The Australian Commissioner referred me to the constitution of the "International Market Supervision Network" which might be useful to look at when we get into more detailed drafting if what we propose has similarities to that organisation. That material can be found at: [www.imsnricc.org/imsn/estmemo.htm](http://www.imsnricc.org/imsn/estmemo.htm). The other enquiry, from the Ontario Commissioner, expressed an interest in having documentation circulated in advance of the Paris conference if that is possible.

I look forward to your responses to my letter of 21 December. However, in the meantime I suggest that our task is probably to:

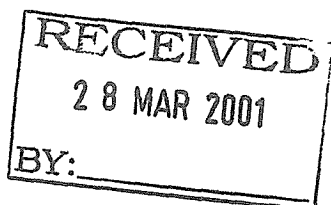
- devise a process for recognising credentials which I presume will involve the establishment of a Credentials Committee;
- propose criteria as to what constitutes a recognised data protection supervisory authority etc to enable participation as a commissioner in the conference and to propose and vote upon resolutions (such guidelines to be applied by the Credentials Committee).

I would be grateful if you could confirm that you each see the project in the terms I have suggested above. It may be possible to divide up aspects of the work between the three of us. We could then each prepare a short paper on the aspect we have been assigned and distributed to the others for comment and later integration. I would be pleased to have your suggestions as to how the work could be divided up or otherwise progressed.

Yours sincerely



**B H Slane**  
**Privacy Commissioner**  
*bhs\mar01\ working group accreditation*



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B H Slane, Privacy Commissioner  
Office of the Privacy Commissioner  
PO Box 466  
Auckland  
New Zealand

Our ref:  
20 March 2001

Dear Mr Slane,

**Working Group to Establish Accreditation Features of Data Protection Agencies.**

Thank you for your letter of 8 March 2001. I am sorry it has taken so long to provide a response.

We agree with your tasks for the group and we have discussed internally the features which an accredited data protection agency should have. We would suggest the following criteria.

- The agency must be established by lawful authority, although it is not necessary for the agency to be established by statute. In addition, the agency must be an authority that is recognised by the state and that exercises public functions. The functions that the agency exercises must be in the field of data protection and must be exercised on behalf of the state or of a supranational or international body.
- The agency must be independent of the government in undertaking its activities or exercising its powers. The process for appointing and removing the agency's most senior officials must also demonstrate independence, although it seems impossible to prescribe any particular process. However, an agency should not necessarily be refused accreditation because it is staffed by state employees.
- The agency's activities must be of a supervisory rather than an advisory nature. The agency need not itself have formal powers of enforcement. However, the agency's supervisory activities must have legal or administrative consequence. We expect any accredited agency's supervisory activities to be broadly consistent with principles set out in one of the following international instruments;
  - The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.
  - The Organisation for Economic Co-operation & Development Guidelines governing the Protection of Privacy and Transborder Dataflows of Personal Data.
  - The United Nations guidelines for the regulation of computerized personal data files.



- The European Union Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Those principles must be implemented in good faith, although we recognise that in some circumstances the agency's freedom to perform its functions will be relatively restricted.

It would not be a barrier to accreditation that data protection was one of several functions of an agency, nor would the restriction of its functions to a particular sector or geographical area be such a barrier.

Perhaps a system should be implemented that would allow a true data protection agency to participate fully in the International Commissioners' Conference, with other agencies enjoying only observer status.

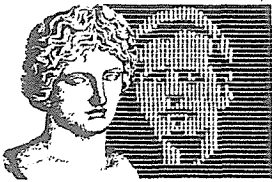
Whilst we recognise that our approach to accreditation may result in any Credentials Committee that is set up having to exercise fairly wide discretion in respect of the accreditation of agencies, on balance we feel that this is better than expecting agencies to adhere rigidly to a detailed set of rules for accreditation.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Iain Bourne', written in a cursive style.

Iain Bourne  
Strategic Policy Manager

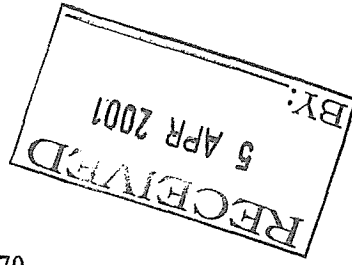
A handwritten signature in dark ink, appearing to read 'Peter Ad', written in a cursive style.



Commission Nationale  
de l'Informatique et des Libertés

Le Président

Our Ref : MGT/JBR/MG/AB/01-70



Bruce SLANE  
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United Kingdom

Paris, the

27 MARS 2001

Subject: Working group to establish accreditation features of Data Protection Agencies

Dear Colleagues,

During our last closed International Data Protection Commissioners Conference held in Venice last September, it has been decided to set up a working group on the accreditation features of Data Protection Agencies with regard to the adoption of resolutions by the annual International Data Protection Conference.

Commissioner Bruce Slane provided us with two major documents on the matter dated December 21<sup>st</sup>, 2000 and March 8, 2001 with the view of a discussion paper to be presented at the 23<sup>rd</sup> Conference, which will be held in Paris on September 23-26. Those documents are currently examined by CNIL.

The importance of the issue, and the reference made by Malcom Crompton to the "International Marketing Supervision Network", suggest that the three of us, as member of the working group should meet for a discussion in deep before issuing a common paper. This paper should of course circulate among all our colleagues before the conference.

In order to do so in time, I would be glad to have you both for this meeting in Paris at a convenient time for you between May 14 and June 15 or between June 25 and June 30.

Please let me know when you could be available for this meeting, by contacting Marie Georges ([m.georges@cnil.fr](mailto:m.georges@cnil.fr)).

Yours sincerely,

Michel GENTOT

## MEMORANDUM

TO : BRUCE SLANE  
FROM : BLAIR STEWART  
DATE : 4 APRIL 2001  
SUBJECT : ACCREDITATION FEATURES OF DATA PROTECTION AGENCIES

Please find attached a copy of the letter from the UK Information Commissioner's office. I have numbered the points and note that the letter combines some issues which are really separate points. Nonetheless, it is a valuable starting point.

### **Suggested approach**

It seems to me that the sort of points made in the UK letter can be fashioned into brief generic statements of principle which would guide the accreditation process. Those brief general principles could be elaborated on in brief comment.

Take the first point. This might start with a heading such as "Establishment by Law" and a statement of the principle. We might then comment on the features we think important and give examples. The first criterion might therefore be something like:

#### **Legal authority**

The agency must be a public body established by appropriate legal authority.  
*Comment: The legal authority underpins the agency's independence and ability to perform its functions and demonstrate a jurisdiction's commitment to effective protection of personal data. The appropriate legal basis for an agency will differ between jurisdictions but should be of the type normally associated with significant public bodies dealing with citizens' rights in that jurisdiction. Typically the legal authority will emanate from the legislature, such as a statute, but depending upon local traditions the legal basis may be found in an Executive instrument. The legal authority should be transparent, publicly available and with sufficient permanence that it cannot be revoked without reference to the highest authority or reference to the legislature.*

A layout such as this highlights that only the broad principle is to be directly applied to the Credentials Committee. The rest is simply guidance. Indeed, the conference could grant the Credentials Committee the function of issuing new commentary as it develops expertise. Any new principles would have to expressly be adopted by the conference.

If you like this sort of approach I will rework the UK letter into five or so principles with possibly some of my own devising.

## Some issues

The UK letter raises a couple of issues about the jurisdiction of agencies, particularly overlapping jurisdiction.

Point 2 of the UK letter assumes the possibility of an agency at a supranational or international level. The only candidate would be the proposed EU Commissioner. I am not sure that we can simply assume the case and we will need to work through the issues. Perhaps some principles which will work at national level may be rather awkward to apply at international level – we may not wish to compromise simply to allow an unusual EU entity to be accommodated?

However, of more real significance are the:

- overlapping geographical jurisdictions – typically state-federal issues;
- sectoral jurisdictions – e.g. health complaint ombudsmen, Broadcasting Standards Authority, FTC in the USA etc;
- complementary institutions *within* data protection laws e.g. NZ CRT.

The UK is essentially suggesting that any of these could qualify. That would be problematic once it came to voting on conference resolutions. An option would be only to recognise the national data protection Commissioners. This is fine with respect to resolutions but may belittle and exclude important sub-national agencies (e.g. Berlin and Ontario are significant international players). My suggestion is that all such agencies should seek to have their credentials recognised but within categories, e.g:

- class 1 – national data protection agencies;
- class 2 - second tier data protection authorities (i.e. state, province, lander – but not city commissioners if found within jurisdiction with state commissioners);
- class 3 – other data protection agencies (sectoral, city, functional etc).

As a further spin, we could offer the notion of a country's "premier data protection agency". This would always be the class 1 agency (for which there could only be one for each country). However, if there was no class 1 agency then a class 2 or class 3 agency could take its seat at the conference. NZ actually offers an example whereby the Wanganui Commissioner participated in several of the international conferences in the 1980s.

# FAXED



Privacy Commissioner  
Te Mana Matapono Matatapu

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**For** : **Iain Bourne,**  
**Strategic Policy Manager**  
**Of** : **Office of the Information Commissioner**  
**Fax number** : **0044-1625-524 510**  
**Destination** : **Wilmslow, United Kingdom**  
**From** : **Blair Stewart**  
**Date** : **1 May 2001**  
**No. of pages** : **7**

The following information is of a private and confidential nature intended only for the above-named person(s). If, for any reason you should receive this fax in error or do not receive the stated number of pages, please telephone this office immediately.

### **WORKING GROUP TO ESTABLISH ACCREDITATION FEATURES OF DATA PROTECTION AGENCIES**

I write further to my fax of 30 April 2001.

Please find attached a draft document incorporating proposed:

- criteria and rules for credentials committee.
- accreditation principles for data protection agencies;
- addendum to earlier guidelines on conference resolutions.

Once you have advised an email address, I will provide the document in electronic form which will be more convenient for marking up with comments and redrafts.

As yet, I have not shown this to the French Commissioner as I have had some difficulty in connecting by email or obtaining responses to faxes. Since I have tried to mirror the comments in your letter of 20 March in the accreditation principles I thought I would show the document to you first. I should add that the document is subject to further consideration in this office. While I have discussed the issues at length with Bruce Slane, he has yet to consider in detail the draft document I am showing you. However, I am keen to get things moving quickly since Bruce will be travelling to Europe later this month and M. Gentot suggested the possibility of a meeting in Paris.

Comments are welcomed on any aspect but I would mention two points.



## 1. Sectoral agencies

In your letter you suggested that it should not be a barrier to accreditation that data protection is one of the several functions of any agency nor would the restrictions of its functions to a particular sector or geographical area be such a barrier. I see no problem with a multi-functional agency nor one whose functions were limited to a particular geographical area (such as a state or province). However, I see an agency with a limited sectoral role as being quite problematic. I have tried to solve the issue by a fourfold classification and have postponed the problem to a proposed future 4<sup>th</sup> category. I welcome comment on whether we might usefully drop the 4<sup>th</sup> category altogether for the time being.

Note that sectoral agencies do not currently participate in the closed session and therefore to recognise them by accreditation represents a fundamental change to the conference rather than simply formalising the status quo. I think we have no mandate for that. I suspect that many Commissioners would not wish to contemplate such a change. In terms of numbers, there might be many such agencies in a single jurisdiction - in a federal country this could be multiplied many times over. Finally, in my experience, these sectoral agencies are typically multi-functional - privacy may possibly be a tiny part of their (principally complaints) workload.

## 2. Paris principles

I have referred to the "Paris Principles". If you are not familiar with these, you will find them annexed to the paper sent with our letter to Elizabeth France of 21 December 2000. In my view most of those principles can sensibly be applied with some notional adjustment in places. I see the committee as being perfectly able to make that adjustment without any specific direction from the conference.

So long as the principles are apt, it seems to me useful to make the explicit link to them. However, in doing so, we should be aware that we are placing data protection clearly in the framework of human rights. Personally I am comfortable with that as would, I suspect, most existing commissioners. Views are sought on the relevance and usefulness of the incorporation of the Paris principles.

It would be appreciated if you could provide some initial comments on an urgent basis since it would be my wish to send a revised version of the document to our French colleagues before the end of the week if possible. Any such comments would, of course, be received on the basis that your commissioner will wish to consider the matters further (and I will welcome any further considered comments). If the meeting between the commissioners can be arranged it is hoped that they would finalise a document suitable for circulation to other commissioners for comment. If that is to be achieved, it will be desirable to work through a few preliminary drafts in advance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Blair Stewart', written in a cursive style.

Blair Stewart  
Assistant Commissioner

## **PAPER FOR CONSIDERATION BY WORKING GROUP TO ESTABLISH ACCREDITATION FEATURES OF DATA PROTECTION AUTHORITIES**

This paper suggests a process and criteria for recognising the credentials of data protection authorities for the purposes of the international conference.

The paper is set out in three parts:

- (a) proposed criteria and rules for credentials committee;
- (b) proposed accreditation principles;
- (c) proposed protocol to resolution adopted at the 22<sup>nd</sup> Conference concerning guidelines and procedures for conference resolutions.

### **A. PROPOSED CRITERIA AND RULES FOR CREDENTIALS COMMITTEE**

#### **1. Credentials committee**

There will be a credentials committee ("the committee") to consider applications from data protection authorities ("authorities") that wish to be accredited to participate in the International Conference of Privacy and Data Protection Commissioners ("the conference"). The committee will also keep these criteria and rules, and the accreditation principles, under review and, if warranted, recommend change to the conference.

#### **2. Membership**

The committee is to have 3 or 4 members. The initial committee will be selected by participants in the closed session of the 23<sup>rd</sup> conference in Paris. [A further delegate will be selected to examine an application by the authorities constituting the initial committee.] Thereafter members will be selected from participating accredited authorities only. No more than 1 person from any country may serve concurrently on the committee whether by election or co-option.

#### **3. Co-option**

To fill vacancies the committee may co-opt an additional member or members (not exceeding 2) from accredited authorities. In doing so the committee should have regard to the desirability of diversity in its membership between legal systems, geographical areas and size of jurisdiction.

#### **4. Applications for accreditation**

Any authority that wishes to be accredited must write to the committee explaining its case in terms of the accreditation principles. Applications should be made at least 3 months before the annual conference. The committee will offer a recommendation to the conference in respect of each application received and will propose a resolution to recognise the credentials of each approved authority within a national, sub-national or international category.

*Note for working group: It is proposed that authorities be classified as follows:*

- *Class 1 – national authorities;*
- *Class 2 – authorities operating within a limited sub-national territory (typically a state, province, canton or land in a federal country);*

*At a later stage it may be desirable to consider establishing two further classes:*

- *Class 3 – authorities within an international or supranational body;*
- *Class 4 – authorities but having narrower functions than otherwise acceptable for accreditation, typically operating within a single sector (such as medical privacy) or performing just one kind of function (e.g. solely a complaints or advisory body).*

#### 5. Committee procedure

The Committee may adopt whatever procedure it deems appropriate.

#### 6. Term

The normal term for committee members is 2 years. Co-opted members serve only until the following conference. No member may serve consecutively for more than 4 years.

#### 7. Costs

Members will bear their own costs. However, if a committee meeting immediately precedes or follows the conference, reasonable accommodation and associated expenses (not including travel to and from the conference) can, at the discretion of the host, be incorporated as part of the costs to be met from conference fees.

#### 8. Reviews of accreditation

At the request of the conference, the committee will review the position of any previously accredited authority and offer a recommendation as to whether that accreditation should be continued.

### B. PROPOSED ACCREDITATION PRINCIPLES

#### 1. Legal basis

The data protection authority must be a public body established on an appropriate legal basis.

*Comment: The legal basis upon which an authority is established underpins its independence and ability to perform functions and demonstrates a jurisdiction's commitment to effective protection of personal data. The appropriate legal basis should be of the type normally associated with significant public bodies dealing with citizens' rights in that jurisdiction.*

*Typically the legal basis will be primary legislation enacted by the legislature, such as a statute, but depending upon local traditions a suitable Executive instrument may be appropriate. The legal basis should be transparent and with sufficient permanence that it cannot be revoked or changed without reference to a high authority or the legislature.*

## 2. **Autonomy and independence**

The data protection authority must be guaranteed an appropriate degree of autonomy and independence to perform its functions.

*Comment: Autonomy requires that an authority be empowered, both in a legal and practical fashion, to initiate and undertake appropriate action without having to seek others' permission. Independence is important for agencies to be able to operate free from political or governmental interference and to withstand the influence of vested interests. Typical guarantees include:*

- *appointment for a fixed term;*
- *removal only for inability to perform the office, neglect of duty, or serious misconduct;*
- *the power to report directly to the head of government or legislature and to speak publicly on matters of concern;*
- *immunity against personal law suit for actions carried out as part of official duties.*

## 3. **Consistency with international instruments**

The law under which the agency operates must be compatible with the principal international instruments dealing with privacy and data protection and should, as far as relevant, also be consistent with the UN principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the "Paris Principles," 1991).

*Comment: The principal international instruments are the OECD Guidelines (1980), Council of Europe Convention No 108 (1981), UN Guidelines (1990) and the EU Directive (1995).*

## 4. **Appropriate functions**

The authority must have an appropriate range of functions with the legal powers necessary to perform those functions.

*Comment: A data protection authority will have a range of functions in areas such as compliance, supervision, investigation, redress, guidance and public education. An authority must not merely be advisory but instead have supervisory powers with legal or administrative consequence.*

### C. PROPOSED ADDENDUM TO GUIDELINES AND PROCEDURES FOR CONFERENCE RESOLUTIONS

At the 22<sup>nd</sup> conference held in Venice in September 2000, commissioners adopted guidelines and procedures for conference resolutions. It will be necessary to adapt those procedures once there is a process established for recognising the credentials of authorities. The following addendum to the earlier resolution is proposed.

1. From the 24<sup>th</sup> International Conference onwards, resolutions may only be proposed and seconded by accredited authorities. Resolutions may be proposed, and co-sponsored, by any authority whether operating at the national or sub-national level.
2. From the 24<sup>th</sup> International Conference onwards, only accredited authorities may vote on any resolution.
3. Only 1 vote may be cast on behalf of any country. Where more than 1 delegate from any country is present the vote is to be cast by the national authority which may consult other sub-national authorities. If the national authority is not represented then the other authorities present may agree how the vote is to be cast. Failing agreement the vote is forfeited.
4. Resolutions proposed by the credentials committee for recognition of data protection authorities are not required to be circulated in advance of the conference.

*bns\establish accreditation features*

## MEMORANDUM

TO : BLAIR STEWART  
FROM : BRUCE SLANE  
DATE : 11 June 2001  
SUBJECT : ACCREDITATION

Blair

We had a good solid meeting going through the paper line-by-line and there was general agreement with most of the paper. There were some changes suggested and considerable debate about just what <sup>kind of</sup> authorities would be given accreditation .  
A

There was considerable praise for the work you have done on this and for New Zealand's having pressed to have these matters dealt with to get some order out of the informal shambles that we have at present. Unfortunately the French have succumbed to pressures on the rest of their programme to reduce the time for the closed meeting to two hours. We have however persuaded M Gentot to put at least one item of substance on the agenda so that people are not encouraged to deal with this matter at length, even though we think it will probably be the most important of the business.

It was also agreed that we should tidy up the draft in accordance with the decisions made and do a brief covering note to all those who were at the last meeting, and any obvious recipients, to ask for a response within one month of despatch of the letter. The French will do a French language version and dispatch it to people they have on the mailing list, presumably appropriately sending English or French language versions. We were left a little vague as to where the dividing line was between the ones we would send the circular to and the ones that would be sent it by the French *or whether the French would send out both versions*

It was, however, agreed that once we have had comments, if any, and made a revised version that would be sent out in English and French by the French as part of the papers for the conference.

In order not to confuse the situation for the general conference it was agreed that some general statement ought to be made to avoid doubt that nothing in the document should be regarded as limiting the right of the host to allow any person to attend the public sessions of the conference on such ~~considerations~~ <sup>considerations</sup> as the host thinks appropriate.

There is a little problem as to who passes the resolutions at this meeting but we have tried to address that under C.

Detailed comments as follows:

A. PROPOSED CRITERIA AND RULES FOR CREDENTIALS COMMITTEE

- A2. Delete third sentence beginning "a further delegate". This deletion is just for <sup>the</sup> purpose of simplicity and <sup>as it was</sup> likely to be needed only for the initial committee <sup>It would</sup> ~~and will~~ only tend to complicate matters as most of the membership <sup>affiliations</sup> will be uncontroversial.

The decision was to favour having four members, although this obviously invites the criticism that they may not be able to make a decision. Query, should we have a provision that the committee will appoint a convenor?

- A3. After the word "to fill vacancies" add the words "occurring between conferences". Delete the words "an additional" and substitute the word "a". Delete the words in brackets.

4. It was considered that the word "class" may suggest there was some sort of hierarchy and it was therefore suggested that the words "class 1, class 2, class 3 ~~and~~ class 4" be deleted. It was then suggested that the opening sentence after the colon should read "Authorities could fall into the following categories as <sup>..</sup>."

Delete the sentence starting "At a later stage", make the third bullet point "Authorities within an international or supranational body which will have a right to attend and participate but not to vote at meetings".



The fourth would then comprise a new sentence that would read "The Committee may be requested to consider the credentials of authorities having narrower functions than those otherwise acceptable for accreditation, typically operating within a specific area of activity (such as medical privacy) or performing just one kind of function (e.g. solely a complaints or advisory body) which may at the discretion of the host or the conference be invited to attend as observers but without the entitlement to vote."

The thinking behind this was that the EU is about to appoint <sup>to</sup> such a position but the ~~intention~~ <sup>wish</sup> is to keep the conference as being a conference of national and subnational authorities and not an organisation of international authorities. It is contemplated that the Credentials Committee might then produce a list of authorities entitled to have a representative attend closed sessions.

#### A7. Costs

Delete the second sentence. We believe it will cause more discussion than it is worth. It would still be open to a conference to allow for such an arrangement for accommodation.

#### A8. Reviews of accreditation

It was felt that it would be too cumbersome to require the conference to vote to review an accreditation, but on the other hand the committee should not appear to be interfering. The compromise was to delete the first phrase and add a provision allowing any accredited authority to request a review. The sentence would then commence "The committee may, at the request of any accredited authority, review ...".

### B. PROPOSED ACCREDITATION PRINCIPLES

For reasons not entirely clear to me they preferred data protection preceding privacy; the meaning would not therefore be changed.

B1. Legal basis

It was suggested that we should delete the words in the last line of the commentary "a high authority or". It was felt if anybody felt that their legal basis could be changed by a high authority rather than the legislature then they could argue for a change to the commentary.

B3. Consistency with international instruments

Gentot was not keen on importing the Paris principles but was happy for them to be mentioned in similar terms after the existing comment referring to the international instruments. This could possibly read as: It is also expected that the authority would also meet the minimum standards contained in the UN principles relating ... so far as they are relevant.

I note that the word agency is used in 3 in the first line, should this not be "authority"?

B4. Appropriate functions

It was suggested that the commentary second sentence delete the word "instead" and substitute the word "must".

C. PROPOSED ADDENDUM TO GUIDELINES AND PROCEDURES FOR CONFERENCE RESOLUTIONS

It was felt that a new clause 1 was required. It was seen as something of a problem for the 24<sup>th</sup> meeting that they needed to be accredited before they could pass any resolutions which might mean that no resolutions be passed before the 25<sup>th</sup> international conference.

It was therefore suggested that there be a new C1 which would read, "At the 24<sup>th</sup> International Conference the meeting of authorities shall first consider and

approve such recommendations as may be made by the committee. Thereafter resolutions may only be proposed and supported by accredited authorities ...”.

Existing C2 and C3 should be combined and reordered. The sentence “Only 1 vote may be <sup>cast</sup> ~~case~~ on behalf of any country” should be added at the end of the present <sup>text</sup> ~~type~~ for C3, and the following sentence should be added after that: “Authorities within an international or supranational body which have been duly accredited may attend and participate in meetings but will not be entitled to vote.”

## MEMORANDUM

**TO** : **WORKING GROUP MEMBERS**  
(Michel Gentot, Elizabeth France)

**CC** : **Marie Georges, Iain Bourne, Blair Stewart**

**FROM** : **BRUCE SLANE**

**DATE** : **10 September 2001**

**SUBJECT** : **PROPOSAL FOR ACCREDITATION FEATURES OF DATA PROTECTION AUTHORITIES**

In response to the circular attached to Michel Gentot's letter of 27 July 2001, inviting submissions by 31 August, I have received written submissions from the commissioners in Guernsey and British Columbia. In addition, I have had informal written comments from the commissioners in Australia and Ontario. These comments were made in response to an earlier version of the paper which was informally circulated. I have not been advised of any submissions having been received by other members of the Working Group.

The four submissions can be briefly summarised as follows:

- **Guernsey:** Is the meaning of "participation" sufficiently clear? How will the application process work in practice? There will be some difficulties in placing some commissioners in the national or sub-national categorisation. Will existing commissioners need to be accredited?
- **British Columbia:** Can the Canadian Commissioner be recognised as a truly national data protection authority given federal/provincial division of powers?
- **Australia:** Will the committee have to look at the credentials of all current participants or only authorities which apply in the future?
- **Ontario:** Concern at item C2 which provides that the national authority would cast the vote. Suggested instead that all accredited authorities should each exercise a vote.

In addition, after the meeting of the Working Group but before the paper was generally circulated, Michel Gentot raised an issue which by agreement was deferred. As described in Marie Georges' of 26 June this was posed as follows: shouldn't we establish, within the draft paper, a list of regional and international organisations as members of the conference with a status of observer but not subject to the discretion of the host?

My own views on the issues are as follows:

- *Existing participants will have to be assessed against the principles to be adopted by the conference as with any new applicants. I think it would be indefensible to do otherwise notwithstanding that this places an administrative load on the first committee to be elected. I believe that this point can be simply dealt with by a brief statement of clarification to commissioners and does not require the circulated document itself to be changed.*

- I believe that "participation" will be adequately understood by all those who regularly attend the conference. No special permission is needed to engage in the public sessions.
- Generally speaking it will be a simple task to classify an authority as national or sub-national. There may be a very few difficult cases. They could be resolved if necessary relying upon a constitutional advice on how the jurisdiction is treated in other international fora (like the UN). In some cases the applicant could be asked to supply an opinion from its own jurisdiction's ministries of foreign affairs or justice. If necessary, the Working Group could undertake its own researches and obtain advice elsewhere. I think it is unnecessary to amend the document to deal with this.
- I think it unlikely that an international conference would be willing to adopt a voting system based on the number of national and sub-national authorities established in each country. Either option will produce some anomalies but a vote for each authority would give unitary countries a single vote but federal countries many. At present consensus is the approach of the conference and it is likely in the future that few issues will actually be put to a vote. However, if they are to be voted upon, the proposed arrangement would seem to be likely to have wide support. It is probably fair to note that there is some tension between federal and provincial commissioners in Canada at present and I expect that most of us would not wish to get drawn into that.
- I am not sure that the paper needs to be amended to achieve participation by international organisations. Instead, it would be possible for a conference to use the resolution process to put a standing arrangement in place for observers at future conferences. Discretion could also be left to the host to add to this. In terms of establishing credentials none of these international organisations yet has an authority that would meet our principles (although the EU is well advanced in establishing one).

#### Where to from here?

It seems to me that we can take the matter forward in one of three ways.

1. circulate a memorandum to commissioners briefly explaining the issues raised in submissions and indicating that the Working Group does not believe that the document circulated needs to be changed;
2. we further redraft the document this week in order to circulate it with an explanatory memoranda;
3. we work through the issues with a view to redrafting the document at a personal meeting of the members of the Working Group in Paris prior to the closed session.

I favour the first option. I set out the suggested form of a memorandum that could be circulated which is consistent with making no changes to the document. If other members support that approach may I suggest that the French colleagues use that wording, or a revised version of it, and circulate the message to commissioners.

If the second option is favoured may I make the obvious point that we are very short of time. I will be departing New Zealand on Monday 17 September and accordingly drafting work should probably be completed this week.

If the third option is adopted, may I mention that I will be arriving in Paris on Sunday 23 September prior to the opening ceremony that evening. Accordingly, it will be necessary to find some time on Sunday evening or on Monday given that the closed session is on the Tuesday afternoon.

**Suggested circular to Commissioners if no change is made**

If the Working Group recommends that no change be made to the circulated document (perhaps other than any minor typographical or grammatical changes) I suggest that the following memorandum be circulated to commissioners:

“Several submissions were received from commissioners in response to the paper earlier circulated entitled ‘Proposal for Accreditation Features of Data Protection Authorities’. In general terms the following questions were posed:

- Will existing authorities need to be accredited?
- What “participation” would accredited authorities be entitled to?
- When would newly accredited authorities be able to participate?
- How will the Credentials Committee distinguish between national and sub-national authorities?
- In the case of federal countries, should each of the national and sub-national authorities have their own separate vote?
- Should a list of international organisations approved to participate as observers be drawn up?

“The Working Group is of the opinion that the paper need not be changed in response to these issues. Instead, by way of explanation it advises that it is intended that the credentials of all existing participants in the conference should be assessed in the same manner as for any future participants notwithstanding that this will place a heavy load on the first credentials committee. Accredited authorities will be entitled to participate in the closed session of the conference, others (including applicants whose credentials have not yet been recognised) can continue to participate in the public sessions. The first item of business for the closed session of any future conference will be any recommendation concerning the credentials of new applicants thereby allowing them to participate in the session. It is thought that the ‘one country-one vote’ system is the fairest and most universally adopted at international meetings. Finally, it is open to the conference to adopt a resolution to recognise certain international organisations generally as observers.

“There will be opportunity at the closed session to discuss the paper and to raise questions and issues such as those mentioned above.”

Yours sincerely

B H Slane  
Privacy Commissioner