

NOTES ON PART D10: INTERPRETATIVE MEMOS

The memos discuss some of the issues that the Committee has grappled with from time to time. In acting as the secretariat to the sub-group and committee these memos are from Blair Stewart. It should be noted that interpretative memos do not necessarily represent the view of the Committee as finally adopted. However, they are provided in case they may assist subsequent committees in understanding some of the positions adopted or rejected by the Committee.

The interpretative memos should be read together with the relevant checklist, recommendations of the Committee and annual reports to obtain the complete picture. In the unlikely event that future committees would like further information on these interpretative questions, further information may be available direct from Blair Stewart.

MEMORANDUM

TO : CREDENTIALS COMMITTEE SUBGROUP
FROM : BLAIR STEWART
DATE : 5 June 2002
**SUBJECT : DIVIDING LINE BETWEEN NATIONAL AUTHORITIES
AND SUB-NATIONAL AUTHORITIES**

We have always known that there will be difficulties in classifying the Bailiwick of Guernsey, States of Jersey and Isle of Man (collectively known as "Crown dependencies" I understand). Peter Harris, the Guernsey Data Protection Registrar, raised the issue earlier when the Working Group was producing the accreditation principles. I cannot recall whether he also raised it orally during the Paris Conference session.

In Auckland we briefly discussed the approach that we would take as a sub-group. We agreed that using an external benchmark could be most objective. David explicitly recorded in his checklist that the national authority status would be "within the UN criteria".

Guernsey, Jersey and Isle of Man are included in the applications that I have initially assessed. Accordingly, I have had to muse on the subject somewhat earlier than either of you. You will each need to address the matter also as a second or third reviewer. Since this is bound to be contentious, ultimately it will need explicit consideration by the full committee.

I suggest that we continue our initial assessments using the UN criteria. (As an aside, the list of member states of the United Nations is easily accessible at www.un.org/Overview/unmember.) While UN membership is a good guide to easily conclude that an applicant *is* a national authority, it may not be satisfactory as the last word to deny that status. This note is merely some preliminary thoughts – we can discuss them further once we gather together any issues arising from these initial assessments.

May I add that for different constitutional reasons a similar issue may arise in the case of Hong Kong – or more correctly "the Hong Kong Special Administrative Region of China". Hong Kong has applied as a sub-national authority although one might think it had at least as good a case to be considered a national authority as, say, the Isle of Man. (There seems to be a common thread here of Britain claiming islands around the world and bequeathing quaint constitutional arrangements!)

It seems to me that a sub-national authority is an authority having jurisdiction over a geographical area that is simply part of a whole country. In this respect, Hong Kong is clearly sub-national. The position of the Crown dependencies is less clear to me. A government in a sub-national jurisdiction does not possess the full powers of a

national government and indeed its powers are, to some extent, limited by what a national state allows (for example, if a constitution cannot be changed if it touches upon the powers or interests of the larger entity).

I wondered whether it might be appropriate to soften our UN-recognised “national status” approach. I propose that we have a qualified category of “authorities treated as national authorities for the purpose of accreditation.” This would not need the Paris Resolution to be altered. The status be explicitly stated to apply “only while no accredited national authority exercises concurrent jurisdiction in that territory”. The suggested approach would satisfy each of the Crown dependencies but could also be applied to Hong Kong if it wished (it may not wish to do this for internal constitutional or political reasons).

I think that such a formulation would work for these problem cases and would not create any undesirable precedent or loophole undermining the Paris resolution in terms of ordinary sub-national authorities.

We would in a sense be recognising entities such as Jersey and the Isle of Man as “nations” where they are not so recognised for UN purposes. However, does that matter? Our criteria simply need to work for the purposes of data protection and organisational purposes and not in the sense of recognising states able to enter into treaties as equals. Also, we would put these entities into a separate category and treat them “as if” they are national authorities. This acknowledges that their status does differ from usual nations. I doubt that the authorities in question will take this as a slight since they will recognise that their constitutional arrangements are unusual. It may provide a working compromise.

Comments by Marie Georges dated 12 June 2002

Marie Georges noted:

“About Isle of Man, Guernsey, Jersey, the matter was raised by M Gentot with E France during the Paris conference for the purpose of the resolution we had to adopt in Paris. It was agreed that there will be only one vote for UK and the Islands according to the UN criteria. The Islands are under the Crown for international matters.”

MEMORANDUM

TO : CREDENTIALS COMMITTEE
Cc : CREDENTIALS SUBGROUP

FROM : BLAIR STEWART

DATE : 2 July 2002

SUBJECT : CREDENTIALS COMMITTEE DECISION ON 4 DISPUTED APPLICATIONS

I write this memo on behalf of the subgroup to the Credentials Committee: Marie Georges, Jonathan Bamford (who has replaced David Smith in this work) and myself.

The subgroup is well advanced in processing the 48 applications received. I will not report on progress in that task since I presume that other members of the subgroup are keeping their respective commissioners fully briefed. However, for present purposes I simply note that there is still considerable work to do before all applications are assessed. We are on track to have that work completed to enable the Committee to consider a draft resolution to submit to the host of the Cardiff Conference by the recently advised deadline of 22 July.

Thus far we have identified 4 applications which might be said to be "in dispute". Three applicants seek to be accredited as national authorities whereas sub-national authority status may be more appropriate. The other case relates to a city commissioner in a federal country. Given the limited remaining time available to the Committee these 4 cases are being presented to the Committee for decisions. As the subgroup completes its work it is conceivable that there might be some further disputed applications.

Brief details of the four applications follow together with a list of attachments to this memorandum.

Switzerland: Zurich City (application received 14 May)

The application was first assessed by Marie Georges who recommended that it be declined due to the authority's "narrow geographical competence and powers". Marie did not recommend observer status and suggested that this be left to "the Swiss delegation and the host". She recommended contact with J P Walter (Federal Commissioner) and Thomas Balocher (Zurich City Commissioner). Blair Stewart did a second assessment of the application and noted that it did not seem clear whether the authority had exclusive jurisdiction over city institutions or whether jurisdiction was shared with the Canton Commission (the version of the law available on the Internet is in German). He suggested that contact could be usefully made with Bruno Baeriswyl (Zurich Canton Commissioner). Blair was favourably disposed to recommending the applicant as an observer since the authority had been represented at the conferences at Hong Kong, Venice and Paris and therefore has a serious

commitment to the conference. Unfortunately, Jonathan Bamford has not yet had a chance to offer a third assessment of this application.

Attached to this memo are:

- the application;
- the completed assessment checklist containing comments by Marie Georges and Blair Stewart.

The first question for the Committee is whether on the material before it provides sufficient information to make a recommendation or whether enquiries need to be made of the applicant or any other person. If enquiries are to be made, the Committee should determine whether those enquiries are to be made by a nominated member of the Committee or whether it wishes the subgroup to perform this task. If the Committee has sufficient information, it needs to take a decision. If that decision is adverse to the applicant, the Committee should decide how it wishes to proceed. It may also wish to consider whether its decision should be communicated to the Federal and Canton Commissioners as well as the applicant. Naturally, if the Committee is minded to recommend accreditation no special process is needed and the recommendation can simply be included in the final resolution.

Guernsey (application received 22 May)

At the subgroup's meeting in Auckland in March it was decided to use as a working guide for recognising national status the United Nations criteria. In other words, to recognise an applicant as a national authority, that territory must be represented as a nation in the United Nations. The list of UN member states can be found at: www.un.org/Overview/unmember.

Regrettably, in the time available this application has only been assessed by Blair Stewart. If a second or third assessment from Marie or Jonathan becomes available they will be forwarded to commissioners to consider with this note. Blair noted that Guernsey is not on the list of member states of the United Nations. If the subgroup's working guide stands then the issue is clear cut. Guernsey would not be recommended for accreditation as a national authority. However, the applicant could be recommended for accreditation as an authority within a limited sub-national territory. Blair noted that it may be appropriate to await the assessment of the applications of similar placed jurisdictions (Jersey, Isle of Man) before making any enquiries. No enquiries have yet been made.

Blair circulated a memorandum dated 5 June to members of the subgroup further exploring the dividing line between national authorities and sub-national authorities and suggesting that there might be a way forward if it were desired to move away from the UN criteria. The suggestion was that the Guernsey application be recommended to be accredited in a qualified category of "authorities treated as national authorities for the purpose of accreditation". This would not need the Paris resolution to be altered. The status would explicitly apply "only while no accredited national authority exercises concurrent jurisdiction in that territory". Marie Georges offered some comments on the memo and for convenience these have been added into the memo itself.

Attached to this memo are:

- Guernsey application;
- checklist;
- memo of 5 June;
- two other supporting documents supplied by the Guernsey Commissioner.

The first decision for the Committee is whether it has sufficient information before it to decide the matter. If not, it needs to consider what further information is needed and what process is to be followed to obtain that. If there is sufficient information, the Committee will need to decide whether to favour accreditation as a national authority, sub-national authority or approach the matter in some other way such as proposed by Blair Stewart. If the Committee recommends Guernsey be accredited as a national authority then no further action is needed and the recommendation can be recorded in the general resolution. If any other course is proposed the matter will need to be taken up with the Guernsey Commissioner and the Committee will need to decide whether this is to be done by a nominated member of the Committee or by the subgroup on the Committee's behalf.

Isle of Man (application received 23 May)

The position of the Isle of Man is as for Guernsey.

Unfortunately, this application has only had an initial assessment by Blair Stewart. Comments from Marie and Jonathan are not yet available.

Please find attached:

- application for Isle of Man;
- assessment checklist.

The decisions that the Credentials Committee needs to take are the same as for Guernsey.

Jersey (application received 24 May)

The position is the same as with Guernsey and the Isle of Man. The application has had an initial assessment by Blair Stewart. The other two members of the subgroup have not considered the application.

Please find attached:

- application for Jersey;
- checklist.

The decisions for the Committee are the same as for Guernsey and the Isle of Man.

MEMORANDUM

TO : Credentials Committee
Cc : Credentials Subgroup

FROM : Blair Stewart

DATE : 8 July 2002

SUBJECT : Credentials Committee decision on a further 3 disputed applications

Further to my memo of 2 July 2002, I draw to the Committee's attention a further 3 applications which are "in dispute". Two of the 3 has been considered by two members of the sub-group, Marie Georges and Blair Stewart, the other just by Marie. Given the limited time available to finish processing the applications, I have not awaited the comments of the third subgroup member, Jonathan Bamford. However, if a completed checklist is received from Jonathan while the matter remains before the Committee, I will forward it on.

The first 4 disputed applications, earlier forwarded, raised a common question: should they be classified as "sub-national authorities"? These 3 further applications coincidentally also have something in common: are there adequate guarantees of independence and autonomy?

Two of the 3 applications come from authorities in eastern Europe. It is, of course, gratifying to see these countries with data protection laws and institutions which are, apart from the matter before the Committee, satisfactory. However, it should not be thought that all the eastern European data protection arrangements face the same difficulty – the subgroup has already considered the Roumanian application which does not suffer the same defect.

Brief details of the 3 applications, with attachments, follow.

Lithuania (application received 13 May)

The application was first assessed by Marie Georges who recommended that it be approved although noting issues in relation to autonomy and independence. Marie noted that the law provides explicitly for the authority to operate independently and guaranteed freedom of speech. Further, she noted that for EU accession reasons, the Government is drafting a new law (not yet at the Parliament) which would provide complete autonomy if enacted. Blair Stewart undertook a second assessment and concluded that the authority was not guaranteed an appropriate degree of independence and the application should therefore be declined until the new law is enacted. Blair noted that the Director "may be removed for the same reasons, minor and major, that any civil servant can be dismissed". Blair suggested permitting the authority to participate as an observer at Cardiff.

Attached to this memo are:

- the application;
- completed assessment checklist.

The first question for the Committee is whether the material before it provides sufficient information to make a recommendation or whether further enquiries need to be made (and if so, the process to be followed including whether those enquiries should be made by a nominated member of the Committee or by the subgroup). If the Committee has sufficient information it needs to take a decision as to whether to grant or decline the application. If it declines the application it should decide whether it will recommend observer status and how it is to communicate its decision to the applicant.

Latvia (application received 27 March)

In the initial assessment Marie Georges noted that “although the independence is not fully established” the law under which the authority operates provides for it to act independently and it does issue a public report. Marie further noted that the Government is preparing a law to provide the organisational independence in the course of the process of EU accession. Marie recommended accreditation. In the second assessment Blair Stewart took the view that while the law appropriately provides for the appointment of the Director of the Data State Inspection the removal from office is the same as for any civil servant and this would call into question whether there is a guarantee of independence. As with Lithuania, Blair suggested that accreditation be declined until the proposed law is enacted but that the DSI be accorded observer status at Cardiff.

Attached to this memo are:

- the application;
- completed checklist.

The decisions of the Credentials Committee are the same as for Lithuania.

Monaco (application received 11 June)

This application is in French and Marie Georges has completed the initial assessment. Given the language difficulty, this application has not yet had a second assessment but given Marie’s adverse recommendation it is included for the Committee to consider. In terms of autonomy Marie notes that in case of infractions reports to the Ministre d’Etat “who decides on actions to be taken”. The report is not made public and there is “no possibility to make public statements”. Marie notes that a draft bill which might be adopted by the end of 2002 would confer “independence/free speech and effective powers”. This will also bring the applicable law into conformity with the international norms, another area in which Marie found the application wanting (the new law would enable Monaco to sign CoE Convention 108). Although recommending the application be declined, Marie supports observer status.

Attached to this memo are:

- application form;
- checklist.

The decisions for the Committee are for the same as for Lithuania and Latvia.

Blair Stewart

From: Blair Stewart
Sent: Thursday, 4 July 2002 6:11 p.m.
To: Blair Stewart; Jonathan Bamford (E-mail); Marie Georges (E-mail)
Subject: Accreditation Applications - Circulation to Researchers

Marie and Jonathan, I realise that you both may be fully engaged in completing your accreditation checklists but I wondered if I could distract you for a few minutes!

You'll know that virtually all of the authorities have agreed to the release of the applications to a researcher or researchers. It seems to me that there's a wealth of material in the applications to enable some interesting comparative law articles to be written. We've not released anything to researchers yet. Personally, I think it would be a terrible waste - and a disservice to the study of comparative data protection - if we didn't release the material in some fashion.

The choices might include:

1. The Committee jointly select a suitable researcher or several researchers and invite them to make whatever use they wish of the material.
2. Each member of the Committee individually select a researcher and give them the material.
3. The Committee announce that it will release the material to any researcher on application.

My preference would be a combination. We try to interest a suitable researcher or several researchers to take an interest but be open to release it to others working in the field if they want the material. We could burn a number of CD-Roms to facilitate dissemination if needed. The only conditions I'd suggest is that any published work include an acknowledgement and that the Committee be given a copy of any published analysis.

I'd be interested in your thoughts about how to deal with the issue. If the Committee were minded to release the applications we could start identifying some likely scholars and sound them out - possibly in Cardiff if not before.

Blair Stewart
Assistant Commissioner
Office of the Privacy Commissioner
PO Box 466, Auckland, New Zealand

tel +64-9 302 8654 fax +64-9 302 2305
website www.privacy.org.nz

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MEMORANDUM

TO : CREDENTIALS SUBGROUP
FROM : BLAIR STEWART
DATE : 22 May 2003
SUBJECT : SUGGESTED APPROACH TO VOTING RIGHTS QUESTIONS FOR INTERNATIONAL/SUPRA-NATIONAL DPAS

We now have applications for 4 data protection authorities (DPAs) within supra-national bodies (3 authorities within EU and 1 within Council of Europe). We may receive another EU application and one from Interpol. I think we should formulate an approach to recommending the conferring of voting rights.

Marie's assessment of the Council of Europe application was that there be "no voting rights" because "area of competence too narrow – activities not public". Initially I was attracted to the suggestion that we use the breadth of competence as a criterion for the question of whether voting rights be conferred. I said so in my assessment of the Council of Europe (CoE) and of the 3 joint supervisory authorities (JSAs).

Having further reflected on the question I am no longer confident that this is the right approach. By their very nature, DPAs within supra-national bodies are bound to have a narrower competence than a typical national DPA. Breadth of competence will be a difficult basis upon which to justify withholding voting rights. It may be contentious.

In this note, I suggest what I believe will be a workable approach. It could make our task on the question of voting rights reasonably simple. I have been much influenced by the strong line that the conference took to make sure that each country only has 1 vote and does not get multiple votes through a plethora of sub-national DPAs.

I therefore propose, consistent with the approach taken at country level, that:

1. Each supra-national body with an accredited DPA be entitled to a vote.
2. There be only 1 vote for any 1 supra-national body.
3. A supra-national body's vote be cast by the premier DPA in that body if there is one but otherwise collectively by the accredited authorities present.

Accordingly, if we recommend accreditation for, say, the Customs JSA, it will follow that the EU as a supra-national body is entitled to 1 vote notwithstanding that the Customs JSA is narrow in its competence.

On the second proposition, the EU must get only 1 vote notwithstanding that the 3 JSAs are likely to be accredited.

On the third proposition, clearly the Customs JSA cannot be seen as a premier DPA for the EU. If it were to be the only EU DPA accredited for the Sydney conference then it could exercise the vote alone. If the other 2 JSAs were also to be accredited,

then the 3 would collectively exercise the vote in the manner of sub-national DPAs where their national DPA is not represented. However, once the EC Data Protection Supervisor is appointed he or she would be the premier DPA for the EU. Whenever present the supervisor would exercise the vote, after consultation with the other EU JSAs.

I think that the approach is principled and will be easy to justify to the conference. It leaves relatively little discretion with the Credentials Committee but this, I think, is appropriate. It becomes controversial if, for example, the Committee recommends that the CoE Data Protection Commissioner not be entitled to a vote whereas the EC Data Protection Supervisor is.

If any members of the Credentials Committee have serious misgivings about, say, the breadth of competence of a particular DPA this issue should be addressed, I suggest, in terms of accreditation itself. This particularly goes for any misgivings we might have about, say, independence. I therefore return to Marie's queries about whether the CoE Data Protection Commissioner can make public statements. If this is a problem, perhaps we should withhold a positive recommendation until it is put right? This would be akin to the approach we took to Monaco. However, if we recommend accreditation, I think it will be difficult trying to explain the denial of a vote.

I welcome your thoughts on the questions.

Blair Stewart

From: Blair Stewart
Sent: Thursday, 19 June 2003 11:26 a.m.
To: Blair Stewart; Jonathan Bamford (E-mail); Marie Georges (E-mail)
Subject: Approach to voting issues - supra-national DPAs

I was thinking again about this issue and was wondering whether Marie's original suggested approach is perhaps the best way to go after all? In other words if a DPA only has a narrow field of competence, such as a particular law enforcement system, no vote is granted.

On this basis none of the 3 JSAs will get a vote. Nor will the EU get a vote until, in due course, the application of the EC DP Supervisor is considered.

I supported this approach in my own assessments of some of the authorities but came to question it when I started to wonder about decision on the CoE DP Commissioner. Marie has suggested that the CoE DPC competence is too narrow. I expect Marie is right but we need to be able to explain the basis upon which we distinguish the CoE from the EC. Is it merely that one has a few hundred employees and the other has thousands or is there more to it?

Sorry if I may sound a little indecisive on these issues but I think we need to test out some of these approaches to be sure we've got one that will be workable, able to be explained and supported, and accepted by the conference. Also bear in mind that I'm not as familiar with the European institutions as you each are. I'd be grateful to hear Jonathan's contribution to the discussion.

Blair Stewart
Assistant Commissioner
Office of the Privacy Commissioner
PO Box 466, Auckland, New Zealand
Home page: www.privacy.org.nz
tel +64-9 302 8654 fax +64-9 302 2305
case notes: www.worldlii.org/nz/cases/NZPrivCmr

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