

Economic Commission for Latin America and the Caribbean

**ECLAC SUBREGIONAL HEADQUARTERS
FOR THE CARIBBEAN**



Report of the expert group meeting on creating an enabling environment for e-government in the Caribbean: a review of data protection legislation for alignment with the General Data Protection Regulation



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Economic Commission for Latin America and the Caribbean
Subregional Headquarters for the Caribbean

Expert group meeting on creating an enabling environment
for e-government in the Caribbean: a review of data protection
legislation for alignment with the General Data Protection Regulation

Virtual meeting, 15 July 2020

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**REPORT OF THE EXPERT GROUP MEETING
ON CREATING AN ENABLING ENVIRONMENT FOR E-GOVERNMENT
IN THE CARIBBEAN: A REVIEW OF DATA PROTECTION
LEGISLATION FOR ALIGNMENT WITH THE GENERAL DATA
PROTECTION REGULATION**

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A. SUMMARY OF RECOMMENDATIONS

1. There is an urgent need for Caribbean countries to put in place modern data protection legislation that protects privacy rights and personal data, while creating an enabling environment for digital government and data sharing in the subregion.
2. Technological developments have exposed personal data to unprecedented threats, necessitating the development of enhanced frameworks for the protection of privacy. As a result of its extraterritorial scope and influence beyond European borders, the European Union's General Data Protection Regulation (GDPR) is expected to have a global impact and contribute to the harmonization of data protection legislation around the world. National data protection laws need not mirror each article of the GDPR but should aim to establish a comparable or essentially equivalent level of protection and the means for ensuring the effective application of the legislation.
3. Caribbean countries' data protection and sharing regimes are at varying stages of development, with 15 Caribbean countries and territories having data protection legislation in place and several having no relevant laws. All six laws reviewed in ECLAC's study "Creating an enabling environment for e-government in the Caribbean: a review of data protection legislation for alignment with the GDPR" include areas of substantial, partial and non-alignment with the GDPR. Some of the least aligned areas include territorial scope, consent requirements, data breach notifications, data protection impact assessments, prior consultation procedures, data protection officers, and cooperation and mutual assistance. Revision in areas of partial and non-alignment is recommended for consistency with modern data protection and sharing principles.
4. Implementing internationally aligned data protection legislation across the Caribbean will not only strengthen individual privacy rights but also help to facilitate data and trade flows between Caribbean countries and those outside the subregion. Meanwhile, there is also a need to facilitate better access to e-government in the Caribbean and to digitize government transactions with citizens' needs in mind. The urgency of developing secure tools to deliver digital services has been demonstrated by the COVID-19 pandemic. Modern data protection and sharing frameworks can support the multiple pathways of data flow required for e-government functionality, create incentives and gateways for data sharing, and build public trust in online services.
5. The components of a robust framework for processing personal data and enforcing privacy guarantees were also discussed by meeting participants. It was agreed that a competent supervisory authority is an essential feature of a modern data protection framework, but it must be adequately resourced and empowered to fulfill its functions independently. Guidance was also given on the extraterritorial and material scope of data protection legislation, how legislation can balance privacy rights with freedom of expression and press freedoms, and the age whereby children can give their consent to processing of their personal data under the GDPR.
6. Participants further agreed on the need for Caribbean supervisory authorities to cooperate and engage in dialogue on matters of data protection to contribute to the adoption of harmonized privacy protections in the subregion. Information was shared about international cooperation forums for data protection as well as projects of other regional organisations related to data protection and cybersecurity. It was agreed that, while Caribbean countries need to enact data protection laws suitable for their national contexts and supervisory arrangements, harmonized adoption of privacy protections would contribute to the cross-border enforcement of laws as well as data sharing between countries in the subregion.

B. ATTENDANCE AND ORGANIZATION OF WORK

1. Place and date

7. The Economic Commission for Latin America and the Caribbean (ECLAC) subregional headquarters for the Caribbean convened an expert group meeting to discuss the study entitled “Creating an enabling environment for e-government in the Caribbean: a review of data protection legislation for alignment with the GDPR”. This meeting took place virtually on 15 July 2020.

2. Attendance

8. The expert group meeting was attended by representatives of government ministries, departments and supervisory authorities responsible for data protection, information sharing and e-government from six Caribbean countries participating in the study, namely Antigua and Barbuda, the Bahamas, Barbados, Belize, Cayman Islands and Jamaica. Representatives of regional and international organizations with data protection, cybersecurity and e-government mandates also participated in the meeting, including the Caribbean Community Implementation Agency for Crime and Security (CARICOM IMPACS), the Caribbean Telecommunications Union (CTU), the European Commission, the Inter-American Development Bank (IDB), and the World Bank. Legal advisers and consultants from other Caribbean countries and a representative from the German Federal Commission for Data Protection and Freedom of Information also took part in the meeting.

3. Agenda

1. Welcome remarks and introduction
2. Overview and presentation of the study
3. Discussion on presentation and study
4. Closing remarks

C. SUMMARY OF PROCEEDINGS

1. Opening of meeting

9. The Acting Coordinator of the Caribbean Knowledge Management Centre (CKMC) introduced himself as the moderator of the meeting and, after some short remarks, handed over to the Director of ECLAC subregional headquarters for the Caribbean to open the meeting. The Director welcomed all participants virtually and stated that the meeting would provide an opportunity to discuss how legislation that facilitates data protection and sharing may be adopted or revised in Caribbean countries to promote the protection of privacy and personal data, while creating an enabling environment for digital government.

10. The Director informed participants that digital government presents untapped opportunities for improving public service delivery and governance outcomes in Caribbean Small Island Developing States (SIDS), and that the COVID-19 pandemic has demonstrated the urgent need to facilitate better access to e-government in the subregion and to digitize government services with citizen’s needs in mind.

11. She explained that technological developments can, however, expose personal data and the right to privacy to new threats. After a series of high-profile global data breaches affecting millions of users in

recent years, governments around the world are creating enhanced frameworks for the protection of personal data, including laws, regulations and policies to protect privacy rights. One of the latest innovations in data protection frameworks is the European Union’s General Data Protection Regulation (GDPR), which is gaining recognition as global best practice in the area of data protection.

12. ECLAC’s study, “Creating an enabling environment for e-government in the Caribbean: a review of data protection legislation for alignment with the GDPR”, undertakes a review of the data protection legislation of six Caribbean countries and territories, Antigua and Barbuda, the Bahamas, Barbados, Belize, Cayman Islands and Jamaica, in order to assess the extent to which they are aligned with international standards and best practice, including the GDPR.

13. The Director stated that the study aims to raise awareness on how implementing internationally aligned data protection and sharing legislation can both facilitate data and trade flows with entities outside the Caribbean and foster an enabling environment for data sharing and e-government within the subregion.

14. She encouraged the active participation, questions and comments of all present in the expert group meeting and thanked participants for this opportunity to work together to creating an enabling environment for e-government and the protection of personal data in the Caribbean.

2. Presentation of the study: “Creating an enabling environment for e-government in the Caribbean: a review of data protection legislation for alignment with the GDPR”

15. The Associate Programme Management Officer of the CKMC in ECLAC subregional headquarters for the Caribbean started by thanking all participants for their engagement with the study: “Creating an enabling environment for e-government in the Caribbean: a review of data protection legislation for alignment with the GDPR”. She noted that the purpose of the expert group meeting was not only to present the study’s draft findings but to ensure it is ready for publication and can serve its purpose of strengthening data protection frameworks in the Caribbean. As a result, she encouraged the questions and comments of all participants in the discussion and invited the submission of any detailed feedback on the individual country reviews by email after the meeting.

16. The Officer gave a brief overview of the draft study, beginning with the motivations for embarking on the research. She explained that digital government, or the government application of ICTs for delivering public services, is still in the early stages of development in many Caribbean countries but it presents vast opportunities for improving public service delivery and governance outcomes in the Caribbean. She noted that one of the critical enablers of digital government is a supportive environment, including resilient ICT infrastructure and modern frameworks for data protection and sharing. With this study, ECLAC aims to assist Caribbean countries to put in place legislation that facilitates data protection and sharing meanwhile promoting the aims of protecting privacy and personal data and creating an enabling environment for digital government.

17. The Officer indicated that putting in place modern data protection frameworks will not only create an enabling environment for digital government, but also strengthen individuals’ privacy rights and encourage a continuous flow of information to and from the Caribbean with significant economic value for countries in the subregion. Caribbean individuals, businesses and governments transfer massive amounts of personal data across borders each day, and the sharing of health data across the globe has been critical in the fight against the COVID-19 pandemic.

18. She further noted that the right to privacy and the protection of personal data have taken on greater significance in the digital age with technological developments increasing government surveillance capabilities and allowing private organizations to conduct targeted advertising and profiling. Examples

were given of data breaches made possible by new technologies including unlawful government surveillance in the context of the Snowden Revelations and data harvesting for the purposes of voter manipulation in a Caribbean country.

19. Next, the Officer outlined the key features of the GDPR, including its extraterritorial and material scope, data protection principles, conditions for lawful processing, consent requirements, individual rights, data security, financial penalties, cooperation and mutual assistance provisions, and restrictions on international transfers. She explained that the aim of the study is to assist Caribbean countries to put in place data protection laws that provide a level of protection for personal data which is comparable or ‘essentially equivalent’ to that found in the GDPR and could therefore facilitate transfers of personal data subject to an adequacy decision from the European Commission or ‘appropriate safeguards’ as set out in the GDPR.

20. She went on to add that Caribbean countries’ data protection and sharing regimes are at varying stages of development, with several countries having no relevant laws in place. Many other countries in the subregion have outdated laws that require revision for consistency with modern data protection and sharing principles.

21. Following this initial overview, the Associate Programme Management Officer presented the approach to and provisional findings of the study. She referred participants to Annex 1 of the study for the matrix of indicators used to assess the alignment of the laws under review with each area of the GDPR. She noted that full alignment with the GDPR is not necessary for each area of a national law and that substantial or partial alignment will suffice where it provides an equivalent level of protection for personal data to that in the GDPR. Furthermore, she clarified that the study also includes a focus on data sharing best practice given its importance to Caribbean countries, but in some cases the recommended best practice may exceed the requirements of the GDPR.

22. Based on the study’s provisional findings, the Officer stated that all six laws under review had at least one area of substantial alignment with the GDPR, but no laws were fully aligned. Overall, the laws were 23 per cent not aligned, 44 per cent partially aligned, 25 per cent substantially aligned and 8 per cent fully aligned with the GDPR. The most aligned areas of the laws were then discussed, including the data protection principles, material scope and definitions, conditions for lawful processing, and supervision requirements. Least aligned areas of the GDPR included territorial scope, consent, breach notifications, data protection impact assessments, prior consultation procedures, data protection officers, cooperation and mutual assistance. Each area of alignment was set out in some depth, with the Officer noting that the most areas of non-alignment were found in laws that pre-dated the GDPR by one or two decades.

23. Next, the Officer gave a series of general recommendations for all Caribbean countries wishing to strengthen their data frameworks as set out in the draft study. These included aligning national data protection legislation with the GDPR, facilitating public and private sector information sharing, ensuring data protection legislation adequately balances the right to privacy with press freedoms and freedom of expression, enabling effective domestic and cross-border enforcement of Caribbean data protection laws, and introducing independent oversight and safeguards to limit exercise of broad exemptions and exceptions to data protections. She discussed the main ways that Caribbean countries can facilitate GDPR-compliant data flows with European Union (EU) Member States and noted that the GDPR is expected to contribute to the harmonization of data protection legislation around the world.

3. Discussion on presentation and study

24. Representatives from the countries whose data protection laws were reviewed in the study, including Barbados, the Bahamas, Belize, and Jamaica, began with questions on aspects of their respective

reviews as well as comments and questions related to the GDPR. ECLAC's Associate Programme Management Officer answered questions relating specifically to the reviews, while the Senior Data Protection Officer of the German Federal Commissioner for Data Protection and Freedom of Information, the representative of the Directorate-General for Justice and Consumers of the European Commission, and other stakeholders inputted on questions and comments relating to the GDPR. In some cases, ECLAC's Officer asked participants to send their specific questions via email to be answered in more detail following the meeting.

25. The Executive Director of Belize's Economic Development Council asked for recommendations on setting up an appropriate supervisory authority for data protection matters, including the different forms an authority could take. ECLAC's Officer noted that a competent independent supervisory authority is an essential component of a strong data protection framework but could take a variety of forms provided it is independent. In the Caribbean, a variety of models are used from an Ombudsman office in the Cayman Islands to a Data Protection Commissioner in the Bahamas. The Senior Data Protection Officer from Germany noted that independence demands that a supervisory authority can fulfil its mandate without interference from other government agencies. The head of the authority should not receive instructions or face disadvantages when carrying out his or her functions, and the body should be adequately staffed and resourced.

26. The Parliamentary Counsel of the Chief Parliamentary Counsel's Office in Barbados, the Chief Technical Director of Jamaica's Ministry of Science, Energy and Technology, and the Executive Director of Belize's Economic Development Council asked for guidance on the age whereby children can give consent to processing of their personal data under the GDPR for translation to their national contexts. The legal consultant from Anguilla noted that the GDPR provides that children aged 13 or over can give their own consent and, for children under this age, the data controller needs to obtain consent from whoever holds parental responsibility for the child. The European Commission representative noted that the GDPR offers EU Member States some flexibility to set the age of consent between the ages of 13 and 16, since countries across Europe tend to have different traditions determining when minors can make their own decisions. Counsel from the World Bank added that the default age is usually 16.

27. The Chief Technical Director of Jamaica's Ministry of Science, Energy and Technology enquired about how the GDPR balances press freedoms and the rights to privacy and freedom of expression in light of the registration requirement for data controllers, including journalists, in Jamaica's Data Protection Act 2020. ECLAC's Officer noted that the GDPR requires Member States to reconcile the right to the protection of personal data with the rights to freedom of expression and information through a journalistic exemption. Member States have some flexibility in the formulation of their legislative provisions but risk legal challenge if they do not strike an adequate balance between the rights. She added that secrecy of journalistic sources is an important press freedom, and that a requirement on journalists to register particulars with an Information Commissioner could be an unjustifiable limitation on that right.

28. Furthermore, Trinidad and Tobago's Director of Legal Services in the Ministry of the Attorney General and Legal Affairs noted that journalistic exemptions can have broad application since the term 'journalism' is usually not defined and therefore will include non-traditional media sources, such as social media bloggers. She asked whether it was recommended for data controllers to keep a record of data processing activities or submit this information to a central register. The ECLAC Officer noted that the GDPR requires data controllers to maintain a record of processing activities under its responsibility but that data controllers are no longer required to submit these particulars to a central register. Counsel at the World Bank added that this requirement was removed from the GDPR as it was felt that it did not improve data protection. However, personal data breaches must be both recorded and reported to the national supervisory authority under the GDPR.

29. The Data Protection Commissioner for the Bahamas asked about the core requirements for qualifying for an adequacy decision from the European Commission as well as the implications of blockchain technology for the GDPR. The European Commission representative noted that national supervisory authorities are beginning to produce guidance on blockchain to help data controllers reconcile tensions between core data protection principles and this new technology. The European Commission is also working on guidance in this area. He stated that the right to privacy is not absolute and can be limited to balance other interests provided any limitation respects the essence of the individual's fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society.

30. The European Commission representative continued by introducing the work of the Directorate-General for Justice and Consumers, explaining that it is tasked with the international aspects of data protection and facilitating cross-border data flows to third countries. He outlined the main modes of facilitating data flows outside EU Member States, noting that contractual clauses are the most common method. He also gave an overview of the process and substantive requirements for applying to the European Commission for an 'adequacy decision'. This is a declaratory decision of the European Commission based on a detailed assessment of the safeguards available in the legal regime of a third country for data protection and it allows personal data to flow freely between the EU and any country who receives such a decision.

31. The European Data Protection Board (EDPB) has adopted a document called the 'Adequacy Referential', which sets out the core elements of the GDPR that will be taken into account in assessing whether a third country offers a comparable level of data protection to EU law. The procedure starts with a request from an interested third country and, after lengthy exchanges with the country, a decision is drafted which then goes to the EDPB for consideration and adoption. It is a dynamic process as the European Commission can work with the country to address gaps and put in place stronger safeguards for transfers.

32. The Trade Economist in Belize asked about the material scope of modern data protection frameworks. In particular, she was interested to know whether data protection principles would apply to data shared through an online platform for businesses and government agencies responsible for trade, known as the Single Electronic Window, and under Belize's legislative framework for electronic transfers. ECLAC's officer noted that modern data protection frameworks apply to all transfers of personal data, whether by electronic means or otherwise. Therefore, any personal data shared through the Single Electronic Window or under the electronic transfers framework would fall within the scope of data protection legislation unless a relevant exemption or exception was included in the law. This would not necessarily prevent the transfers in question but would require the identification of lawful grounds for data processing as well as 'appropriate technical and organizational measures' to ensure data security. The legal consultant from Anguilla noted that data sharing agreements could be entered into pursuant to the Single Electronic Window to facilitate transfers consistent with the data protection framework.

33. The Legal Consultant from the Office of the Prime Minister in the Bahamas expressed her gratitude and appreciation for the study. She asked if the study will include guidance for Caribbean countries on policy and regulatory frameworks to complement data protection laws, especially on what is mandatory versus optional under the GDPR at the policy level. ECLAC's officer noted that, due to the length of the study, it was not possible to include comprehensive guidance on policy and regulatory frameworks to complement GDPR-aligned legislation but that some guidance would be included on data sharing best practice falling outside the scope of the GDPR, including data sharing codes and data sharing agreements. Furthermore, guidance could be provided separately for the Bahamas on request to facilitate the development of appropriate regulatory and policy tools.

34. Counsel at the World Bank noted that the United States of America does not have a federal data protection law, and instead individual states are developing their own data protection frameworks. He asked if the GDPR conflicts with any state laws in the United States of America, noting that this country is a

major trading partner for Caribbean partners. The ECLAC officer noted that California's Consumer Privacy Act (CCPA) is becoming the new standard for doing business in the United States of America, with other states adopting similar legislation. Commentators are noting that the GDPR and CCPA are for the most part aligned, therefore compliance with one will usually entail compliance with the other.

35. The ICT Specialist from the Caribbean Telecommunications Union enquired about next steps for bringing Caribbean countries into closer alignment with the GDPR, mentioning the possibility of a regional roadmap for harmonization of data protection laws in the region. The World Bank's Counsel said he would also be interested to know if this ECLAC study links to current or future programmes or projects in the region, or globally. The ECLAC officer noted that this study is part of an ongoing effort by several regional organizations to assist countries with strengthening their data protection frameworks. While countries need to enact data protection laws suitable for their own national contexts and supervisory arrangements, harmonized privacy protections could contribute to regional economic growth and data sharing.

36. The Senior Specialist from the Inter-American Development Bank (IDB) informed the meeting that the IDB is about to embark on a regional project comparing national data protection standards with the Standards for Data Protection for the Ibero-American States. The IDB will coordinate with ECLAC to ensure that the two projects complement and build on one another. He also noted that various groups are emerging in the region dealing with related topics, including open data, access to information, data protection, cybersecurity and data sharing. He encouraged stakeholders working on these topics to coordinate to begin a strategic cross-cutting conversation and avoid duplication of efforts.

37. Furthermore, CARICOM IMPACS has recently published a Harmonized Framework Document dealing with Caribbean legislation in the areas of cybercrime and cybersecurity. The Programme Officer from CARICOM IMPACS noted that this document examined data protection and other legislation and policy relevant to cybersecurity in CARICOM Member States. The development of the framework involved numerous consultations with national stakeholders and a regional validation workshop and has subsequently been shared with CARICOM States. ECLAC's study builds on this framework by providing a more detailed review of selected Caribbean countries' data protection frameworks.

38. Active engagement of Caribbean supervisory authorities in data protection cooperation forums can contribute to the adoption of harmonized privacy protections in the subregion. Meeting participants discussed the various cooperation forums available for Caribbean countries to engage in dialogue on data protection matters. The Senior Data Protection Officer from Germany noted that the next meeting of the Global Privacy Assembly, formerly called the International Conference of Privacy and Data Protection Commissioners, will take place virtually in October 2020. Information was also shared about the Global Privacy Enforcement Network, which seeks to encourage cross-border cooperation in the enforcement of laws protecting privacy, and the Common Thread Network, a forum for data protection and privacy authorities of Commonwealth countries. ECLAC's Officer agreed to share CARICOM's Harmonized Framework Document on Cybercrime in addition to other links and information discussed following the meeting.

4. Closing remarks

39. ECLAC's Associate Programme Management Officer gave a vote of thanks, expressing appreciation to the participants for their substantial contributions to the expert group meeting. She emphasised that feedback, suggestions and recommendations advanced during the meeting and sent via email will be meaningfully incorporated in the revised study. She ended by urging Caribbean countries to grasp the opportunity to implement the study's recommendations and encouraged all stakeholders to continue to work together to strengthen data protection frameworks in the subregion.

Annex I**List of participants****Representatives of government ministries, departments and supervisory authorities**

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Annex II

Agenda

0930-0940

1. Welcome remarks and introduction

Alexander Voccia, Moderator, Chief, Caribbean Knowledge Management Centre (CKMC), ECLAC subregional headquarters for the Caribbean

Diane Quarless, Director, ECLAC subregional headquarters for the Caribbean

0940 – 1015

2. Overview and presentation of the study

Amelia Bleeker, Associate Programme Management Officer, CKMC

1015-1145

3. Discussion on presentation and study

Representatives of government ministries, departments and supervisory authorities responsible for data protection, information sharing and e-government from participating Caribbean countries, Antigua and Barbuda, The Bahamas, Barbados, Belize, Cayman Islands and Jamaica

Representatives of Caribbean and other regional organisations with data protection and e-government mandates

Legal professionals with regional data protection and e-government expertise

1145-1200

4. Closure of the meeting

Amelia Bleeker, Associate Programme Management Officer, CKMC



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