

Data Protection Update May 2004

By Ibrahim Hasan

Act Now Training

Hoping for developments in the area of data protection, is like waiting for a number ten bus. For ages we wait, and then a number of them come along at the same time.

The case of *Durant v Financial Services Authority* (2003) EWCA Civ 1746 has turned the world of data protection upside down. No longer can we say that a data subject can get access to all information held about him or her. The case redefines "personal data" so that it has to fulfil three conditions - be focused on the individual, be biographical in a significant sense and affect the individual's privacy. The principles of the *Durant* case have been applied by the High Court in *Johnson v Medical Defence Union Ltd* [2004] EWHC 347. The Information Commissioner's office has also produced a detailed guidance note (www.informationcommissioner.gov.uk). It gives examples of what it now believes, for sure, to be personal data ; namely salary information, medical history, financial information and spending preferences.

I believe that the Information Commissioner is now pushing a definition of personal data which is far too narrow and risks falling foul of the European Data Protection Directive. The Commissioner's definition is more akin to the definition of "sensitive personal data" under the Data Protection Act 1998 (DPA). Surely this is not correct. In fact one solicitors firm, specialising in data protection law, is advising the public sector not to give too much weight to *Durant* (or even the Commissioner's guidance) and to stick to the European Directive definition. I don' t know if this is correct but there is an Austrian case which has ruled that the Directive is directly applicable in national law and the Department of Constitutional Affairs is taking legal advice on this whole issue. Watch this space!

Durant might initially seem good news for all data controllers. However local authorities should not book any parties. If personal data is defined narrowly, all it means is that the information previously accessible under DPA will become non personal data and so be accessible under the Freedom of Information Act 2000 (FOI) from 1st January 2005. The private sector can bring out the confetti though, because most of it will not directly be subject to the FOI regime.

Another point in *Durant* was about paper files. It restates the law that, to be covered under the DPA, paper systems containing personal information have to be highly structured. Again this will have limited effect on councils because, when FOI comes into force, the definition of data under the DPA will change to include unstructured paper records.

Durant has increased work for the Information Commissioner. His office is re-examining all its guidance for “The Durant Effect”. A recent change to their position is with regard to CCTV. To be considered personal data a video of an individual has to clearly identify them; long shots of bustling city streets with pedestrians are clearly not in this category. It also has to impact on the privacy of that individual and merely walking up and down a street doesn’t usually have that effect. To identify an individual and record something significant, the system has to zoom in and follow that person for some time. Most small shops or static cameras don’t have this capability. Therefore DPA does not apply. The Commissioner calls this “The Small Business Exception”. However I would say that ninety per cent of CCTV systems may fall into this category. This is not to say that local authorities can do what they like with CCTV. The Human Rights Act and Article 8 of the European Convention on Human Rights directly applies to them. This means that privacy should be respected and to do this it does no harm to follow DPA principles such as having signs etc.

Many people are wary when posting information of a personal nature on the Internet especially staff information. This is because the Eighth DPA Principle states that information can be transferred outside Europe only if the data controller can fulfil a condition set out in Schedule 4. The web is a worldwide phenomenon. Is it therefore transferring outside Europe? A recent European case (Lindqvist (ECJ 6 Nov 2003) states that if you upload personal data on to a web page, and your server is based in Europe, it is not a transfer outside Europe.

Of course no article on data protection can be complete without mentioning the Bichard Inquiry. The final report is due in May. The Information Commissioner has stated that he will produce clearer guidance on data sharing. There may even be changes in the Act. We wait and see. Just as I decide to end this piece knowing that I have exceeded my editors deadline, I here that Naomi Campbell has won her appeal in the House of Lords. I covered this case in 2002 when it was decided in the High Court. It was about the publication of pictures of the supermodel coming out of a Narcotics Anonymous meeting and her claim for breach of privacy and data protection. The High Court trial judge, Mr Justice Morland, stated that even celebrities are 'entitled to some space of privacy' With regard to the Data Protection Act, he said that the information contained in the Mirror article as to the nature of, and details of, the therapy that Campbell was receiving, including the photographs with captions, was clearly related to her physical or mental health or condition and was therefore “sensitive personal data” as defined by the Act. He ruled that The Mirror did not have one of the legitimising conditions in Schedule 3 of the Act to enable it to lawfully publish such material. The Law Lords have now reinstated the original High Court decision.

This case comes as a salutary reminder to everyone that they must be aware of privacy issues when taking and using photographs of people. Steps must be taken to obtain consent, especially where individuals are photographed in circumstances which may put them in a bad light either through the

photograph itself or the use to which it is put. For example, a simple photograph of people walking in a high street may be fine without consent but a shot of an individual walking into a sex shop may not.

The law of data protection is finally hitting the headlines. There was a time when very few people had heard of it. There is a greater willingness amongst celebrities as well as the public to use it to enforce their privacy rights . All of us need to keep a breast of developments in this area. After years in the wilderness data protection seems to be coming home.

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