

The Information Commissioner's Employment Practices Code

What is the Code for?

The Employment Practices Code is intended to provide guidance for all employers in applying the Data Protection principles to human resources practice. The purpose of the Code is to provide best practice in dealing with Data Protection issues.

In summer 2005, the Information Commissioner published the final version of his Employment Practices Code in one document. The first five years of the new millennium have been punctuated by the publication of the Code's various guises, sections and drafts. The number of incarnations suggests that even the Commissioner has found it difficult to apply Data Protection rules when crossing the minefield of the workplace.

The Code weighs in at 90 pages, and is accompanied by Supplementary Guidance which adds a further 85 pages. This short article is intended to give a brief overview of the main topics and themes that run through the Code.

Who are the "Employees"?

It is important to remember that the definition of employees does not apply to the standard group of staff who clock in 9 -5. Data Protection applies to current, former, casual, temporary, permanent and voluntary staff. It also applies to secondees and work experience placements. The same rules also cover to both current and former applicants. In other words, data about anyone who works, has worked, or has tried to work for you, and whose data you have kept should be treated in the same way, and with the same care.

The code is divided into four sections, with the issues becoming increasingly complex even as the sections become shorter. The sections are: recruitment and selection, management of day-to-day records, monitoring of employees and worker's health records. The main aim is to draw practical parallels between the broad, abstract Data Protection principles, and the all-too concrete world of employer / employee relations. Although some of the Code's recommendations betray a rather inflexible, impractical approach that many organisations may balk at, each section of the Code contains enough ideas to force any employer to take a long hard look at their approach to Data Protection.

Recruitment and Selection

The first section takes you from the initial stage of placing an advert and developing an application form. A consistent theme is to relate recruitment back to fair processing and the first principle. Whether it is the way in which an advert is drafted or the manner in which the facts on an applicant's form are verified, the Code places strong emphasis on being transparent. For example, it should always be clear who the employer is, and if a recruitment agency is being used, the organisation should not receive an applicant's data unless the individual has been informed who their prospective employer is.

Another common thread is necessity – Section 1 puts emphasis on ensuring that application forms and other aspects of the recruitment process do not ask questions that only the successful applicant needs to answer. One aspect of the Code that caused some concern – despite the fact that it is a very straightforward interpretation of the principles – is that notes made during an interview which are retained either electronically or in a structured filing system are likely to contain personal data – in other words, they will be accessible to the applicant under subject access. It is, of course, worth remembering that the successful applicant is unlikely to care what was said about him / her. Comments made in interview notes therefore need to be accurate and objective.

Other issues in Section 1 include proper verification of information and criminal records checks, pre-employment vetting, what information can be retained from application forms.

Managing information

Some elements of Section Two may come as a surprise to many employers, although they are based on sound interpretations of the DPA. In particular, recommendations that staff should be shown their personnel file every year, or at least be told very clearly how they should apply for their information might be difficult to swallow. Equally tough is the notion that employers have to maintain a list of staff that opt-out of receiving information included on payslips, or in the envelopes that contain them, because such information is classed as marketing.

When managing files day-to-day, the DP principles do not go away – employees have a right of access to electronic information and structured manual files, and their data must be accurate, and up-to-date. Above all, employers have to walk a virtual tightrope, keeping enough information but not too much, retaining information for long enough to deal with all eventualities without hoarding it for so long they breach principle 5.

Perhaps the hardest recommendation in the Code as a whole comes in the security section, where the Commissioner recommends that organisations use BS7799 as their security standard. The Code advises organisations to conduct a full security audit, ensuring that current practice meets the British Standard. While no-one could argue with the rigour and value of an attempt to meet the requirements of BS7799, it is a huge undertaking, and the Code's authors do not seem to acknowledge the significant, long-term commitment that BS7799 compliance requires.

Other, more immediately practical advice includes an examination of whether HR offices are secure enough, whether storage provision allows files to be locked away. The Code mirrors this with attention to electronic documents, requiring access to electronic data to be protected and covered by audit trails.

The Code rather pointedly turns the spotlight on HR staff, including recommendations that they are properly qualified, and have confidentiality requirements built into their employment contracts. He also recommends that HR staff in the importance of Data Protection.

Other crucial issues highlighted in Section 2 include the rules covering access to references (the Commissioner has since returned to the subject with a good practice note), the handling

of sickness and absence information (with the emphasis placed firmly on the latter and not the former), outsourcing and the need to ensure that equal opportunities monitoring complies with the sensitive data conditions.

Monitoring your staff

The third section of the Code covers one of the most complicated and contentious of issues in employment: the extent to which staff monitoring complies with Data Protection. The section begins with the helpful reminder that monitoring creates new data in itself – thus increasing the amount of data an organisation is obliged to protect, justify and provide access to.

The Commissioner's view is clearly that the more monitoring can be automated, keeping the amount of human intervention to a necessary minimum, the more likely it is to stay within the boundaries of acceptable practice.

The most substantive part of the section is the suggested 'Impact Assessment', which the Commissioner believes should be carried out whenever monitoring is contemplated. The assessment is based on a series of questions –

- What is the purpose of monitoring?
- What is the likely adverse impact on staff (and others)?
- Are there any alternatives which will achieve the same objective?
- What obligations will monitoring create?
- On balance, is monitoring justified?

The Section emphasizes the Commissioner's view that monitoring is "usually intrusive", despite an acknowledgement that it is a legitimate part of the relationship between employer and employee. The section also asserts that workers have a legitimate expectation that their private lives will be private, and that they are entitled to a degree of privacy in the workplace.

Particularly important to the Commissioner's approach is the need to ensure that staff understand what personal use they can make of phone, email, internet and fax. If they are to be monitored to assess their adherence to any kind of acceptable use policy, staff must first understand what that policy.

Section 3 requires that the use of CCTV should adhere to the CCTV Code of Practice (which has been watered down since the Durant case), and also contains advice about monitoring vehicles, including the logical but slightly impractical suggestion that it should be possible for a staff member to switch off any in-vehicle monitoring by the use of a "privacy button" if they use the vehicle for private use.

Information about workers' health

The final section of the Code is the shortest, and in some ways the most unsatisfying. Page 80 of the Employment Code states that it is inherently "intrusive" to hold information about staff's health, while page 24 of the Supplementary Guidance describes the maintenance of health and sickness records as "clearly necessary".

Section 4 is the easiest to summarise. Based on his view that the processing of health data about staff is at least intrusive if not highly intrusive, the Commissioner's advice is to ensure that every use of health or sickness information should meet a sensitive data condition. Further, he recommends the use of a similar impact assessment as described for staff monitoring.

There is an important emphasis on the need for medical professionals to make judgements about workers' health rather than managers, and a general expectation that all information about workers' health will be kept secure and available only to those who need access. Section 4 also places significant parameters around the collection of information in medical tests.

Conclusion

The best parts of the Code represent a common-sense application of the Data Protection principles to the workplace. It does provide a set of rigorous suggestions for HR staff, although some of the contents veer away from practicality in favour of a rigid fidelity to Data Protection rules. It would be very interesting to see whether the Commissioner's own Personnel Department has been able to fully implement the Code of Practice. Nevertheless, even where an organisation finds some of the content unrealistic, it will force them to think very seriously about how they operate DP in their workplace.