

A Data Protection newsletter for the public sector

Welcome to our 4th newsletter on data protection and privacy issues in the public sector. Circulation now over 350. If you received this and don't want it email ActNow and we'll remove you from our mailing list. Please check the disclaimer, virus warning and copyright notice at the end of this newsletter.

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MP DEMANDS TO SEE HIS FILES

The Liberal Democrats are putting the UK government's data protection policy to the test

Treasury officials will have to trawl through thousands of electronic documents in response to a request by Liberal Democrat economics spokesperson Matthew Taylor for information that the department holds on him. The MP is using the tactic to obtain more information from the department than he usually receives in reply to questions in Parliament.

The 1998 Data Protection Act requires the Treasury to hand over to Taylor all files it holds on him (apart from those exempted for reasons such as national security). These presumably include early drafts of replies to his Parliamentary questions.

In January 2001, a television comedian, Mark Thomas, used the act to compel government departments to hand over documents about his investigations into arms exports.

Taylor asked the department for all emails and electronic documents referring to him after becoming frustrated with "not being able to get a straight answer to a question.

"We thought it would be interesting to see the degree to which the civil service and government departments are saying things they are not supposed to be saying," the Financial Times of 3 September 2001 quotes him saying.

The Treasury said that is complying with the request. "Every team has been asked to check their records. It will cover pretty much all staff but should not take too long as it's possible to do computer searches," a Treasury spokesperson said on 3 September 2001. "In accordance with the legislation, we will provide all the information requested as early as practicable." The department has six weeks from the end of July 2001, the date the material was requested, to pass Taylor the material.

You have to ask yourself the question - If a national elected member can do it how long before a local elected member will do it...

MANUAL RECORDS IN 8 WEEKS?

24th October 2001 is D Day for Manual records. The majority of paper files containing personal data will have to comply with the 1998 Act. There is a very limited exemption for files which were created after 24th October 1998. However this only gives exemptions to part of the Act and is really not worth bothering with. Are you ready for subject access requests to paper files?

NOTIFICATION IN 8 WEEKS?

Transition is nearing its end. By 24th October 2001 anyone processing data will be required to have in place a notification describing their processing. Or will they? The Freedom of Information Act when it arrived in November last year amended the Data Protection Act to permit those who held registrations which ran past the end of the transitional relief to continue holding them until they expire and put back the deadline for taking out a notification. If you were lucky with your timing you may have up to 2 years more before you need to take out a notification. It is a victory for common sense as you can imagine the scenes on Wednesday 24th October at the Office of the Information Commissioner as everyone in the UK decides to take out a notification at the end of the transitional relief. Check your registrations to see when they expire. You may find you have some breathing space.

DISCLOSURE OF PATIENT RECORDS

A HEALTH AUTHORITY v X & ORS (2001) : This case sets out guidelines for the disclosure of medical records from one public body to another. A Health Authority had applied to the High Court for disclosure of medical records by a Dr X and his partners in an NHS general practice, because of matters which had emerged in the course of care proceedings in respect of patients of that practice.

The Health Authority wished to investigate the extent of compliance by Dr X and his partners with their terms of service and sought disclosure of two categories of documents on grounds of public interest :

- (i) List A consisted of copies of certain documents that were either produced to the court or were generated by the care proceedings and
- (ii) List B consisted of the records of 17 named patients or former patients of the practice

Dr X and his partners sought the court's guidance, having obtained the consent of all the patients, save two who did not consent.

The Court's reasoning was as follows :

- (1) Patient records were confidential between a doctor and his patients, and were equally confidential between the patients and the health authority. That confidentiality was emphasised by the guarantee of respect for a patient's private and family life in Article 8 of the ECHR.
- (2) In order to compel the disclosure of List A, there had to be a compelling public interest. The serious matters that the Health Authority wished to investigate satisfied the court that disclosure of the List A documents was necessary within the meaning of Article 8(2). This disclosure, which interfered with a patient's rights to privacy could only be justified if there were effective and adequate safeguards against abuse. The normal safeguards would depend on the particular circumstances of the case, but would usually require:-
 - (i) Anonymity for the patient
 - (ii) The maintenance of the confidentiality of the documents themselves and
 - (iii) The minimum public disclosure of any information in the documents.
- (3) There is no principle that any regulatory body can obtain a mandatory court order for the disclosure of documents to carry out its public or regulatory functions. The terms and conditions for NHS doctors does not allow Health Authorities the unqualified right to demand confidential medical records, although it may have disclosure of medical records for administrative purposes.
- (4) Regarding the List B documents (which had not been produced in the care proceedings) the only course

available was to issue a subpoena. The Health Authority would only succeed in an application for List B type documents in the following circumstances:

- (i) Where the documents are bona fide and reasonably required for one of the Health Authority's functions under the 1977 Act;
 - (ii) In cases where the documents are to be used for purposes other than in the patient's interests, for example, as in this case, for disciplinary or regulatory purposes, there must be a compelling public interest in their disclosure satisfying the criteria of necessity and proportionality.
 - (iii) Where there are efficient and adequate safeguards against abuse.
- (5) Given the nature of the Health Authority investigation, there was a compelling public interest requiring disclosure of the List B documents

The disclosure of patient records to a Health Authority requires justification to avoid a breach of Article 8 because it interferes with each patient's right to respect for private and family life.

List A documents were to be disclosed on the express conditions that the documents remained confidential and subject to effective and adequate safeguards against abuse. This also applied to List B documents with the additional safeguard of an express condition that they would remain confidential and that every public body was subject to the obligation to take effective and adequate safeguards against abuse.

Finally, the requirement to justify an interference with a patient's rights under Article 8 of the Convention arises not only when that patient's records passed from his doctor to a public authority but also every time such records transferred from one public authority to another. It is the duty of every public body, including the court, to ensure that that confidentiality is preserved and that there are effective and adequate safeguards against abuse before authorising the transfer of medical records from a doctor to a public body or from one public body to another.

PRIVACY & THE MAN ON THE CLAPHAM OMNIBUS

Readers will know that there is now a strong link between data protection and privacy under the Human Rights Act 1998. In the last issue we discussed the ground breaking case of Michael Douglas and Catherine Zeta Jones in which for the first time a UK court recognised that an individual had a right to privacy which it would protect. Since then a whole host of celebrities have tried to use this right in the courts:

David and Victoria Beckham won a continuation of an injunction against MGN Ltd, gained on a Saturday to prevent the publication of pictures of their new house taken without their permission in the Sunday People. Lawyers acting for the England football coach, Sven-Goran Eriksson, have written to Hello asking for damages, claiming his privacy was invaded by a magazine feature about his new home. The actor, Amanda Holden, recently brought a suit against the Daily Star after it published revealing pictures of her on holiday with her husband, Les Dennis. Paul McCartney's fiancée Heather Mills was refused an injunction restraining "The Sun" newspaper from printing any material that might identify a residential property that she was intending to buy in Hove.

But it's not just celebrities who have a right of privacy. Councils in particular should note a recent case declared admissible by the European Court which has great implications for CCTV and the rights of the ordinary man in the streets: *Peck v United Kingdom*, (May 15, 2001)

Geoff Peck felt so depressed that he took a kitchen knife to the town centre of Brentwood late at night and tried to kill himself by cutting his wrists. He was picked up on the council's CCTV system. The police were called, Peck given medical assistance and taken home. Without his consent, the council released his images to the media. He appeared in the local press, then Anglia Television and then on Crime Beat, a BBC "infotainment" programme.

Peck successfully complained to the Broadcasting Standards Commission and the Independent Television Commission of an unwarranted infringement of privacy.

Did Geoff Peck have any remedy against Brentwood Council, which released the images in the first place? The High Court (pre-Human Rights Act) said no, and Mr Justice Harrison found that distributing the images

to the media was incidental to statutory provisions allowing councils to set up CCTV systems for crime prevention. The case, to be ruled on by the European Court of Human Rights, raises issues such as whether Peck's right to respect for his private life was engaged by being filmed in public; the legality of any interference with his private life and whether it could be justified.

It is welcome that the extent of personal privacy is being tested here not by a celebrity but by "the man in the street". But where will it leave council CCTV systems and disclosure of images?

ADOPTION RECORDS AND DISCLOSURE

You may remember the case of *Gaskin v United Kingdom* concerning the right of a child taken into care to know about its past family history. Here is a case which involves the right of an adopted child.

LINDA GUNN-RUSSO V (1) NUGENT CARE SOCIETY (2) SECRETARY OF STATE FOR HEALTH (2001)

Linda Gunn-Russo successfully challenged a decision by the Nugent Care Society to deny her access to confidential information about her adoption 50 years ago.

The High Court ruled that adoption agencies should operate a "widespread discretion" when providing information to adopted people and ordered the Society to reconsider the case as it had not lawfully used the "wide discretion" it had under regulations to disclose information and had applied its policy too rigidly.

Another important case in this area is *Re T Child* (May 2001) which concerned the right of the child to have the opportunity to know his true paternity outweighed the possible disruption to his stable family life

DATAEDGE

Are you still struggling with your policies and procedures to comply with the Act? Help is available in the form of the DataEdge compliance tool kit. It has been produced by Hammond Suddards Edge a firm of solicitors with offices throughout the country ([website](#)). The kits are ideal for any organisation which wants a ready resource upon which to base a data protection compliance programme. Each kit contains very useful material such as a data protection policy, data processor agreement, security checklists and employment contract clauses. They are available for sale at the reduced rate for local authorities of £500 (no vat). The normal price is £750. Anyone interested should contact Hammond Suddards Edge on 0121 2002001 or email [Caroline Egan](#)

STANDARD CLAUSES FOR DATA TRANSFER

The European Commission has adopted a decision setting out standard contractual clauses ensuring adequate safeguards for personal data transferred from the EU to countries outside the Union. The decision obliges Member States to recognise that companies or organisations using such standard clauses in contracts concerning personal data transfers to countries outside the EU are offering "adequate protection" to the data. Further information can be found [here](#)

FREEDOM OF INFORMATION

This is now the responsibility of the Lord Chancellor's department after the cabinet reshuffle. The Campaign for Freedom of Information has produced a version of the full text of the UK Freedom of Information Act 2000 which can be downloaded in a single Acrobat PDF or Rich Text Format file. This may be more convenient to use than the version on the Stationery Office website, which requires readers to view more than 30 separate web pages.

The Act can be downloaded from: <http://www.cfoi.org.uk/foiact2000.html>

The Office of the information Commissioner has published a document for consultation about the Publication schemes that every public body will be required to produce. You can download it from www.dataprotection.gov.uk. The LGA issued a circular recently 348/2001 which also asked for comments on the publication scheme. Time is short – 7th September for the LGA but 21st for the OIC. Your chance to influence the FOI regime. – Take it!

BRISTOL UNIVERSITY AND THE SECURITY PRINCIPLE

Recent features (Newsnight Friday 31st August) have highlighted a potential breach of the Data Protection Act by Bristol University. They had material about paedophiles and their victims on a PC which they were using for research. When they disposed of this PC by selling it on to an individual they apparently did not consider that they should delete the personal data and the new owner found all the (highly sensitive) personal data on his new purchase. Simon Davies and Assistant Information Commissioner David Smith were interviewed on the programme and we suspect we have not heard the last of this, Watch the media but at the same time ask yourself if your organisation has a policy about removing data from PCs you donate or re-sell. This may not be an isolated incident.

IRELAND'S FIRST CASE OF INTERNET DEFAMATION

In May a judge in Ireland ruled that a sandwich maker must pay damages for putting the name and telephone number of his local rival on a prostitution web site, according to reports by Associated Press and BBC Online. Do you have an internet/email policy in place. How do you police it? Do you carry out surveillance? Is this lawful? See our website article.

GAY CONSENT WEBSITE

A web site set up by a group who voted for a House of Lords amendment to the Parliament Act to avoid lowering the age of consent for homosexuals from 18 to 16 was the recent target of an investigation by the Information Commissioner.

The site, ageofconsent.org.uk, canvasses votes from visitors on whether or not they support Baroness Young's argument. To vote, users were asked to submit their name, postcode, age range, sex, sexual orientation and whether or not they are a UK citizen. Most of the data is personal data under the Data Protection Act 1998, which means that the person collecting the data (Baroness Young) must be registered as a data controller and comply with the Act's provisions on collection, use and disposal of the data. The question about sexual orientation constitutes sensitive personal data under the Act, which carries more stringent conditions of use.

The web site had no data protection notice in place, hence the Commissioner's concern. Over 50,000 votes have already been cast. In fact, no action was taken by the Commissioner other than an exchange of letters, warning the site that a suitable notice was required. This was put in place by the site.

This is word of warning for all of us who have web sites. Do we comply with data protection? Do we have privacy notices?

EMAIL MONITORING

In a related development, the OIC has confirmed that a new code of conduct governing workplace privacy and the right of employers to monitor their staffs' email traffic, has been delayed until at least the end of this year following extensive industry lobbying. One of the biggest concerns relates to the apparently conflicting provisions under different pieces of legislation, including the Regulation of Investigatory Powers Act, the Data Protection Act and the Human Rights Act. ActNow attended a conference in Manchester in June hosted by the OIC where it was clear that a 'them and us' attitude pervades the discussion. Let's hope that we end up with a workable document

WEBSITES TO WATCH

www.pro.gov.uk - as well as lots of records management issues (including DP and FOI) view the original letter from a man purporting to be Jack the Ripper and Guy Fawkes original signed confession.

www.dancingpaul.com - Nothing at all to do with data protection but worth a look. Please view this in your own time not your employers!

ACT NOW - DATA PROTECTION TRAINING FOR THE PUBLIC SECTOR

So far 88% of delegates at our seminars who completed a feedback sheet have rated them good or excellent. Consequently we have received many requests to present the course in house. We have now improved it to incorporate FOI, HRA and RIP. If you would like us to deliver training to your organisation please contact us. Organisations in an area may wish to club together so that they can share the costs and resources. Our availability is limited therefore the sooner you contact us the better. Contact us or look at the website for details.

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