

Data Protection, Privacy and Freedom of Information



In this month's Brief Update we look at some developments in the data protection, privacy and freedom of information fields and their implications for businesses:

Unlawful Trading in Personal Information

The Information Commissioner's report "What price privacy now?" (see the Information Commissioner's website at www.ico.gov.uk) makes interesting reading and includes the names of media organisations - mainly tabloid newspapers - which have purchased people's personal information in search of a story. Similarly the activities of, amongst others, private detective agencies and investigators and finance companies wishing to trace debtors have come in for criticism and a renewed call for custodial sentences (the present penalty is a fine) to be handed out where personal data is obtained through unlawful means.

The message for those in business is to be extremely careful when you hire third party investigators as the potential damage to your business reputation through unfavourable association with any illegal conduct can be significant. The most high profile example to date has been the resignation of Hewlett Packard's chairwoman Patricia Dunn last year following the appointment of investigators to look into a leak in the HP board room; it emerged that through impersonation and other illegal conduct the investigators had duped phone companies into providing the phone records of a number of journalists and fellow HP directors. Bear in mind too that this took place in the US where data

protection is much less extensively regulated than in Europe - but it reinforces the message that data protection and privacy issues in the business context need to be taken seriously.

Freedom of Information

There are continuing signs of increasing political pressure aimed at restricting the operation of FOI. Politicians have expressed concern over the release of advice from civil servants to government ministers (advice to Chancellor on removal of pension tax credits - obtained by The Times newspaper) and correspondence between MPs and public authorities - this latter issue now being the subject of a Private Members Bill seeking to remove Parliament from the list of public authorities subject to the Act. On the former issue, the Commissioner appears to disagree and is of the view that very clear and specific evidence would need to be produced to the effect that "formulation or development of policy would be materially altered for the worse by the threat of disclosure". The Commissioner is more sympathetic to the suggestion that changes to the Act are needed to block vexatious or pointless requests - regarded as bringing the legislation into disrepute.

Leaving politics and the scope of the Act aside, there have been one or two important cases and decisions on commercial confidentiality (based on the provisions of the English legislation) including that of the Information Tribunal in the Derry City Council case (disclosure of contract details on landing fees between Derry City Airport and Ryanair) and a decision involving Pembrokeshire County Council. These decisions confirm fears previously expressed that claims for confidentiality based on carelessly drafted "boilerplate" type confidentiality clauses are just not going to work. In both of these cases no attempt had been made to particularise or restrict the claim for confidentiality to that information which was truly regarded by the supplier as confidential (details of landing fees in the Ryanair case and customer contracts provided as evidence of past experience to support a tender in the Pembrokeshire case). Instead, the parties clearly expected that most, if not all, of the relevant contract(s) would be protected by a typical generous boilerplate definition of "confidential information". It is now clear that such broad definitions and claims will be ineffective to set up the application of the exemption.

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