

Suggested redraft 13 May

DATA PROTECTION ACT, JOURNALISM AND THE PCC CODE

This short note has been put together to draw the attention of journalists and editors to those provisions of the Data Protection Act 1998 (DPA) that may impact on them as they carry out their professional duties. The DPA carries within it a journalistic exemption and implicit reference to media codes including the PCC Code of Practice. As such, the Commission is from time to time asked questions about how it is applied. Therefore, in order to assist understanding, the Commission has drawn together some of the questions it is most frequently asked. This note is by way of straightforward general guidance only and should not be relied on as legal advice. If you are concerned about how the Act will impact on a specific case you should seek advice from a specialist lawyer.

What is the DPA designed to do?

The DPA requires those who use information about individuals for a business purpose to observe rules of good practice when handling information to ensure that such information is used appropriately, and is accurate, relevant, and up to date. It also grants rights to the individual 'data subject' to ask for information from the 'data controller' about such 'personal data', where it came from (subject to some protection of individual sources), to whom it has been passed and, in some cases, to require that there be no further processing of relevant data. There are various exemptions.

What do 'data processing', 'personal data' and 'data controller' mean?

Very broadly, 'personal data' is information relating to an identifiable, living human being (the 'data subject') which is held electronically and capable of being processed by computer, or held in equivalent non-computerised filing systems.

Processing personal data includes obtaining, recording, holding the information or data, or carrying out operations on it such as consulting, adapting, organising, retrieving, disclosing, erasing and destroying it.

'Data controller' is a person who 'determines the purposes for which, and the manner in which, any personal data are to be processed'.

Full definitions are contained in the DPA, which can be found at <http://www.hms.gov.uk/acts/acts1998/19980029.htm>. Relevant case law is developing on their legal meaning as the Court of Appeal and other courts consider cases brought under the Act.

Isn't there a journalistic exemption?

The government recognised that the imposition of these rules without exemptions for journalistic, literary and artistic purposes ('the special purposes') would be damaging to freedom of expression. It acknowledged that journalists and the media must be allowed to

process data about individuals without having their activities, including newsgathering, investigations and publication, scotched by the Act's requirements. The DPA therefore contains an exemption for personal data that is processed for the special purposes. This exempts newspapers and magazines from compliance in relation to some aspects of the processing of personal data when it is undertaken with a view to publication where this would prejudice journalism.

The exemption applies to specified provisions of the Act. It applies to personal data which are processed only for the special purposes if

- the processing is undertaken with a view to publication by any person of any journalistic, literary or artistic material,
- the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
- the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes

In these circumstances, there is an exemption from the Act's data protection principles (apart from security) and from data subjects' rights of access to data, of preventing its processing, and of obtaining court orders to rectify it, block it, erase it and destroy it.

There are also other safeguards for the media that allow the courts to stay legal action and protect against arbitrary use of investigation and enforcement powers. The Data Protection (Processing of Sensitive Personal Data) Order 2000 also added a 'special purposes' ground to assist public interest disclosure to the media, about a range of individual misconduct, in compliance with the data protection principles.

Part of the journalistic exemption relates to the public interest. What counts as the public interest?

The Act does not define what the public interest means in any context.

However, in the case of the journalistic exemption under section 32, it does say that in considering whether a data controller's belief was reasonable that publication was or would be in the public interest, regard may be had by the court to his compliance with any relevant Code of Practice, designated by order of the Secretary of State. The broadcasters' codes and the PCC Code have been designated. In the case of newspaper and magazine journalism, this therefore clearly means the PCC Code of Practice.

The PCC Code itself does not require satisfaction of a specific public interest test to justify publication or to demonstrate compliance with each clause. Where it refers to the public interest, the Code of Practice makes clear that the public interest exceptions may be invoked to justify breaching in 10 of the 14 clauses of the Code, principally relating to an individual's privacy. It says in that the public interest includes detecting or exposing crime or serious misdemeanour, protecting public health and safety, and preventing the public from being misled by some statement or action of an individual or organisation. It also states that there is a public interest in freedom of expression itself, and that the Commission will have regard to the extent to which material has, or is about to, become available to the public.

The Commission has made clear on a number of occasions – not least through its case law that has been built up since 1991 – that the examples of the public interest contained within the Code do not constitute an exhaustive list. The Commission's adjudications, which can be found at www.pcc.org.uk, amplify the Code and should be read in conjunction with it.

Are there any other rules on obtaining personal information?

~~The DPA also regulates the lawful disclosure of information. This Note does not deal with the general operation of the DPA, or how its general provisions regulate access and disclosure of personal data~~ and how that might be relevant to disclosure to the media, or how journalists might use DPA information rights, or the DPA's inter-relation with the Freedom of Information Act 2000, for which the Information Commissioner also has responsibility.

However, it is important for journalists to understand that in addition to the Act's requirements about the way that personal data can be used, the rights of data subjects and the exemptions to them, it contains some other controls and prohibitions on the way that information can be obtained and disclosed.

There is a specific criminal offence of unlawful obtaining of personal data. A person must not knowingly or recklessly, without the consent of the data controller, obtain or disclose personal data or the information that it contains, or procure the disclosure to another person of the information contained in personal data.

Both individuals and companies can be prosecuted at the instigation of the Information Commissioner or the Director of Public Prosecutions. It is also an offence to sell or offer to sell information that has been obtained without consent.

However, there are a number of exemptions – which are generally applicable and not just for journalists – from liability for the offences. Among other things, it may be a defence to argue that the obtaining, disclosing or procuring of the data or information:

- was necessary for the purpose of preventing or detecting crime;
- was justified as being in the public interest (~~see note on the public interest, above~~). A court would have to decide whether, in the particular circumstances, obtaining the information without the agreement of the organisation or individual concerned (the data controller) was of sufficient importance to override the protection afforded by the Act.

Moreover:

- in rare cases, there may be an exemption where the personal data in question fall within the Act's national security exemption;
- and also where the data fall within the 'manual data held by public authorities' exemption which is due to come into force on 30 November 2005.

There are other exemptions, where the defence would have to satisfy the court that the obtaining, disclosing or procuring of the data:

- was required or authorised by or under any enactment, by any rule of law or by a court order

- that the person concerned acted in the reasonable belief that he had in law the right to obtain or disclose the information or data, or to procure the disclosure of the information to the other person
- that he acted in the reasonable belief that he would have had the consent of the data controller if the data controller had known of the obtaining, disclosing or procuring or the circumstances of it.

However, it would be advisable to seek legal advice before assuming whether any of these defences under section 55 will apply. ~~There are other exemptions that may not be as likely to apply to journalists.~~ More information can be found on the website below.

How can I find out more about the Data Protection Act?

A copy of the Act can be found at <http://www.hms0.gov.uk/acts/acts1998/19980029.htm>. For more information about how the Act has been implemented, you can visit the website of the Information Commissioner at www.informationcommissioner.gov.uk or telephone the office of the Commissioner on 01625 545 700. The website also gives information about the Freedom of Information Act 2000 and its implementation.

Revised draft: Santha Rasaiah 13 May 2004

REASONS

I have set out the reason for the changes proposed in the revised draft of 13 May below.

Where they relate to the law, they simply reproduce the sections of the Act and are therefore I hope uncontentious.

Page 1

What do data processing, personal data and data controller mean?

Delete: Court of Appeal and other

Reason: As several cases have now been considered by the higher courts, I think that the note can now simply say courts.

Page 2

Isn't there a journalistic exemption?

Restore the outline of section 32, which simply reproduces part of section 32, and explanation of what it does.

Reason: For reasons understood by the Information Commissioner, PCC and industry consulted to date, this note is being produced. All are happy that the note should adopt the format of a FAQ note based on the fact that the Commission is sometimes asked questions about the DPA and its application to journalists and editors, because section 32 contains a journalistic exemption and implicit reference to media codes, including the PCC Code, rather than simply being confined to information about a section that has no connection to the PCC at all.

It therefore seems a little absurd to leave out a very brief outline of section 32, which actually provides information about the conditions for its application, who can benefit and what it does. The act's wording is complicated, but I think it is better just to set it out than to leave it out, or go into mindnumbing detail on which the interpretation of the courts, the media's views and the Information Commissioner's views may not be easy to reconcile or appropriate to publish in a PCC note, or offer an incomplete or inaccurate explanation that simply confuses things further.

Section 32 is not the focus of any concern. Phil Jones did not appear to object the extract from section 32 or account of its effect and it is difficult to see how any objections could be sustained. Indeed its very inclusion and complexity demonstrate that it is not a blanket exemption and easy get out for the media, everyone is advised to consult their lawyers and after looking at the bullet points I imagine that most journalists and editors would not want to hazard a guess at its meaning!

The omission of the brief outline also means that there is no discernable reason for the whole of the next section- which after all is headed '*Part of the journalistic exemption relates to the public interest. What counts as the public interest?*'

It is also important that the note achieves a proper balance and does not concentrate upon section 55. The inclusion of the outline of section 32 assists this.

Moreover, a the counterbalance of a fuller note on section 32 is important as the European Commission and the UK Government were both persuaded that it was important that there were media exemptions by the media's 10 year campaign. This was conducted against vehement EU and UK opposition led by the UK Data Protection Registrar (now Information Commission) - and the final stages of the negotiations on section 32 were publicly led by the PCC Chairman on behalf of all the media.

In respect of a few points raised in your correspondence with Phil Jones relevant to this, please note that I have left unaltered the revised text that you agreed with him.

I doubt that he would make the points again in respect of the bullet points since they just reproduce part of section 32.

However, my reasons on those specific points would include:

Past discussions with the Data Protection Registrar, Home Office and others under the 1984 Act acknowledged that freelance journalists and those operating with a great degree of independence might be data controllers - for the reasons that he himself acknowledges in your correspondence on section 55. The courts so far have only had to consider cases where they could find that the publisher was the data controller for the purposes of the action.

The note ought to refer to all the special purposes for reasons of accuracy, information and as a point of principle. Just because the PCC is issuing a FAQ likely to be most read by editors and journalists is no reason to leave out any mention of two of the three special purposes.

Given that this will be read by interested members of the public as well as journalists, I think the inclusion of the two other special purposes as part of an accurate explanatory note is important for freedom of expression purposes.

It will also help counter the type of arguments usually deployed against the press and the PCC. People should be told that the exemption does not just apply to journalists but to anyone, and that it does not just apply to processing for the purposes of journalism, but to literary and artistic purposes as well. The media actually wanted to protect everyone's freedom of expression and avoid media 'special pleading', whilst ensuring adequate protection for the publishing, broadcast and artistic communities and this was the only way offered for it to be achieved.

Moreover, I can imagine cases in the future where a publisher, editor, journalist, photographer, cartoonist, researcher, writer or contributor might well be working across several media platforms - book or online publishing, press, broadcast, even artistic presentation, and find the reference to what section 32 says helpful in seeking further legal advice.

Part of the journalistic exemption relates to the public interest. What counts as the public interest?

Redraft of the first two sentences of the third paragraph explaining the PCC Code.

Reason: I accept the original version was unclear. It was intended to prevent any contention that there had to be a specific public interest justification for any journalistic conduct or publication to avoid breach of the DPA (the media had to argue strongly against this in the course of the directive and Act).

I felt that the sentence substituted did not quite address this- and worse might be a gift to those who wanted to discredit the Code and the PCC!

Pages 3 and 4

Are there any other rules on obtaining personal information?

Deletion of the first sentence and redraft.

Reason: I am actually amending an amendment of my own suggestion, so I doubt that this can cause problems with the Information Commissioner. I fear that I can produce far too many examples and complaints from editors that demonstrate that too many people are labouring under the legal misapprehension that the DPA controls all information, rather than regulates specific personal data. The combination of my original wording and this redraft would re-inforce this impression. I have therefore amended the redraft of my original suggestion- and I can see no reason why the Information Commissioner should find fault with this more accurate statement of the position, even if he might prefer the current wording!

Deletion of the reference to the note on the public interest.

Reason: That note relates to reasonableness of belief that the processing was in the public interest under section 32 only. Strictly speaking, the Act does not define the public interest nor presupposes that the court would look at section 32 and the PCC code for assessment of the section 55 defence.

Addition of in the particular circumstances

Reason: This is what the section says and only adds emphasis to the point that the Phil Jones wanted to make.

Re-insertion of the other defences, insertion of express reference to the section number, deletion of dismissal of relevance of other defences.

Reason:

Background: The Newspaper Society had a very constructive discussion with the Home Office on the drafting of the predecessor to this clause, an amendment to the 1984 Act, which was forced upon the Government by a Lords' revolt and the Data Protection Registrar seizing the opportunity to close a loophole. The PCC was also contacted by the Home Office and supported the NS representations, which were adopted. The Home Office inserted a public interest defence into this clause without any prompting from the press at the time of the 1998 Act.

Express reference to section 55:

Reason: The note cites section 32 and it would be useful to journalists seeking legal advice to be able to cite the precise provision to their lawyers who may not be familiar with the DPA.

Deletion of the dismissal of the three defences as unlikely to apply to journalists:

Reason: In the interests of fair, full and accurate information about section 55, all the defences ought to be included.

Phil Jones is only focussing on two particular examples of possible breach of section 55 and, quite understandably, thinks that these defences would rarely be relied upon in those instances. I do not think that it is so unlikely in the wider context of the Act's operation. I also think that it would help counter misunderstandings that create unnecessary problems.

For example, I am very aware of ill informed or fearful public service employees citing data protection as a reason to refuse to supply information to the regional press, even though they are obliged by law- usually under statutory requirements, to make it available for public inspection and data protection legislation, by way of the data protection principles and this provision, specifically provides that they can provide do so lawfully. These problems might well intensify when the FOI act comes into force. It would therefore be helpful to include the defence, which might generally help counteract such misunderstandings.

I can also envisage situations where personal data other than that envisaged by Phil Jones, might have been customarily supplied with the consent of the data controller, but a change of policy has been introduced to stop that from happening but not communicated, which might mean that there was just such an innocent obtaining or disclosure under the impression that the data controller continued to agree to its supply. Public services, including the police, health authorities, schools and other emergency services have all instigated such changes of policy, sometimes as the result of a change of personnel at one level. It might be helpful to flag up the existence of the defence.

It is highly unlikely that a mere mention of the three omitted exemptions will lead journalists astray or allow them to lead others astray, especially as two of the defences actually refer and rely on arguments based on other areas of the law. Journalists would realise that this creates further complications. However, I have taken account of Phil Jones' concerns. I have listed these defences last, presented them clearly in the context of a trial where the defence would be trying to satisfy the court of the exemptions and extended the final warning about seeking legal advice to all defences under section 55.

Santha Rasaiah
13 May 2004