



England and Wales: Data Protection

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ENGLAND AND WALES

DATA PROTECTION

Executive Summary

The definition of personal data within the Data Protection Act 1998 is relatively broad and, where questions arise, the context in which the data is held needs to be considered. The Information Commissioner has produced detailed guidance to assist in the determination of what constitutes personal data that identify a number of key elements.

I. Introduction

The Data Protection Act 1998 defines personal data as: “data which relate[s] to a living individual who can be identified from th[at] data, or from data and other information which is in the possession of, or is likely to come into the possession of, the data controller.”¹ This broad definition has resulted in some confusion. As a result, the UK’s Information Commissioner² has provided extensive guidance on what does and does not constitute personal data.³

The Information Commissioner has stated in her legal guidance that email addresses are personal data when the address identifies the person.⁴ As an example the email address clare.feikert@libraryofcongress.gov would be considered personal data because it provides the complete name of the individual, her place of business, and a means of contacting her, whereas an email address that does not name or identify a person, such as itspoppet@gmail.com, is less likely to be considered personal data.

II. Information Commissioners’ Guidance on What Constitutes Personal Data

The following guidance provided by the Information Commissioner was recently revised in response to a judgment from the Court of Appeal⁵ and provides a number of questions to aid in the

¹ Data Protection Act 1998, c. 29, s. 1.

² The Information Commissioner's Office is an independent public body set up to promote access to official information and protect personal information. Sponsored by the Ministry of Justice, the Office enforces and oversees the Data Protection Act, the Freedom of Information Act, the Environmental Information Regulations, and the Privacy and Electronic Communications Regulations: http://www.ico.gov.uk/about_us.aspx (last visited Jan. 29, 2008).

³ Information Commissioner’s Office, *Data Protection Technical Guidance: Determining What is Personal Data*, Aug, 2007, available at http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf.

⁴ Information Commissioner, *Data Protection Act 1998 Legal Guidance*, Version 1, ¶ 2.2.3, http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf (last visited Jan. 28, 2008).

⁵ *Durant v Financial Services Authority*, [2003] EWCA Civ 1746. In *Durant* Auld LJ stated that: “Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two

determination of what is personal data. If the answer is yes to any of the following questions, the data is considered to be personal data within the meaning of the Data Protection Act 1998.

Identifiable

The first question the Commissioner recommends is whether the data is identifiable. If an individual can be identified from the data or other data in the possession of, or likely to come into the possession of, the data controller it is considered to be identifiable data. In many instances, a name is not necessary for the data to be considered to be identifiable and account must be taken of all the means available to the data controller or others to identify the person and the extent to which these means are available. If the data is identifiable, then if any of the following questions can be answered affirmatively the data is personal data within the meaning of the Data Protection Act.

Relates to an Identifiable Individual

If the data is identifiable data the next question to be considered is whether the data relates to the identifiable living individual, either in his or her personal, family, business, or professional life. The following questions assist in determining whether the data relates to an identifiable individual.

Obviously About an Individual

In cases where it is not immediately obvious that the data is about an individual it must be considered whether the data is being processed, or could easily be processed, to learn; record; or decide something about an identifiable individual; or an incidental consequence of the processing means that something could be learnt or recorded about an identifiable individual or that the process could have an impact on or affect an identifiable individual. If any of these are the case, the data is personal data.

Linked to an Identifiable Person

If the data is linked to a person to provide particular information about him or her it is personal data.

Purpose of Processing

If the data is used to inform or influence actions or decisions affecting an identifiable person, for example to learn something about him or her, it is personal data. The Information Commissioner notes that context is important for determining whether data is personal data, because data in the hands of one controller may not be personal data in that instance, but when passed to another may become personal data. The purpose of processing and potential impact of the processing is important to note. The guidance provides the example of a picture taken by a journalist for use in a library that includes people in the background would not be considered personal data. If the same photograph is the used in a police investigation, however, the picture would then be considered to be personal data.

Biographical Significance

notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised ... The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest ... In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity." This definition has, to a certain degree, been expanded upon by guidance provided by the Information Commissioner's Office. This case provided three concepts that must be met for data to be considered personal data: "it must affect a person's privacy; it must be biographical in a significant sense; and it must have the individual as its focus." Kate Brimsted, *Determining 'personal data'-a case of believing six impossible things before breakfast?* (2007) PDP 8 2 (8).

The guidance specifies that biographic significance is where “the data go[es] beyond recording the individual’s casual connection with a matter or event which has no personal connotations for him.”⁶

Focus of the Information on the Individual

If the data focuses or concentrates on the individual, it is likely to be personal data. Whether the information focuses on a person or an object is a consideration. For example, if information is being recorded to monitor the efficacy of a machine it is not likely to be viewed as personal information. If the information recorded, however, is used to monitor the productivity of the person that operates the machine it will be personal information.

Impact of the Data on an Individual

If the data impacts, or has the potential to impact, a person in his or her personal, family, business, or professional capacity, it is personal data. This is the case even if the data is not being processed by the controller to provide information about an individual. If there is a reasonable chance that the data will be used for these purposes it will be considered personal data.

III. Concluding Remarks

Overall, whether an email address constitutes personal data depends on the information contained in the email address itself, any other information that the data controller holds, and the context in which this information is held.

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⁶ Information Commissioner’s Office, *Data Protection Technical Guidance*, *supra* note 2, at ¶ 6.