

Criminal Cases (Punishment and Review) (Scotland) Bill

Response by the Information Commissioner's Office

Introduction

The (UK) Information Commissioner, as regulator of the Data Protection Act (1998) ("the DPA"), is pleased to respond to the consultation on the Criminal Cases (Punishment and Review) (Scotland) Bill ("the Bill") by the Justice Committee of the Scottish Parliament. His specific interest is in Part 2 of the Bill which proposes to amend the conditions under which the Scottish Criminal Case Review Commission ("the SCCRC") may disclose information obtained by it in the exercise of its functions. The Commissioner welcomes the proposed clarification of existing legislation by specifying additional circumstances under which disclosure may be made rather than relying on a permissive order made by the Secretary of State. In doing so, the Commissioner believes that the transparency surrounding the decision to disclose is enhanced and, consequently, any disclosure made becomes fairer to the individuals concerned.

The Data Protection Act 1998

The DPA provides a statutory framework for the processing of all personal data (ie, data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, including any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual). Further protection is afforded to sensitive personal information which is defined as personal data consisting of information about

(a) racial or ethnic origin, (b) political opinions, (c) religious beliefs, (d) trade union membership, (e) physical or mental health or condition, (f) sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings. Significant amounts of the personal information held within criminal case review documents will be defined as being sensitive personal data for the purposes of the DPA.

The SCCRC is the data controller for all personal data processed by it in connection with its consideration of criminal case reviews and must therefore process that information in accordance with the DPA. In doing so, the SCCRC must abide by eight principles set out in the Act but the proposals contained within the Bill relate only to the first two principles, viz:

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

Principle 1

Fairness in processing concerns amongst other things, the method by which data are obtained and, more specifically, it considers whether any person from whom data are obtained is deceived or misled as to the purpose or purposes for which they are to be processed. Part 2 of the Bill prescribes specific conditions which must be met to allow additional disclosures to take place. The Commissioner particularly welcomes the section 194N which requires the SCCRC to notify persons affected by any proposed disclosure that such disclosure may take place and that it must also have due regard to any representations made as a consequence of that notification. He also welcomes section 194R which requires that affected persons are subsequently notified of any decision to disclose. Taken together, 194N and 194R enhance the fairness of the processing being undertaken and are consistent with the requirements of the DPA.

Whilst the SCCRC must itself be satisfied that its processing meets the relevant conditions within Schedules 2 and 3 of the DPA, the Commissioner would expect that this would be the case. Both Schedule 2 and Schedule 3 permit processing for the purpose of administration of justice as well as for the exercise of any functions conferred on any person by or under an enactment. By amending the existing legislation as proposed, the functions conferred upon the SCCRC are more clearly stated.

Principle 2

The SCCRC processes personal information to review and investigate cases where it is alleged that a miscarriage of justice may have occurred in relation to conviction and/or sentence. To publish the Statement of Reasons for referral to the High Court of any case reviewed by it (whether or not the related Appeal was abandoned) is unlikely to be incompatible with the purposes for which the information was processed.

Conclusion

The Information Commissioner welcomes the proposals within Part 2 of the Criminal Cases (Punishment and Review) (Scotland) Bill. The amendments to the Criminal Procedure (Scotland) Act 1995 contained within the Bill will help ensure that the disclosure of Statement of Reasons by the SCCRC in cases where appeals have been abandoned or otherwise withdrawn, meet with the provisions of the DPA. Importantly, the Bill contains a robust legislative framework which will ensure that such disclosure is fair and lawful.

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