



Information Commissioner's Office

The Information Commissioner's response to the Ministry of Justice's Consultation - Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders

Introduction

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA). He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner's Office (ICO) welcomes the opportunity to respond to the above consultation. In this response we will focus on the issues that have data protection, privacy and transparency implications.

Q17. What changes to the Rehabilitation of Offenders Act 1974 would best deliver the balance of rehabilitation and public protection?

The ICO welcomes the proposals to reform the Rehabilitation of Offenders Act 1974 (ROA) and re-evaluate its objectives. We would support measures to broaden the scope of the ROA, to review the length of rehabilitation periods, and to make the ROA less complex and easier to understand. This reform provides an opportunity to strike the right balance between public protection and the right of ex-offenders to rehabilitation without unwarranted interference into their private lives.

The DPA affords a higher level of protection to information defined as 'sensitive personal data'. This includes information relating to the commission or alleged commission of any offence, any proceedings for any offence or alleged offence, the disposal of such proceedings or the sentence of any court in such proceedings. Under the first principle of the DPA any organisation processing 'sensitive personal data' needs to meet a higher threshold in order to make the processing lawful. The organisation is also required to take into account the sensitivity of the information and the potential effects on the individual when determining whether any proposed disclosure of information is fair.

When convictions, cautions, warnings or reprimands (referred to throughout this response as conviction information) become spent under the ROA, unless an exception applies, it gives an individual the right not to disclose them when seeking employment. The Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 (as amended) prescribes the positions for which an exception applies and where, if asked, individuals must disclose both spent and unspent conviction information to a potential employer. Where a position is covered by the Exceptions Order the potential employer can also apply for the appropriate criminal record disclosure certificate.

The current criminal record disclosure regime offers three levels of disclosure – basic, standard, and enhanced. Although basic disclosures have not yet been implemented in England and Wales they are available to any individual through Disclosure Scotland and Access Northern Ireland. These checks include conviction information from Police Forces in England and Wales. This is an anomaly that has persisted for a number of years and we will specifically address this later in this response.

Standard and enhanced checks are available to registered bodies through Disclosure Scotland, Access Northern Ireland and the Criminal Records Bureau (CRB) in England and Wales. Basic disclosures do not show ROA spent conviction information, whereas standard and enhanced disclosures do. Enhanced disclosures also show any other information deemed relevant by a Chief Police Officer. These different levels of disclosure certificate are designed for employment 'vetting' purposes relevant to the nature of the job role.

The ICO recognises that exceptions from the right not to disclose conviction information to a potential employer must exist for certain sensitive positions. However, we consider that the disclosure of individuals' conviction information and any 'other relevant information' included on enhanced criminal records disclosures must be justified, necessary and proportionate to the position for which the individual has applied.

We consider that broadening the scope of the ROA to cover all determinate sentences would be a welcome development. This would allow for a more proportionate, evidence-based approach to rehabilitation periods for prison sentences over the thirty month threshold which would never become spent under the current system. Given the relative increases in sentence length since the ROA was passed, the rigidity of a set threshold can lead to a disproportionate effect on ex-offenders seeking to gain employment. If a threshold remains it should reflect current sentencing practices, balancing the likely impact on individuals' employment prospects with wider public protection concerns.

The ICO would welcome a review of current rehabilitation periods to ensure that they reflect the point at which the likelihood of reoffending tails off following a conviction. An individual's sensitive conviction information would then only be disclosed where it was justified by the risk to public protection and necessary for employment 'vetting' in relation to the specific position for which an individual has applied.

The consultation document outlines the option of introducing a simplified classification of rehabilitation periods. The ICO would welcome any measures that have benefits in terms of clarifying ex-offenders rights under the ROA and making it easier to understand when conviction information becomes spent. However, this should not lead to 'catch-all' rehabilitation periods that are too general to reflect the nature or length of the sentence and risks to public protection.

We would also recommend a parallel review of the Exceptions Order to ensure that it is necessary for spent conviction information to be disclosed for all of the positions currently included under the Order. The Exceptions Order has been amended a number of times to include an increasing number of positions. Further extensions may undermine any changes to the ROA to improve the right of ex-offenders to gain employment.

The ICO is concerned that there seems to be a widespread presumption that employers must ask applicants for all spent conviction information if a position is covered by the Exceptions Order. It is important to recognise that, unless the employer is under a specific legal obligation, the Exceptions Order does not oblige employers to ask an applicant to disclose all spent conviction information.

The third principle of the DPA requires that personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed. The ICO considers that an employer is obliged to take this into account when deciding whether it is necessary to ask an applicant to disclose spent conviction information. We consider that an employer should only ask for conviction information where it is directly relevant to the position for which an individual has applied and not excessive for the purposes of determining the applicant's suitability for that role.

The ICO's view is that in order to only obtain relevant conviction information a potential employer should tailor 'vetting' questions to the specific position. Rather than asking the applicant 'have you ever had any convictions, cautions, warnings or reprimands?' the employer should ask more refined questions designed to minimise the information the applicant has to disclose. For example, for a position in finance covered by the Exception Order the employer might ask 'do you have any convictions or cautions relating to financial impropriety?' Further

guidance could be provided as to what type of conviction the employer would and would not expect to be disclosed.

We also consider that criminal records disclosure certificates should be refined to ensure that only relevant conviction information is disclosed to a prospective employer. We support the recommendation in the review¹ undertaken by Mrs Sunita Mason, the Independent Advisor for Criminality Information Management, to introduce a filter to remove old and minor conviction information from criminal record disclosure certificates. If an employer has only asked an applicant for limited conviction information then it should not then receive irrelevant, old or minor information that could lead to a disproportionate effect on the applicant if taken into account in the employment decision. Both the legislation and any guidance on this matter should, if possible, put this issue beyond doubt.

The current system allows for unintended anomalies which undermine the ROA. For example, if an individual applies for a job as a cleaner at a school they are required to disclose their spent conviction information. The school has to apply for an enhanced criminal records disclosure for child protection purposes. If the applicant had a spent conviction for theft the disclosure of this information could lead to the school not offering the applicant a position. If the individual had applied for a similar position at a private company, where the employer had no basis to ask the applicant to disclose spent conviction information, then the protections of the ROA would apply and the spent conviction would not form any part of the employment decision. There is a potential disproportionate detriment to the applicant when applying to the school due to the disclosure of spent conviction information where the nature of the spent conviction means it is unlikely to have any bearing on child protection. It is questionable whether employers should be able to turn down applicants for a position due to the disclosure of conviction information which arguably has no relevance to the specific public protection issue for which they have been given privileged access to the conviction information.

The ICO is also concerned about standard and enhanced criminal records checks being undertaken where positions are not covered by the Exceptions Order. We consider that criminal records disclosure bodies should have processes in place to ensure that standard and enhanced disclosures are only issued where a position is covered by the Exceptions Order. We support the recommendation in Mrs Sunita Mason's review² to rigorously enforce penalties and sanctions where employers knowingly make unlawful criminal record check applications. This practice is also likely to engage concerns about compliance with the DPA by the bodies concerned.

¹ Mason S, *A Common Sense Approach – A Review of the Criminal Records Regime in England and Wales*, 11 February 2011.

² *Ibid.*

Basic Disclosures and Enforced Subject Access

The ICO considers it essential that an offence of enforced subject access is introduced as a vital safeguard to prevent employers circumventing the ROA and the criminal records disclosure regime. Enforced subject access forces individuals to use their data protection subject access rights to obtain details of all spent and unspent convictions and provide these to prospective employers. A criminal offence to prevent individuals' rights being misused in this way has been lacking for a number of years. It is provided for in section 56 of the DPA but has not yet been brought into effect. Without the introduction of enforced subject access as an offence, the ROA and any reforms designed to improve the right to rehabilitation, will continue to be undermined.

We support the introduction of basic disclosure certificates through the CRB as recommended in Mrs Sunita Mason's review³. This would give individuals a proportionate way to provide prospective employers with unspent conviction information or to confirm that there is no such information but with important ROA safeguards in place. Basic disclosures provide a much more privacy friendly solution than the practice of enforced subject access.

Section 56 of the DPA prohibits the pernicious practice of enforced subject access but can only be brought into effect once the relevant provisions in the Police Act 1997 are commenced. It is unlikely that Parliament, when including this measure, could have envisaged that the practice of enforced subject access would still be taking place some 14 years later because of a failure to implement basic disclosures in England and Wales. The Commissioner has made previous representations to the Government urging the introduction of section 56 as soon as possible and continues to seek its early introduction.

Without such safeguards the criminal records disclosure regime will be open to further misuse – effectively allowing any potential employer to require applicants to disclose all spent and unspent convictions for any job role and not just those covered by the Exceptions Order.

Human Rights

The first principle of the DPA requires personal information to be processed fairly and lawfully. This means that as well as complying with the principles of the DPA, in order to comply with the lawful requirement of the first principle, the organisation must also comply with all other statutory provisions and common law. Therefore, in order to be lawful all processing of personal information by a

³ *Ibid.*

public authority must also comply with the Human Rights Act 1998 and particularly Article 8 of the European Convention on Human Rights (ECHR).

The Supreme Court case *R v Commissioner of the Metropolis [2009]*⁴ related to the disclosure of 'other relevant information' on an enhanced criminal records certificate. The Court found that all enhanced disclosure decisions made by the relevant Chief Police Officer are likely to engage Article 8 ECHR as the information has been stored or collected in Police records and the disclosure of 'other relevant information' is likely to diminish the individual's employment prospects. It found that the proportionality of the proposed disclosure must be considered in each case and that when balancing the public interest in protecting vulnerable persons and respecting an individual's Article 8 ECHR rights neither consideration should be afforded precedence.

The ICO considers that the principles derived from this case can be applied more generally to the ROA and the criminal records disclosure regime. The balance to be struck between public protection and an individual privacy is as important when applied to conviction information as when applied to 'other relevant information' on enhanced criminal records disclosures. The ROA and the Exceptions Order should strike the right balance to ensure that any interference with an individual's right to privacy is justified and proportionate to the legitimate aim of protecting vulnerable individuals. This is particularly important when considering the coverage of the ROA, the length of rehabilitation periods and the extent of disclosure that the Exceptions Order allows in any given case.

The Future of Data Protection Legislation

The European Commission has published a Communication⁵ on its strategy for modernising the EU legal system for the protection of personal data. Among other things, it mentions the importance of continuing to guarantee a high level of protection to individuals with regard to the processing of personal data.

The Communication highlights the right to control over one's own data, data minimisation and the so-called 'right to be forgotten'. This is likely to be a feature of any future European legislative instrument. Although clarification of this right, or the scope of any proposed extension and what it means in practice will be necessary, if it is taken as a wider concept then it highlights the importance of

⁴ *R (on the application of L) (FC) (Appellant) v Commissioner of Police of the Metropolis [2009] UKSC 3*; on appeal from [2007] EWCA Civ 168.

⁵ *Communication From The Commission To The European Parliament, The Council, The Economic And Social Committee And The Committee Of The Regions: A Comprehensive Approach On Personal Data Protection in the European Union*, 4 November 2010.

legislation surrounding rehabilitation and conviction information taking into account an individual's right to leave their past behind them.

Q34. How can we better explain sentencing to the public?

Q35. How best can we increase understanding of prison sentences?

Q59. What more can we do to engage people in the justice system, enable and promote volunteering, and make it more transparent and accountable to the public?

The ICO welcomes the commitment to improve understanding of the criminal justice sector by improving transparency and accountability.

We consider that pro-active publication of information can go a long way to improving public awareness and has the potential to improve engagement with the Criminal Justice System. This can be achieved by making information available through Criminal Justice Agencies' Freedom of Information publication schemes. Individual agencies should ensure that the public know what information is available by having a clear up-to-date Guide to Information which is widely publicised and signposted where appropriate.

There are a number of ways in which information can be made readily available to the public. The crime mapping website provides a recent example of the proactive publication of large amounts of data in a format which is accessible to the public. One option would be to build upon this website to provide a national 'one-stop shop' for Criminal Justice Sector information including information about the criminal justice process and sentencing outcomes although this would need to be done responsibly to avoid identification of victims or witnesses.

Although important, in isolation, making information widely available on a website is unlikely to be the most successful strategy in reaching the widest possible audience. There are a number of opportunities where individuals come into contact with the Criminal Justice System and information aimed at particular individuals can be provided proactively. A 'one-size fits all' approach should be avoided and full advantage should be taken of opportunities to engage on an individual basis. For example, Witness Care Units have a duty to inform victims and witnesses of the result of a court case within certain time periods – this provides a clear opportunity to provide more detailed information about sentencing outcomes. It also gives individuals an opportunity to ask questions or for the Criminal Justice Agency to direct individuals to the information it proactively publishes.

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