

Response from the Information Commissioner's Office. Consultation on the Draft Defamation Bill

The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA), the Privacy and Electronic Communications Regulations 2003 (PECR) and the Freedom of Information Act 2000 (FOIA). The Information Commissioner's Office (ICO) is the UK's independent authority set up to uphold 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 Commissioner's comments in this document are primarily based on the practical experience he has gained in regulating compliance with the DPA and PECR.

Context of this response

We do not intend to comment in detail on each of the specific questions posed by the consultation document as the ICO has no direct involvement in the majority of the areas covered. We do however consider it important to highlight that there is an interaction between defamation law and data protection, and to ask the Government to bear this in mind when deciding how defamation law should be reformed.

The consultation document notes that increased use of the Internet has given rise to some new issues in the sphere of defamation law. The same can be said, of course, for data protection law. Whilst these issues are not necessarily the same, there are some cross-overs, and changes in one area of the law potentially have an impact on the other.

Of particular relevance has been the prolific growth in the use of social networking websites and blogs. This has inevitably led to a situation in which some information posted online causes offence or annoyance to its subjects. The publication of some such information online doubtless gives rise to potential claims for defamation. Other published information may not be defamatory, but may be untrue or inaccurate nonetheless. Either way, such publication also gives rise to questions about compliance with

the DPA where (as is often the case) the information in question includes the personal data of an individual.

The consequence of this overlap is to cause some confusion for those who believe they have been defamed as to the course of action they should take to obtain redress. Increasingly, we are seeing individuals complain to the ICO in these circumstances on the basis that the publication constitutes a breach of the DPA. It is perhaps unsurprising that people should seek to use the 'accessible' option of complaining to the Information Commissioner over the much more costly alternative of bringing defamation proceedings. However, as we explain below, the DPA is not apt to regulate the trading of insults on the Internet, and nor was it intended to do so. In fact, as we explain below, the DPA rarely provides a remedy for such complaints anyway, but there is a common misapprehension that it does.

The advent of reforms to defamation law which have the effect of further restricting the circumstances in which a successful claim may be brought heightens the need to educate the public about the extent of their rights to seek alternative redress – and about the limitations of such alternatives. It would be unfortunate if one consequence of the proposed reforms were to be an increase in unfounded complaints to the Information Commissioner.

In any event we consider that it is key that organisations themselves have procedures to address complaints about malicious content quickly to help to avoid the need for formal intervention.

Relationship between the DPA and defamation

The DPA is based on a number of principles of good information-handling which are designed to ensure informational privacy and fairness in the way that personal information is collected and used. The need for regulation in this area arises because of the ease with which modern computer systems (or well-structured manual filing systems) allow organisations to process large quantities of information about individuals.

The fourth principle of the DPA requires that personal data is 'accurate'. If inaccurate personal data is processed, there will be a breach of the DPA. Data will be inaccurate if it is incorrect or misleading as to any matter of fact.

Over recent years the Information Commissioner has increasingly received complaints from individuals who object to information other individuals (and occasionally organisations) have made public about them, in particular by posting on the internet. This includes comments on blogs, forums and other social networking sites. The complaints to the

Information Commissioner are made on the basis that the information is 'factually inaccurate' – and therefore in breach of the fourth principle of the DPA. It is however often evident on investigation that the basis for the complaint is that the post is a malicious lie.

One of the principal means of safeguarding informational privacy and fairness is to ensure good records management by organisations, and the DPA is designed to achieve this. By way of contrast, the law of defamation is concerned not with how information is held, but with the publication of information that is untrue and which damages the reputation of the individual to whom it relates.

'Domestic purposes' exemption in the DPA

As mentioned above, many 'offensive' postings on the Internet do not infringe the DPA – even though they may involve the publication of inaccurate personal data. This is because section 36 of the DPA provides an exemption from the requirement to comply with the data protection principles (including the fourth principle accuracy rule) where the processing of personal data is only for an individual's personal, family or household affairs, including recreational purposes. This amounts to statutory recognition of the principle that what individuals do with personal data in their private capacity should not be subject to the usual rules about data protection.

The ICO's view is that the processing of personal data by an individual in connection with the use of a social networking site, forum or blog will usually qualify as processing for the purposes of that individual's personal etc affairs, and so will engage the exemption in section 36 of the DPA. However, ascertaining whether the exemption applies is not always straightforward, as it is sometimes difficult to tell whether the publisher of the information is an individual, or whether the processing is really for personal etc purposes – such as where campaigning groups set up websites to comment on those whose actions they object to.

It follows that there may be some instances where the publication of information online may be actionable both for defamation or as a breach of the DPA. In addition, untruths which do not meet the current (or proposed) definition of defamation may nevertheless constitute a breach of the DPA. Nevertheless, we remain of the view that neither the ICO nor the DPA provide an appropriate forum to regulate 'slanging matches' between individuals who happen to use the Internet as their chosen medium for expressing their views.

There is also an exemption in the DPA to deal with processing for the 'special purposes' of journalism, literature and art. Where information is processed with a view to publication for these purposes, and the

organisation responsible believes publication is in the public interest (and compliance with the DPA is incompatible with those purposes) there is a wide ranging exemption from the requirements of the DPA. This exemption may also be applicable to some cases where information is published online.

Our view is that the key issue in determining whether the appropriate remedy for the publication of untrue material lies with DPA or with the law of defamation involves consideration of the reason why the material was published in the first place. If the publication of untrue material arose as a result of poor records management (such as not keeping information up to date or having poor security arrangements), or from basic unfairness in terms of information privacy, then the matter should be considered under the DPA. If however the publication had nothing to do with informational privacy or records management – but was instead a deliberate slur on a person’s character – then the law of defamation would seem to provide the more appropriate recourse.

We do not however consider the new Defamation Bill should attempt to make a rigid distinction between the circumstances in which the DPA should apply and the circumstances in which defamation proceedings should be pursued instead. We consider that a rigid demarcation would be difficult to achieve in practice. Nevertheless, as stated above, we do consider that more could be done to inform the expectations of people who seek to use the DPA to obtain redress for a complaint which, in reality, is a complaint of defamation.

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