

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE DATED 14 JULY 2008

To: Secretary of State for Defence

of: 5th Floor Zone F
Main Building
Whitehall
London
SW1A 2HB

- 1 The Secretary of State for Defence is the data controller, as defined in section 1(1) of the Data Protection Act 1998 (the "Act"), in respect of the processing of personal data carried on by the Ministry of Defence and is referred to in this notice as the "data controller".
- 2 The Act came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act"). By virtue of section 6(1) of the Act, the office of the Data Protection Registrar originally established by section 3(1)(a) of the 1984 Act became known as the Data Protection Commissioner. From 30 January 2001, by virtue of section 18(1) of the Freedom of Information Act 2000 the Data Protection Commissioner became known instead as the Information Commissioner (the "Commissioner").
- 3 On 21 January 2008 the Commissioner received a report from the data controller concerning the theft of a laptop computer holding personal data. On 9 January 2008 a Royal Navy recruiter's laptop computer was stolen from a car which had been left overnight in a car park in Edgbaston, Birmingham. The stolen laptop computer held the personal data of up to approximately 600,000 recruits or potential recruits. The report also referred to other data losses on a lesser scale involving the theft of laptop computers holding personal data.
- 4 In response the data controller appointed Sir Edmund Burton to carry out a review resulting in the "Report into the Loss of MOD Personal Data" dated 30 April 2008 (the "Burton Report"). The terms of reference were "To establish the exact circumstances and events that led to the loss by MOD of personal data; to examine the adequacy of the steps taken to prevent any recurrence, and of MOD policy, practice and management arrangements in respect of the protection of personal data more generally; to make recommendations; and to report to MOD's permanent secretary not later than 30 April 2008".
- 5 The Commissioner has considered the report on the issues arising out of the theft of the laptop computer referred to in paragraph 3 above. The Commissioner has also been provided with a copy of the Burton Report which makes 51 Recommendations summarised at Annex A of the said report. The Commissioner has further considered the data controller's compliance with the provisions of the Act in light of these matters.

6 In particular the Commissioner has taken into account the fact that the stolen laptop computer also held the personal data of up to 400,000 individuals, who were either referees or parents of the recruits. Therefore the stolen laptop computer held personal data of up to 1,000,000 individuals in total. The Burton Report also found that the data loss was avoidable and that access was required by recruiters only for the records of those individuals with whom the MOD would deal in the immediate future. In the circumstances the stolen laptop computer held an excessive amount of personal data at the time it was stolen. The Commissioner has further had regard to the fact that the laptop computer was not encrypted.

7 Section 4(4) of the Act provides that, subject to Section 27(1) of the Act, it is the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller. The relevant provisions of the Act are the Third and Seventh Data Protection Principles.

8 The Third Data Protection Principle provides, at Part I of Schedule 1 to the Act that:

"Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed".

9 The Seventh Data Protection Principle provides at Part I of Schedule 1 to the Act that:

"Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data".

Paragraph 9 of Part II of Schedule 1 of the Act further provides that:

"Having regard to the state of technological development and the cost of implementing any measures, the measures must ensure a level of security appropriate to –

(a) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage as are mentioned in the seventh principle, and

(b) the nature of the data to be protected".

10 Having considered the report referred to in paragraph 3 above together with the Burton Report, the Commissioner is satisfied that the data controller has contravened the Third Data Protection Principle in that the personal data processed on the stolen laptop computer were excessive for the purpose for which they were processed. Moreover, the Commissioner is also satisfied that the data controller has contravened the Seventh Data Protection Principle in that he failed to take appropriate measures to ensure the security of his data.

11 The Commissioner considered, as he is required to do under Section 40(2) of the Act when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or distress.

The Commissioner took the view that the likelihood of distress is self-evident: the 1,000,000 or so individuals whose data has been lost are likely to have suffered worry and anxiety on account of the risk that their data will come into the possession of unauthorised individuals.

12 The Commissioner has further taken account of the effect of the incorporation in English law of the European Convention on Human Rights (“ECHR”), by virtue of the Human Rights Act 1998, in deciding whether or not to serve an Enforcement Notice. In particular, the Commissioner is mindful of the provisions of Article 8 of the ECHR in that the individuals whose personal data was held on the stolen laptop computer all have the right to respect for private and family life, home and correspondence which has been unlawfully interfered with by reason of the failure of the data controller to comply with the Third and Seventh Data Protection Principles of the Act.

In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the Act, the data controller is required to take the following specified steps to comply with the Third and Seventh Data Protection Principles.

The data controller, the Secretary of State for Defence, shall:

- (1) Use his best endeavours to give effect to the Recommendations still to be implemented in Annex A of the Burton Report by 31st March 2009 in accordance with the data controller’s Action Plan in response to the Burton Report (the “Action Plan”), and
- (2) Provide the Commissioner with a copy of the 3 monthly progress report received by the Defence Operating Board who have oversight of the programme to implement the Recommendations in the Burton Report in accordance with the Action Plan.

Right of Appeal

There is a right of appeal against this Notice to the Information Tribunal. Information about appeals is set out in the attached Annex 1.

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Notice is served. If the notice of appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Dated the 14th day of July 2008

Signed:
Richard Thomas
Information Commissioner
Wycliffe House
Water Lane
WILMSLOW
Cheshire
SK9 5AF

ANNEX 1

THE DATA PROTECTION ACT 1998 (PART V, SECTION 40)

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice or an information notice has been served a right of appeal to the Information Tribunal (the "Tribunal") against the notice.
2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.
3. You may bring an appeal by serving a notice of appeal on the Secretary to the Information Tribunal, Arnhem House Support Centre, PO Box 6987, Leicester, Leicestershire, LE1 6ZX.
 - a) The notice of appeal should be served on the Tribunal within 28 days of the date on which notice of the Commissioner's decision was served on or given to you.
 - b) If your notice of appeal is late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.
 - c) If you send your notice of appeal by post to the Tribunal, either in a registered letter or by the recorded delivery service, it will be treated as having been served on the Tribunal on the date on which it is received for dispatch by the Post Office.
4. The notice of appeal should state:-
 - a) your name and address;
 - b) the decision which you are disputing and the date on which the notice relating to such decision was served on or given to you;
 - c) the grounds of your appeal;

- d) whether you consider that you are likely to wish a hearing to be held by the Tribunal or not;
- e) if you have exceeded the 28 day time limit mentioned above the special circumstances which you consider justify the acceptance of your notice of appeal by the Tribunal; and
- f) an address for service of notices and other documents on you.

In addition, a notice of appeal may include a request for an early hearing of the appeal and the reasons for that request.

5. By virtue of section 40(7), an enforcement notice may not require any of the provisions of the notice to be complied with before the end of the period in which an appeal can be brought and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

However, section 40(7) does not apply where the notice contains a statement that the Commissioner considers that the notice should be complied with as a matter of urgency.

Section 48(3) provides that where an enforcement notice contains a statement that the notice should be complied with as a matter of urgency then, whether or not you intend to appeal against the notice, you may appeal against –

- (a) the Commissioner's decision to include the statement in the notice, or
 - (b) the effect of the inclusion of the statement as respects any part of the notice.
6. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
7. The statutory provisions concerning appeals to the Information Tribunal are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and the Information Tribunal (Enforcement Appeals) Rules 2005 (Statutory Instrument 2005, No. 14).