

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE DATED 2 MARCH 2009

To: Mr Ian Kerr trading as The Consulting Association

of: 4 High Street
Droitwich
WR9 8EW

1. Mr Ian Kerr trading as The Consulting Association is a “data controller” as defined in section 1(1) of the Data Protection Act 1998 (the “Act”).
2. The Commissioner was informed that a list was operating within the construction industry. It was alleged that contractors in the construction industry would send a list of the names of potential staff to the data controller who would then check the names against a list and then advise the contractors of intelligence information which the data controller held in relation to those named on that list. The contractor would then make a decision whether or not to employ an individual on the basis of that information.
3. On 23 February 2009 a warrant, granted under Schedule 9 of the Act, was executed at the premises of the data controller. A search of the premises revealed the following information:
 - (i) A ring binder containing 3,213 entries in relation to individuals. The entries contained information such as names, dates of birth, national insurance numbers, locations and trades alphabetically listed on pages which had been processed on electronic media.
 - (ii) A comprehensive card index system constituting an intelligence database. Some of the information is over 30 years old and the database contained, amongst other things, personal data relating to the union activity of an individual, his employment conduct together with any information that the individual may pose a threat to industrial relations between an employer and its employees. This database was linked to the information contained in the ring binder referred to in paragraph 3(i) above.
 - (iii) The identity of organisations (“subscribers”) within the construction industry that had access to information contained in the database following contact with the data controller.

- (iv) Copies of invoices from the data controller to the subscribers for services provided, for example, employment checks on individuals.
 - (v) Miscellaneous papers for sifting, a computer and other electronic storage media.
4. The Commissioner has considered the data controller's compliance with the provisions of the Act in light of this matter.
 5. Section 4(4) of the Act provides that, subject to section 27(1), 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 provision of the Act is the First Data Protection Principle.
 6. The First Data Protection Principle provides, at Part I of Schedule 1 to the Act, that:

“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.”

Paragraph 2 of Part II of Schedule 1 to the Act further provides that:

Sub-section 1

“Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless-

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

Sub-section 2

In sub-paragraph (1)(b) “the relevant time” means-

(a) The time when the data controller first processes the data, or

(b) In a case where at that time disclosure to a third party within a reasonable period is envisaged-

- (i) *If the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,*
- (ii) *if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or*
- (iii) *In any other case, the end of that period.*

Sub-section 3

The information referred to in sub-paragraph (1) is as follows, namely-

- (a) *the identity of the data controller,*
 - (b) *if he has nominated a representative for the purposes of this Act, the identity of that representative,*
 - (c) *the purpose or purposes for which the data are intended to be processed, and*
 - (d) *any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.”*
- (vi) The Commissioner is of the view that the data controller has contravened the First Data Protection Principle in that, amongst other things, he has processed personal data unfairly by failing to provide the individuals whose names are on the list with the information referred to in sub-section 3 referred to above at the relevant time or at all. Information as to whether an individual is a member of a trade union is “sensitive personal data” under section 2(d) of the Act. In addition, the Commissioner considers that none of the conditions for processing in Schedules 2 and 3 to the Act have been met as required by the First Data Protection Principle.
 - (vii) The Commissioner has 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 takes the view that damage or distress to the individuals named on the list is likely as a result of them not being aware of the existence of the list and being denied the opportunity of explaining or correcting what may be inaccurate personal data about them, which may be processed by the data controller or others and which may jeopardise the employment prospects of an individual in the construction industry.

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, he requires that the data controller shall by 10 March 2009 take the following steps:

- (1) Refrain from obtaining, using or disclosing any personal data of the description specified in paragraph 3 of this Notice unless the disclosure is necessary for the purpose of complying with any obligation under the Act; obtaining legal advice or for the purpose of, or in connection with, any legal proceedings.**
- (2) Refrain from altering, erasing or destroying any personal data of the description specified in paragraph 3 of this Notice.**

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.

Statement of urgency and reasons

The Commissioner considers that by reason of special circumstances this Notice should be complied with as a matter of urgency under section 40(8) of the Act. This means that this notice must be complied with by 10 March 2009 at the latest even if the data controller intends to exercise his right of appeal against this Notice. The Commissioner's reasons for reaching this conclusion are that it is likely that the data controller and/or his subscribers will continue to process the personal data of the description specified in paragraph 3 of this Notice to the continuing detriment of the individuals named on the list who are unable to exercise their rights under Part II of the Act. The Commissioner acknowledges that as this processing has apparently been going on for many years that it might appear difficult to justify action under the urgency provisions. However, in the light of the nature of the personal data, the Commissioner believes that if the data controller continues to provide it to employers there is a very significant risk that this will cause some individuals to be denied employment on the basis of adverse information they are unaware of and are therefore unable to challenge.

Dated the 2nd day of March 2009

Signed:

David Smith
Deputy 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 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. Whether or not you decide to appeal against the notice you may appeal against the Commissioner's decision to include the statement of urgency in the notice, or the effect of the inclusion of the statement as respects any part of the notice.
4. On an appeal in respect of the statement of urgency the Tribunal may direct that the notice shall have effect as if it did not contain any such statement or, that the inclusion of the statement shall not have effect in relation to any part of the notice, and may make such modifications in the notice as may be required for giving effect to the direction.
5. 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.

6. 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.

7. 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.
8. 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).