DPA s.4 and Scheds 1-4 – Data Protection Principles

The Chief Constable of Humberside and The Chief Constable of Staffordshire Police and The Chief Constable of Northumbria Police and The Chief Constable of West Midlands Police and The Chief Constable of Greater Manchester Police v IC

EA/2007/0096, 98, 99, 108, 127
21st July 2008

Cases:
McFeeley v United Kingdom [1981] 3 EHRR 161

R (A) v Chief Constable of C [2001] 1 WLR 461

R v Worcester CC ex p SW [2002] HRLR 702

R (Ellis) v Chief Constable of Essex Police [2003] EWHC 1321

R (Lord) v Secretary of State [2003] EWHC 2073 (Admin)

R (Marper) v Chief Constable of South Yorkshire Police [2004] 1 WLR 2196

The Chief Constables of West Yorkshire, South Yorkshire and North Wales v IC [2005] UKIT EA_2004_

X v Chief Constable of West Midlands Police [2005] 1 WLR 65

Stone v South East Coast SHA and others [2006] EWHC 1668 (Admin)

Johnson v Medical Defence Union [2007] 3 CMLR 9

R (Countryside Alliance v Attorney General) [2007] 3 WLR 922

Facts

Following the findings of the Tribunal in the case of *The Chief Constables of West Yorkshire, South Yorkshire and North Wales v IC* ('the 2005 appeal') a fourth code of practice was implemented by the Association of Chief Police Officers (ACPO) in order to provide guidance which is in line with the DPA relating to retention of personal information on the Police National Computer (PNC). This code of practice was not endorsed by the IC and led to five enforcement notices requiring the erasure of the conviction data of five individuals after CRB requests for standard and enhanced certificates.

The IC took enforcement action because he considered that the continuing retention of the information breached the Data Protection Principles (the DPPs) set out in Schedule 1 to the DPA. In effect the IC considered in each case that the information was irrelevant and excessive in relation to the purposes for which it was held, and that it had been held for longer than necessary. In each case, the IC considered that retention of the information had caused and was likely to cause distress to the individual.

All the Appellants appealed the requirement to erase conviction data in the Enforcement Notices. They disputed that there was a breach of the DPPs and argued that the IC wrongly exercised his discretion in requiring the Appellants to erase the data.

Findings

The questions for the Tribunal were as follows:

- To what extent had the retention of the data caused, or was it likely to cause, damage or distress, and if it had not, or there were several causes, did that vitiate the IC's exercise of his discretion? And if any appeal was to be dismissed, should the Tribunal vary the notices and order the Appellants to delete the DNA and fingerprints, if retained, of any of the data subjects?

With regard to whether Part V of the Police Act 1997 and the SVAG 2006 impose mandatory duties on the police in certain circumstances to disclose all conviction data held on the PNC to the CRB and the ISA, the Tribunal found that the statutory provisions referred to do not impose a mandatory duty to disclose all conviction data, only the information held on the PNC in certain circumstances.

<u>The Appellants' purposes to which compliance with DPP3 and DPP5 is to be assessed</u>

The question here for the Tribunal was what were the *purposes* of the Appellants in the context of the third and fifth data protection principles?

The IC argued that prevention and detection of crime, the investigation and apprehension of offenders, and the maintenance of law and order are the 'core' police purposes and must be taken into account in applying DPP3 and DPP5. The Home Office however argued that all the notified purposes must be taken into account in applying DPP3 and DPP5. The Tribunal stated that it was not clear the extent to which the purpose(s) for which the police are registered under the DPA would be pursued if they provided all conviction data to other bodies such as the CRB. Therefore they found that they must concentrate on the obvious or core police purposes which are easily understood. One of the principal reasons behind the registration process is so that it is transparent and clear as to what purposes are being pursued by a data controller in order for it to be seen that there is compliance with the DPPs. The Tribunal also considered that the police should only process data for their core purposes. In data protection terms this processing requires holding criminal intelligence on the PNC for so long as it is necessary for the police's core purposes. They held that during the course of holding such data the police are under statutory obligations to allow access to or disclosure of such data to other bodies for their purposes; however that Chief Constables are not required under their statutory obligations to hold data they no longer require for core purposes. Therefore, Chief Constables cannot be expected to incorporate other bodies' purposes as part of their own even though there may be some common objectives, like the prevention of crime.

The Tribunal also considered whether the purposes extended beyond operational detection of crime to:

[i] assistance to the Crown Prosecution Service (or any other prosecuting agency) in the prosecution of an offence, and the courts in the administration of justice;

[ii] assisting organisations such as social services departments and probation services in multi- agency work to protect the public, in particular young and vulnerable persons;
[iii] disclosure of information in the context of employment vetting to the CRB; and
[iv] public safety and protection of life and property, for example assisting members of the public in discovering the whereabouts of missing persons?

With regard to assisting the CPS and the courts, the Tribunal held that information that no longer has a policing purpose cannot properly be retained by the police, solely to ensure that a fuller record of conviction information is available for use by the CPS or by the Courts, rejecting the idea that deleting such information impedes the prosecution of offenders.

With regard to multi-agency work, the Tribunal held that multi-agency working does not in itself mean that the purposes for which the police hold information have been extended. What it means is that the police are co-operating with other agencies in order to achieve the object of preventing crime.

With regard to employment vetting, the Tribunal held that if the police hold information that is no longer relevant for the prevention and detection of crime, then its continued retention by the police cannot properly be justified by relying on its potential value to prospective employers from sectors working with children and vulnerable adults. It is not the function of the police to run an information service for prospective employers helping them to assess, in general terms, whether they wish to employ particular individuals.

With regard to public safety and missing persons, the Tribunal held that Chief Constables will only be able to use the information they hold to assist them with say locating missing persons. This purpose does not justify retaining of all criminal intelligence or just conviction data which otherwise would be processed in contravention of DPP3 and 5.

<u>The Third and Fifth Data Protection Principles</u>
The Tribunal questioned in respect each purpose, whether the *retention* of any of the conviction data of the data subjects ceased to be adequate or relevant, or whether it was excessive; and if not whether the IC erred in law in the issuance of the enforcement notices. They also questioned whether in respect of each purpose, the keeping of the conviction data was longer than necessary and if not whether the IC erred in law in the issuance of the enforcement notices.

The Tribunal rejected the Appellants' contentions that the Police Act 1997 establishes that retention and disclosure of all conviction data is relevant and not excessive. They accepted that it was a relevant consideration to take into account but that compliance with the rehabilitation of offenders provisions cannot be regarded as, in effect, the sole consideration when determining compliance with DPP3 and DPP5. The Tribunal accepted the IC's submissions that the third and the fifth principles should be approached by reference to whether the continued retention of the data is *necessary* (in the sense of being reasonably necessary for police purposes), and whether it is *proportionate* (that is, whether the purposes pursued justify the interference with the

rights of the data subjects); relying on the authority in the cases of *Stone v South East Coast SHA*, *R (Ellis) v Chief Constable of Essex Police* and *R (Marper) v Chief Constable of South Yorkshire Police*.

The Tribunal further rejected the idea that retaining criminal conviction data is like retaining health information in order to decide what medical treatments should be offered across the population as a whole. They held that the use that is made of criminal conviction information is very different as it will be used to inform decisions about individuals, for example should this individual be allowed to look after elderly residents in a care home. They stated that the difference in conviction rates upon retaining conviction data is of no practical significance.

With regard to the data subjects, the Tribunal held that all the offences were committed many years ago, they were not committed against children or vulnerable adults, they were not sexual in nature and the punishments were very minor, therefore, applying the necessity and proportionality tests that retention of this information was an infringement of DPP3 and DPP5.

The Tribunal further held that the general approach to the retention of conviction information exemplified by the present cases goes beyond what is necessary for policing purposes and is likely to lead to breaches of DPP3 and DPP5 for reasons that there is no statutory duty on police to record all conviction information, there are retention rules which operate in Scotland and there is a flexible approach taken to soft intelligence information or data.

The Tribunal held that there was no error in law in issuing the Enforcement Notices and also stated that the IC's decision to take enforcement action under s.40 DPA was a legitimate and proper exercise of his discretion, and that there was no proper basis for the Tribunal to overturn that exercise.

<u>What falls within the exceptional category in the 2006 Guidelines?</u>
The Tribunal considered whether there had been a breach of any of the DPPs, rather than what is the proper interpretation of the exceptional category in the 2006 Guidelines. In order to determine that question the Tribunal needed to consider whether the 2006 Guidelines as a whole are a necessary and proportionate response to meeting the polices' purposes taking into account the legislative and practice framework in which they are required to operate.

The Tribunal observed that the 2006 Guidelines did not appear to be a suitable approach to the retention of conviction data in order to comply with the DPA. ACPO seemed to ignore the guidance provided in the 2005 Tribunal decision in relation to stepping out of conviction data. They appreciated that policing requirements had changed since that decision but the 2006 Guidelines did not appear to even attempt to provide a proper consideration of DPPs 3 and 5 in contrast to other police codes referred to.

<u>Was the conviction data in respect of SP processed unfairly?</u>
With regard to one of the data subjects (SP) she was told at the time of her reprimand under the 1999 Rules that her reprimand would be removed from her record in five years if she did not get into any more trouble. However, the data was not removed as

the 1999 Rules were replaced with the 2006 Code before the record was removed. The IC argued that it was unfair to retain the information in a manner that is inconsistent with the assurance that she was given in 2001 about the future treatment of that information.

The Tribunal held that Staffordshire Police were very unclear as to whether the question of fairness to SP had been considered when reaching the decision to retain the information, which led the Tribunal to the view that the personal data was processed unfairly.

Does s.29 DPA exempt data controllers from compliance with the DPPs in respect of any alleged contravention?

The Tribunal held that the intention behind s.29(3) DPA (which states that personal data are exempt from the "non-disclosure provisions" in any case in which the disclosure is for a purpose mentioned in s.29(1)) is that personal data can be disclosed for the limited purposes set out in section 29(1) even if otherwise in breach of DPP1. It does not apply to DPP3 and DPP5. Therefore in their view s.29 could only be considered, if at all, in the context of the issue which relates to SP alone.

The application of ECHR article 8

The Tribunal were asked to address whether there had been a breach of Article 8(1) of the ECHR, in the processing of any of the data and if there had whether it was qualified by Article 8(2). They were also asked to consider whether disclosure of the conviction data under Part V of the Police Act 1997 and in the future under SVGA 2006 is lawful and does not infringe the DPPs and Article 8 ECHR.

However, they did not find it necessary to make a decision on these issues as they upheld the Enforcement Notices which required the erasure of the conviction data at issue, the question of the disclosure of this personal data in the future under these provisions no longer arose.

Damage and distress

The Tribunal preferred the IC's conclusions that the very existence of the conviction on the database is a cause of itself for concern and that knowing that information is retained on the PNC is likely to cause distress to individuals, over and above any distress that may be caused by their being obliged to disclose the historical fact that they have a conviction. The Tribunal agreed that the retention of information on the PNC is likely to give an impression, both to data subjects and to others, that the conviction is still regarded by the police as a serious and relevant matter and that the data subject is potentially of interest to the police.

Conclusion

The Tribunal upheld the five enforcement notices and dismissed the appeal.

Observations

The Tribunal observed that the authority had not accounted for what the previous Tribunal had stated regarding the step down and step out model. They also commented that if the government and other agencies need to hold data of the sort

mentioned, then new legislation is required in order to provide a proper legal framework for that.