DPA s.4 and Scheds 1-4 – Data protection principles

HRA Art 8 – Right to private and family life

The Chief Constables of West Yorkshire, South Yorkshire and North Wales Police v IC

12th October 2005

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

Facts

Three appeals arose from the service of three enforcement notices under s.40 DPA which required the erasure of conviction data held on the Police National Computer (PNC) relating to three individuals (referred to as WY, SY and NW).

The IC stated in the enforcement notices that in continuing to process the relevant conviction data the three Chief Constables of the forces in question as data controllers contravened the Third and Fifth Data Protection principles.

Findings

The central question for the consideration of the Tribunal was 'whether the three sets of convictions pertaining to the data subjects who feature in the enforcement notices should be totally deleted or expunged from the PNC mindful not only of an alleged contravention of the Third and Fifth Data Protection principles but also taking into account Article 8 of the European Convention on Human Rights (ECHR) taking further account of the fact that in accordance with his mandate under the 1998 Act the IC has properly considered that continued contravention has caused or is likely to cause any person, namely here, the data subjects, damage or distress'.

The Tribunal reviewed much evidence regarding the Weeding Rules used by Police in retaining conviction information as the IC argued that "retention of conviction data on the PNC creates a liability to have those data disclosed to third parties." However, the Tribunal also weighed that against the continued justification for retention given within the existing weeding guidelines. The Tribunal was provided with no forensic or empirical research on the part of the IC in support of his contention that there was little if any value in conviction data of the sort therein question being retained for the periods of time prescribed by the weeding rules. In fact, they noted that there was some incontestable value in retaining conviction data dependent largely upon the nature of the offence.

However, the Tribunal found that the Weeding Rules do not and could not conceivably represent an unqualified and rigid code in the way largely maintained on the part of the Appellants. They therefore felt that should ACPO and the Commissioner reinstitute a dialogue as to the way forward, the Appellants together

with the other 40 chief police officers in England and Wales would clearly benefit from clear specific instructions as distinct from guidance. They also recommended that the Weeding Rules should reflect an evolving state of development in order to take account of the fact that the perception of a particular offence from the point of view of the police and the public will alter over time.

The real risk as it appeared that the Tribunal was the prejudicial risk of disclosure as distinct from retention. If there were in force some form of police access only regime subject to one important qualification – that data would always be available to a data subject through any subject access provision in the 1998 Act – no such disclosures in those cases would have occurred relating as they did to police complaints activity and the enquiries of a foreign immigration service and consequently no distress would have been experienced by the data subjects as taken into account of such by the IC.

Article 8 ECHR

The Tribunal was prepared to accept that in the case of spent convictions insofar as the retention of conviction information is concerned, the fact of a spent conviction is clearly relevant in addressing to what extent Article 8(1) rights are engaged, i.e. an individual's privacy rights are clearly likely to be more adversely affected in the case of a spent conviction being retained as distinct from one that is not spent absent other considerations.

The Tribunal noted that the crux of the appeals was the determination by the IC that the retention of conviction data was unlawful. They referred to the cases of *R v Chief Constable of the South Yorkshire Police* and *R (Marper) v Chief Constable of the South Yorkshire Police* which held that DNA information and finger print information held on the database was not information that engaged Article 8(1). However, it seemedclear to the Tribunal that conviction data constitutes the clearest form, if not one of the most vivid forms of personal history unlike DNA information which is stored simply for identification purposes alone.

The Tribunal accepted that Article 8(1) would be engaged with regard to conviction data. However, they found that the data here fell within Article 8(2), since retention was clearly in accordance with the law and related to the interests listed in Article 8(2).

Although the Tribunal did not take issue with the exercise of the IC's initial discretion of a finding of distress, they recommended that particular attention be focused in such cases upon an examination to what degree any distress complained of emanated from the fact of retention rather than from the fact of disclosure.

The Data Protection Principles

The two data protection principles required a somewhat similar exercise, namely balancing on the one hand the protection of the interests of individuals whose data is sought to be retained as against on the other hand the legitimate pursuit of the purposes of the type set out in Article 8(2); namely here in particular public safety and/or the prevention of disorder or crime as well as the general protection of the rights and freedom of others insofar as there is an overlap between those concepts.

The parties proceeded on the basis that their expression was arguably covered by one or more of the explicitly stated purposes. The parties suggested overall descriptions of the purposes such as "police operational purposes", namely assisting a court in the administration of justice, in particular the criminal courts and secondly employment vetting or the facilitating of such vetting via the various disclosure systems. The Tribunal held that retention of conviction data falls squarely within the concept of operational police purposes not to mention the specific purpose descriptions pertaining to the prevention and detection of crime as well as the apprehension and prosecution of offenders which feature in the Register of Particulars applicable in the three cases. However, they held that Data which has been kept for longer than necessary for any of the so called operational police purposes here could on any view be regarded as excessive.

The Tribunal also accepted that employment vetting is in certain respects linked to the registered purposes. However, in regarding a government circular advising chief police officers of the proper approach to employment vetting that only insofar as employment vetting touches and concerns the prevention and detection of crime as well as the apprehension and prosecution of offenders can a chief police officer justify retention of data on the PNC.

The Tribunal noted however, that the factors to be weighed in the balance in applying the Third and Fifth Data Protection Principles may have differing degrees of weight from those which would apply with regard to 'operational police purposes'. They gave the example that conviction data coupled with other data that might be available in a criminal trial (which former data might of itself otherwise be of minimal value with regard to policing purposes) might be of greater importance when assessing the previous bad character of a defendant or of a witness in criminal proceedings. They held that just as the purposes differ, so will the factors differ with regard to a proper consideration of whether the data is relevant and/or excessive and/or not kept longer than is necessary no matter what the purpose.

Overall the Tribunal took the view that the IC was entitled to issue enforcement notices on the material he then had on the facts of each of these cases but given the wider range of material put before it the Tribunal was able to review the underlying determinations of fact and thereby exercised its right to review the notice.

The Commissioner's secondary position

During the course of the appeals the IC was prepared to concede at least that in the alternative some variant of the step down model might be a tenable position. However, the IC himself accepted that there were two potential barriers even to his secondary position: technology and statute.

However, the Tribunal held that technology will advance, therefore: The Tribunal sees no reason why given time that those operating the PNC could restrict access to one party or group of parties alone should not be achievable. The Tribunal noted that this was subject to the rights of parties to reapply should this be beyond any form of sensible resolution.

Insofar as any legal impediment was concerned the Tribunal had the benefit of submissions as to whether as a matter of law it was feasible for this Tribunal to make

an order that though conviction data was to remain on the PNC non police users were not to be permitted to have access, a form of order which was called a "Police Access Only Order." In the circumstances, in the absence of any direct submissions on this issue the Tribunal did not consider it necessary to find that the secondary position adopted by the IC constituted a relevant "change of circumstances" under the provisions of s.49(3) which might equally entitle it to vary the notice or notices in question.

Conclusion

The Tribunal substituted new enforcement notices requiring the conviction data to be "stepped down" so that it could only be processed by Chief Constables for their own use subject to the rules in the ACPO Code of Practice.

Observations

The Tribunal felt that the evidence presented by both parties to the appeals at the same time was both sparse and over generalised. This was a predominant reason why the Tribunal stressed that the three instant appeals do not necessarily form the basis or any useful basis for future cases which might on the surface appear the same.

The Tribunal recommended that in most cases even for old conviction data, be retained a set of case notes, court files or similar materials which will help elucidate the factual background so that a case by case appreciation of conviction data by Chief Officers as data controllers take place at some stage of the relevant history. In the proposed step down model (with whatever variant is proposed) the Tribunal felt that this should take place at the absolute latest after the data has been removed from the PNC.

They commented that there clearly needs to be a review of whether a more rigorous and detailed form of categorisation as to the purposes registrable in respect of police users should be considered.

The Tribunal in particular suggeste that the criteria for access as well as for deletion be arrived at independently if at all possible and be clearly documented so that there is, in effect, transparency to all parties concerned.

Finally, and reflecting the suggestions made above, the Tribunal felt that any code regarding weeding or deletion should be much more sophisticated in its designation of the applicable criteria and that such matters as types of offence, age of offender, modus operandi, length of retention period, nature and extent of any soft information as well as other appropriate items, should be specifically incorporated in any revised code.