

UK DATA PROTECTION REGISTRAR CLARIFIES FAIR OBTAINING

From last year, Eric Howe, the UK's Data Protection Registrar, has named the organizations against whom he has issued an Enforcement Notice (PL&B Sep'89 p.9), his strongest regulatory power. However, these cases, are only the tip of the iceberg because there are many which are resolved by discussion and negotiation, a process which reflects well both on the Registrar's office and those organizations involved. Fair obtaining of data is a frequently disputed issue, one which formed the focus of the Registrar's presentation last October at the PL&B conference.

The Registrar took the unusual step of illustrating his negotiating approach with specific examples. While these examples provide illustrations, he does not want companies to regard them as precedents, as every case is different. As a result, although here we can present readers with some of his main operating principles, the full story of each individual case remains with each organization. PL&B therefore greatly appreciates NDL International's willingness to present its experience in detail (see p.26).

Howe cited NDL International, Tandy and Yorkshire Water as examples of organisations with which his office had negotiated a satisfactory resolution of the way in which they obtained information from individuals. If they had not changed their policies, they may have breached the principle of the Data Protection Act concerned with fair obtaining of data, and could have been served with Enforcement Notices. He regarded the UK law as less burdensome on direct marketing than similar laws in Austria (see p.19) and Sweden (PL&B Feb' 88 p.16)

The Registrar explained Guidance Note 19 has not been withdrawn and conceded that he had not made it sufficiently clear when it was published in August 1988 that it should be read in conjunction with his previous Guideline 4. Now his advice on the data protection principles is consolidated in the new version of Guideline 4 published last year.

The principles for deciding fair obtaining cases

When the Registrar determines the law in a particular case, he looks at the facts and exercises his discretion on appropriate action. The principles he takes into account, include questions such as:

1. Is the obtaining of information fair to the source?
2. Knowledge underpins fairness. For example, who holds the data? For what purposes does he use it, and who is it used by?
3. Is the individual supplying the data informed of the answers to the above questions before supplying the information?
4. How clearly is the individual informed of the above questions?

5. The question of whether the obtaining of personal data is deceiving or misleading is one of fact not intention.
6. Either an opt out or an opt in may be appropriate, depending on circumstances.

Opt in or opt out?

The Registrar has subsequently written to clarify his guidance to companies on the fair obtaining of data:

"When giving information, the source of information should be put in a position of knowledge about who will use the information and for what, such that he can then choose whether or not to supply it. An opt out may be helpful, but it is only necessary where an individual has little choice but to give information, for example, where the data user is a monopoly supplier of an essential service."

"I have also taken the view that if a data user wishes to obtain information for a purpose not apparent to the source and chooses not to tell the source of this purpose, then before the data user does use the data for the extraneous purpose he must describe it to the source and obtain an "opt in" from him. In effect he must fairly obtain the information again for the extraneous purpose."

The effect of the law is that the source of the information must be able to "walk away" from supplying the information. He also pointed out that the Data Protection Register is of very limited use in informing individuals of how their data will be used.

The direct marketing industry view

Kevin Holland, Reader's Digest's Head of Consumer Affairs, representing the direct marketing industry, concentrated on the issues of when direct notification of data subjects was necessary, and what form it should take in order to ensure that personal data was fairly collected.

In the 1984 Data Protection Act, the Register had been intended to play a vital role in informing data subjects of the sources of their personal data, the uses to which they might be put by data users and the types of persons to whom their personal data might be disclosed - all compatible with the Council of Europe Recommendation on the Use of Personal Data in Direct Marketing. Accordingly, the Advertising Association's Code of Practice had required data users to draw the attention of data subjects to Register entries.

Unfortunately, however, in practice, the Register had emerged as not very informative. The registration forms were difficult to design and to complete. It was unrealistic for data subjects to learn from it what data users might do with their data. Now the Registrar had withdrawn copies of the Registrar from public libraries, so it was not easily accessible.

As a result, Holland said that Readers Digest had started to offer individuals an opportunity to obtain a copy of its registration free of charge. In addition, the Advertising Association's Data Protection Committee had proposed a simplified registration system and several amendments to its code of practice which were still awaiting comment from the Registrar. The amended Data Protection Code had a reduced emphasis on the Register. For example:

Section 3.1.4. "If in the course of acquiring personal data from data subjects, data users materially misrepresent to these data subjects the purposes for which the data are to be held, used or disclosed, those data will be regarded as having been unfairly obtained."

Issues still to be dealt with included when, what, and how to notify the data subjects of how data on them will be used

Differences between The Registrar and the direct marketing industry

Holland said that the Advertising Association rejected the Registrar's view that if data subjects were not advised of significantly different intended uses of personal data at the time that it was collected, then their express consent would be required before such uses could be made of the data. There might be exceptional circumstances in which consent might be necessary, but they would be most unlikely to arise in a direct marketing context.

Eric Howe, the Registrar, acknowledges these important differences and says that ultimately they will need to be resolved by the courts, if there is an appropriate test case.