

## UK REGISTRAR CONSULTS ON THE CONFIDENTIALITY OF PERSONAL FINANCIAL DATA

*The UK Data Protection Registrar, in January 1994, circulated a consultation paper "Personal Data Held within the Finance Industry: Some Implications of the First Data Protection Principle with Regard to Confidentiality" to industry representative bodies, regulators and consumer groups. The paper deals principally with the duty of confidence relating to customers' affairs and is designed to advise and inform.*

*The Registrar gives his understanding of the way in which the duty of confidentiality affects the fair and lawful processing of personal data in the finance industry. He believes that some of the finance industry's current and proposed practices could entail the unlawful processing of personal data. Organisations in the finance sector disclose confidential information on their customers' accounts to each other; generally, through credit reference agencies.*

### Introduction

The paper relates to the fair and lawful obtaining and processing of personal data within the finance industry. The Registrar considers *unlawful* to mean: "...something which is contrary to some law or enactment or is done without lawful justification or excuse."

The definition is broad, and includes breaches of both criminal and civil law. Where a duty of confidence arises between a data user and a data subject, it is *unlawful* for the data user to use the data for a purpose other than that for which the information was provided. The exception is when the data subject give his consent to such other purpose.

### An obligation of confidence

Financial institutions, such as banks, building societies, issuers of credit or charge cards, finance houses and insurance companies

amongst others, are subject to a duty of confidence. They may apply the following tests in considering whether this duty exists:

- The information provided by the individual must, in fact, be confidential.
- The information has been obtained in circumstances which impose an obligation on the confidant to respect the confidentiality of the information.

In the second case, for example, an application form may indicate that the information supplied will be kept confidential by the recipient.

### Qualifications to the duty of confidence

According to the landmark 1924 case, *Tournier v. National Provincial and Union Bank of England*, there are four exceptions under which a bank could legitimately disclose information about its customer:

- where disclosure is mandatory by law;
- where there is a public duty to disclose;
- where the interests of the bank requires disclosure; and
- where disclosure is made by express or implied consent of the customer.

### Consent

Consent by the individual is the most usual basis for disclosure by financial institutions to third parties, including companies in the same group. Consent by the individual make the disclosures *lawful*.

Consent must be given voluntarily by the individual, who should not be coerced into giving it. The individual must be fully aware of what he/she is consenting to in order to constitute proper consent. Implied consent cannot be assumed from the individual's lack of response to a written notice by the institution.

### Consent as a condition of business

A contractual arrangement between the financial institution and the individual might be considered as consent to the disclosure of

personal data to third parties, either for marketing or credit reference purposes.

Under the *Unfair Contract Terms Act 1977*, it would not be unlawful to disclose information relying on such a consent. This situation might change as a result of the EU Directive on Unfair Terms in Consumer Contracts. According to Article 3.1: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

A consultation document published in October 1993 by the Department of Trade and Industry proposes that the UK Government complies with the Directive by introducing regulations which will complement the Unfair Contract Terms Act 1977.

Under the proposed regulations, an individual will be able to apply to a court to have a term of a contract declared unlawful and taken out of the contract if it fails to satisfy the test of good faith.

The requirement of "good faith" can be defined as follows: "In making an assessment of good faith, particular regard shall be had to:

- the strength of the bargaining positions of the parties;
- whether the consumer had been induced to agree to the term;
- whether the goods or services were sold or supplied to the special order of the consumer; and
- the extent to which the seller or supplier has dealt fairly and equitably with the other party whose legitimate interests he has to take into account."

#### **The Use of Personal Data for Marketing**

In December 1991, the *Good Banking Code of Practice* made some provisions forbidding companies from disclosing personal data for the purpose of marketing in the absence of express consent. However, in last year's Annual Report, the Registrar considered that these

provisions had been contravened by the fact that many institutions employ "host mailing" techniques.

A review of the Code was published in May 1994. Paragraph 10.1, dealing with marketing services, states that: "Banks and building societies will not make the provision of basic banking services conditional on customers giving such written consent (to the disclosure of names and addresses to other companies in the same group for marketing)."

This change was welcomed by the Registrar. However, the duty of confidentiality restricts not only the *disclosure* of data but also the *use* of data. Thus, it is the Registrar's view that customer information cannot lawfully be *disclosed* or *used* for marketing purposes by third parties, including companies in the same group, without the consent of the customer.

#### **Disclosure of Information to Credit Reference Agencies**

Information disclosed is generally related to credit or bank loans.

Information may be given on so-called "black data" where an account is in default for three months and had, at that time, received a communication from the bank warning that if no measures were taken within 28 days, details of the account would be passed to credit reference agencies. Disclosures made in such circumstances could fall within the third *Tournier* exception, as being within the interest of the bank. However, it seems that this exception has been narrowly construed by the Courts in the past. The Registrar considers that the interest of the financial institutions has to be weighed against the confidentiality of the relationship. Thus, if the disclosures fails to fall within the third exception, the consent of the individual will have to be obtained to be lawful. In addition, disclosures and uses of data can always be made lawful as a condition of a contract.

Information can also be given regarding "white data." The Registrar's view is that the individual should be able to decide whether or

not white data is to be made available to credit reference agencies.

### **Fairness**

On considering the implications of consent as a condition of business in the light of the obligation to process personal data *fairly*, the Registrar is concerned that a customer may have no choice other than to give his consent when the finance industry imposes this as a condition of trade. However, without the freely-given consent of the customer, it may be unfair to process information to be used for third party marketing purposes or to exchange such information with other institutions through credit reference agencies. A breach of the fair processing requirement under the First Principle might arise.

### **Improved standards for the confidentiality of personal data**

According to the consultation paper, the following standards should be adopted to comply with the requirements of the First Principle:

1. Individuals should be informed, every time personal data is requested from them, of all the non-obvious uses to which data about them and their account may be put. This includes which data may be disclosed, to whom and in what circumstances.
2. Personal data should not be made available to third parties, either by direct disclosures or via "host mailing" techniques, without consent.
3. It may be made a condition of an agreement that black data be given to credit reference agencies provided the individual had fallen three months in arrears and has been given appropriate notice.
4. The disclosure of white data should only be made with consent and with the free choice of the individual; although financial organisations are free to point out the advantages of white data disclosures.
5. The disclosure of data to credit reference agencies, and the retention of such data in the course of a credit reference check when an application is made, must be notified to the individual at the time of the application. Credit reference agencies cannot record details of the type of service applied for, nor the amount of a loan or the repayment period. However, the fact that a search took place and the name of the organisation that undertook it may be recorded.

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