Information Commissioner's Office

Social networking and online forums – when does the DPA apply?

Data Protection Act

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Introduction

1. The Data Protection Act 1998 (the DPA) is based around eight principles of 'good information handling'. These give people specific rights in relation to their personal information and place certain obligations on those organisations that are responsible for processing it

2. An overview of the main provisions of the DPA can be found in The Guide to Data Protection.

3. This is part of a series of guidance, which goes into more detail than the Guide, to help data controllers to fully understand their obligations and promote good practice.

4. This guidance explains what organisations, and individuals who process personal data for purposes such as running a business, need to consider when they run, contribute to, or download personal data from online forums such as social networking sites, message boards, or blogs.

Overview

- The DPA contains an exemption for personal data that is processed by an individual for the purposes of their personal, family or household affairs. This exemption is often referred to as the 'domestic purposes' exemption. It will apply whenever an individual uses an online forum purely for domestic purposes.

- The domestic purposes exemption does not cover organisational use of online forums. Organisations that use social media are therefore subject to the DPA in the normal way.

- The exemption also doesn't apply when individuals process personal data for non-domestic purposes. Individuals who use social media for purposes such as running a sole trader business are subject to the DPA in the usual way.

- When an organisation, or individual acting for non-domestic purposes, posts personal data on a social networking site, message board or blog, they will need to ensure that they have complied with the DPA. The same applies if they download personal data from a social networking site and use it for non-domestic purposes.

- When an organisation, or individual acting for non-domestic purposes, runs an online forum they may also have responsibilities as data controllers under the DPA. This would include a duty to take reasonable steps to check the accuracy of any personal data that is posted on their site by third parties.

- What are considered to be reasonable steps will depend on the nature of the site and the extent to which the person or organisation running the site takes a role in moderating content. We would not consider it reasonable to expect a large social networking site to check all posts for accuracy, but we would expect it to have measures in place to deal with complaints about factually inaccurate postings.

What the DPA says

5. There is an exemption in the DPA which means that when personal data is processed by an individual for their own personal purposes the data protection principles do not apply. This exemption is often referred to as the 'domestic purposes' exemption.

6. Section 36 states:

> 36. Personal data processed by an individual only for the purposes of that individual's personal, family, or household affairs (including recreational purposes) are exempt from the data protection principles and the provisions of Parts II and III.

7. Section 36 can't be used by organisations which process personal data. This means that organisations that use social media or other online forums have responsibilities under the DPA:

    - if they post personal data on their own or a third party's website;

    - if they download and use personal data from a third party website;

    - if they run a website which allows third parties to add comments or posts about living individuals, and they are a data controller for the website content. (For more

information about data controllers please see The Guide to Data Protection)

8. The section 36 exemption also doesn't apply to processing by individuals for non-domestic purposes. This means that if an individual, such as a sole trader, is using social media to process personal data for their business purposes then they will also have responsibilities under the DPA.

Determining whether an online forum is being used for non-domestic purposes

9. The section 36 exemption is based on the purposes for which the personal data is being processed, not on the nature or content of the data itself. It applies whenever someone uses an online forum purely in a personal capacity for their own domestic or recreational purposes. It doesn't apply when an organisation or an individual uses an online forum for corporate, business or non-domestic purposes.

Organisations

10. Organisations such as businesses, charities and political parties increasingly use social networking sites or other online forums for their ordinary corporate or organisational purposes. Examples of this include:

    - a business promoting its services by posting customers reviews of a product
    - a police force posting pictures of suspects with details of their alleged crimes
    - a political party carrying out membership recruitment
    - a school asking its alumni to provide their details for a planned reunion

11. The domestic purposes exemption cannot apply to the processing of personal data done by organisations through social networking sites.

12. This is still the case even if an organisation gets a member of its staff to do the processing for it through their personal networking page. This is because the employee is acting on behalf of the organisation and the processing is for the organisation's corporate or organisational purposes, not for the

purposes of the employee's personal, family or household affairs. The ICO would consider it poor practice for an organisation to encourage or allow employees to use their own personal networking pages for corporate purposes.

13. If an organisation does decide to use social networking sites then it must ensure that it complies with the DPA. For further information about what the DPA requires please refer to our Guide to data protection.

Groups of individuals

14. The section 36 exemption refers to an individual processing personal data for domestic purposes. Sometimes online forums can be used or set up by a group of individuals and the question is then asked whether the domestic purposes exemption can apply in these circumstances.

15. The ICO view is that the key issue here remains the purpose behind the processing. If you are processing personal data for non-domestic purposes then you will be subject to the requirements of the DPA regardless of whether you are acting as a sole individual, as part of a group of separate individuals, or on behalf of a group (such as a club or society) with its own separate legal identity.

16. In this circumstance, although the capacity in which you are acting may affect who is identified as the data controller, and whether more than one data controller exists, it doesn't alter the basic premise that you can't rely on the exemption at section 36 of the DPA if the purpose behind your processing is not your own personal, family or household affairs.

17. This does not mean, however, that the status of the group can never be relevant to this issue. In general the more formal and the more distinct the group is from its individual members the less likely it is that the domestic purposes exemption will apply.

18. This is because a more formal group (such as a club or society) that exists independently of its individual members, and whose membership can change over time, is more likely to process personal data for its own distinct purposes rather than for the domestic purposes of its individual members.

Example 1

A group of friends who met on holiday set up a social networking page to share their photographs and arrange a further trip for the following year.

The purpose of the processing is clearly for the individuals' recreational purposes. In this situation the domestic purposes exemption applies. It doesn't make any difference that more than one individual is processing personal data on the same subject.

Example 2

A chess club sets up a website on which it publishes results of the chess matches its members have played in tournaments against other clubs.

Although the members of the club share a recreational interest, the personal data is being processed for the distinct collective purposes of the club rather than for the domestic purposes of its individual members. In this situation the section 36 exemption does not apply.

19. The following questions may help a group of individuals to decide whether the exemption applies to them or not, but they should not be treated as an exhaustive list:

    - Is the site or networking page commercial? Does it generate income through advertising or subscriptions? Has it been set up to pursue a professional or commercial objective?

    - Is the personal data being processed for the distinct, collective purposes of the group, rather than for the personal, family or household purposes of its individual members?

    - Is the personal data clearly being posted on behalf of an organisation?

    - Is the group separately legally constituted in some way?

- Is the personal data being posted on behalf of a group that is distinct from its members? Would the group continue to exist if its membership changed? Does it have its own set of rules that exists separately from its members?

20. If the answer to any of the questions above is 'yes', then it is unlikely that the processing is being done by an individual for his or her domestic purposes and it is therefore unlikely that the section 36 exemption applies.

Individuals

21. The section 36 exemption only applies when an individual is processing personal data for their own personal, family or household affairs (including recreational purposes). This means that even when the processing is clearly done by an individual rather than a group or organisation, if the purpose of the processing is non-domestic then the exemption won't apply.

Example 1

A sole trader sets up a website to promote their nail bar and tanning salon and, with permission, includes reviews from named satisfied customers. The purpose behind this processing of personal data is clearly commercial rather than domestic and the section 36 exemption won't apply.

Example 2

A private individual decides to sell off some unwanted gifts using an online auction site. They process the personal data of prospective buyers who 'message' them through the auction site. Although the seller might make some money from the sale we would distinguish the selling of personal possessions from the running of a business, and would accept that this processing is purely for domestic purposes.

Example 3

A seller runs a business buying goods wholesale and selling them on via an online auction site. They retain details of their previous and regular customers for marketing and delivery purposes. Here, the seller is clearly operating a business and processing the personal data in pursuit of a commercial (rather than a domestic) objective. The section 36 exemption will not apply.

Personal views

22. The domestic purposes exemption doesn't necessarily apply whenever a personal view is expressed. For example, online versions of daily newspapers often include an 'opinion' section where a journalist gives their personal view on a matter of media interest. What is important here is that although the opinion given is a personal opinion, it isn't being given for a domestic or recreational purpose. The journalist is providing personal comment for the editorial purposes of the newspaper.

23. Although the domestic purpose exemption won't apply in this circumstance there is another exemption (at section 32 of the DPA) which may apply to personal data which is processed for the special purpose of journalism, art and literature. Further guidance on this exemption will be published soon.

Example 1

A company has a website and decides that it will improve customer relations and awareness of its products if it sets up a social networking account and asks its senior staff to post messages commenting on the latest developments within the industry. Some of these messages comment on the actions of high profile business leaders within the industry.

In this situation, although senior staff may express a mixture of corporate and personal views, the messages aren't being posted for recreational or domestic purposes. They are part of the company's marketing strategy and are being posted for corporate purposes. The senior staff members are posting as part of their job and section 36 does not apply.

Example 2

An employee of the same company has a keen personal interest in the industry in which he works. He isn't asked to post messages on behalf of the company but he follows the Managing Director's posts from his home computer and Smartphone. He has strong views on the actions of a particular figure within the industry, and posts a comment in response to one of his Managing Director's messages on this subject.

Here, the employee is acting purely in a personal capacity. Although the subject matter is related to his work he hasn't been asked to post messages on behalf of the company and he is acting out of his own personal and recreational interest. Therefore section 36 applies.

Using social media for both domestic and non-domestic purposes

24. The examples given above all consider situations where there is one clear purpose for using an online forum. In reality some users of social media do so for mixed purposes. For example, many people in the public eye have social media accounts that they use both for personal, family and recreational purpose and to promote their business interests by raising their public profile.

25. We recognise that this is a difficult area. One very straightforward solution for people in this situation is to keep their personal and non-personal affairs apart by having separate online profiles for their work and personal lives. We appreciate that not everyone will want to do this and it will be a matter of personal choice for the individual. Ultimately however, if an individual chooses to use social networking sites for mixed purposes then they need to make sure that any posts that that aren't made for purely domestic or recreational purposes comply with the DPA.

Running an online forum or social networking site

Establishing the extent to which the person or organisation running the site is a data controller

26. The first issue a person or organisation that runs a social networking site or other online forum needs to consider is the extent to which they are a data controller.

27. The DPA states that

> 1. Data controller means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are to be, processed

28. In relation to any contact information, or other personal data that the site operator processes about its own users or subscribers, it will clearly be a data controller and will need to comply with the DPA.

29. In relation to any personal data that is posted on its site by third party subscribers the issue is less clear cut.

In *The Law Society and Others v Rick Kordowski (Solicitors from Hell)* [2011] EWHC 3185 (QB) Mr Kordowski set up and ran a website on which members of the public were invited, to 'name and shame' ' Solicitors from Hell'. He moderated posts and charged for fee for adding or removing them.

Mr Justice Tugendhat had no hesitation in accepting that Mr Kordowski was a data controller under the DPA and this was not disputed by any party. It was clear in the circumstances that Mr Kordowski decided the purposes and manner in which the personal data was processed.

30. In other cases the forum might be provided free of charge or the person or organisation running the site might take much less of a role in moderating content. For example, members of many large social networking sites are able to add posts directly to the site without first having them checked by a site moderator.

31. However, even if the content is not moderated before posting this does not necessarily mean that the person or organisation running the site isn't a data controller. If the site only allows posts subject to terms and conditions which cover acceptable content, and if it can remove posts which breach its policies on such matters, then it will still, to some extent, be determining the purposes and manner in which personal data is processed. It will therefore be a data controller.

Reasonable steps to ensure the accuracy of personal data

32. If the person or organisation running the site is a data controller for the content that it allows third parties to post then it will need to comply with the following provisions of the DPA.

Schedule 1
Part I

4. Personal data shall be accurate and, where necessary, kept up to date.

Schedule 1
Part II

7. The fourth principle is not to be regarded as being contravened by reason of any inaccuracy in personal data which accurately record information obtained by the data controller from the data subject or a third party in a case where –

   (a) Having regard to the purpose of purposes for which the data were obtained and further processed, the data controller has taken reasonable steps to ensure the accuracy of the data, and

   (b) If the data subject has notified the data controller of the data subject's view that the data are inaccurate, the data shall indicate that fact.

Part IV

70(2) For the purposes of this Act data are inaccurate if they are incorrect or misleading as to any matter of fact

33. This means that when a data controller runs an online forum it has a responsibility to take reasonable steps to check the accuracy of any personal data that is posted on its site by third parties and is presented as a 'matter of fact'.

34. Expressions of opinion will not qualify as matters of fact. So, for example, a post which records someone's age or date of birth may be 'incorrect or misleading as to any matter of fact', but a post which gives an opinion on how old someone looks cannot be.

35. What are considered to be reasonable steps for the person or organisation running the site to take will depend on the nature of the site and how active a role the data controller takes in selecting, allowing or moderating content. There may also be a

higher expectation where children are the primary users of the site; for further information on this please read our Personal information online code of practice.

36.

> Returning to *The Law Society and Others v Rick Kordowski (Solicitors from Hell)* [2011] EWHC 3185 (QB) discussed above.
>
> It was clear that it was Mr Kordowski who decided what content would and would not be included on the site and posts could not be made without his approval. He did not, however, claim to check the accuracy of the posts that he allowed, and the judge noted that "no suggestion is made by him that the words complained of are true or that they are honest opinion". Although the data subjects had advised Mr Kordowski that they considered the posts about them to be inaccurate he had made no attempt to add this information to the site, or to remove the original postings.
>
> In the circumstances of this case, it is clear that the fourth principle of the DPA had been breached. Given the role Mr Kordowski adopted in deciding what content to publish, the steps he took to ensure accuracy were not reasonable. He also failed to indicate when data subjects disputed the accuracy of the posts.

37. Our expectation of 'reasonable steps' would, however, vary depending on the individual circumstances of the case. For example, in a situation where the vast majority of the site content is posted directly by third parties, the volume of third party posts is significant, site content is not moderated in advance and the site relies upon users complying with user policies and reporting problems to the site operator, we would not consider that taking 'reasonable steps' requires the operator to check every individual post for accuracy.

38. We would consider 'reasonable steps' for a data controller running this type of social networking site to include the following:

    - Having clear and prominent policies for users about acceptable and non-acceptable posts

- Having clear and easy to find procedures in place for data subjects to dispute the accuracy of posts and ask for them to be removed

- Responding to disputes about accuracy quickly, and having procedures to remove or suspend access to content, at least until such time as a dispute has been settled.

39. A person or organisation running such a site might wish to set up a mechanism which allows it to add a note to a post indicating that the data subject disputes its factual accuracy. In practice however, it will probably be more practical for the site to simply remove or suspend access to the disputed post in this type of situation.

ICO involvement in complaints against those running social network sites, organisations and individuals

40. We would expect a person or organisation running a social networking site or online forum to have policies in place that are sufficient to deal with:

    - complaints from people who believe that their personal data may have been processed unfairly or unlawfully because they have been the subject of derogatory, threatening or abusive online postings by third parties;

    - disputes between individuals about the factual accuracy of posts; and

    - complaints about how the person or organisation running the site processes any personal data (such as contact details) given to it by its users or subscribers.

41. We will advise members of the public who approach us about any type of unfair or inaccurate posting about them to do one or more of the following in the first instance:

    - Follow the website's procedure for dealing with inaccurate unfair or derogatory postings,

    - Contact the website administrator,

    - Take the matter up directly with the organisation or individual who has posted the personal data, if they feel this would be appropriate,

- If it is alleged that a posting is libellous, threatening or constitutes harassment then consider taking legal advice or contacting the police.

42. The ICO will not consider complaints made against individuals who have posted personal data whilst acting in a personal capacity, no matter how unfair, derogatory or distressing the posts may be. This is because where an individual is posting for the purposes of their personal, family household or recreational purposes the section 36 exemption will apply.

43. The ICO will consider complaints about posts made by businesses, organisations, or individuals acting for non-domestic purposes in the normal way, using a proportionate approach. Further information about our how we do this can be found on the Complaints page of our website.

44. Where we believe it is necessary and proportionate in order to promote compliance with the DPA, we may work with a person or organisation running a site to ensure its policies and procedures for dealing with complaints and disputes about the content that it allows are adequate. Only where the person or organisation is a data controller will we consider complaints about a site's failure to deal with an individual complaint.

Other considerations

45. Even if section 36 does not apply it is possible that another exemption might.

46. As mentioned above there is an exemption at section 32 from certain provisions of the DPA. This would apply if a data controller posted personal data on an online forum

    - for one of the special purposes of journalism, art and literature;
    - in the reasonable belief that publication would be in the public interest; and
    - in the reasonable belief that compliance with the provision of the DPA in question would be incompatible with the special purposes.

47. Additional guidance is available on our guidance pages if you need further information on other parts of the DPA. Further guidance on section 32 of the Act will shortly be produced

following a recommendation from the Leveson Inquiry into the culture, practice and ethics of the press.

48. You may also find it helpful to read our Personal Information online code of practice.

Other legislation

49. As well as considering compliance with the DPA, organisations and individuals that use or run online forums such as social networking sites need to make sure they comply with other relevant legislation such as:

    - the Protection from Harassment Act 1997;
    - the Communications Act 2003;
    - the European Convention on Human Rights;
    - the Malicious Communications Act 1988;
    - the common law of contempt of court and the Contempt of Court Act 1981;
    - section 4A of the Public Order Act 1986;
    - the common law of defamation and the Defamation Acts 1952, 1996 and 2013 (note that section 5 of the 2013 Act deals specifically with website operators).

50. Further details of all current UK legislation can be found at http://www.legislation.gov.uk/

More information

52. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

53. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

54. If you need any more information about this or any other aspect of data protection, please contact us: see our website www.ico.org.uk.