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The Citizen Controller – section 36 and the Domestic Purposes Exemption

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Domestic Purposes Exemption

- What is the 'domestic purpose' exemption?
- Effect of the exemption
- The exemption in the courts
- Practical issues
- The future?

Scope of Data Protection

- Data Protection Directive 1995/ Data Protection Act 1998 applies to processing of personal data
- Main driver was commercial processing
- “Processing” - in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data,
- Personal data includes images
- Would include everything we do as individuals with personal data
- “Whereas there should be excluded the processing of data carried out by a natural person in the exercise of activities which are exclusively personal or domestic, such as correspondence and the holding of records of addresses” (Recital 12 Data Protection Directive)

The exemption

- Article 3(2) of Data Protection Directive
- “This Directive shall not apply to the processing of personal data:....
 - by a natural person in the course of a purely personal or household activity.”
- Section 36 Data Protection Act
- “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.”

Effect of section 36

- Parts II and III deal with data subject rights and notification requirements
- Essentially domestic processing is excluded from ambit of DPA
- Identification of when the exemption applies is important
- “there is an almost total exemption from the Data Protection Act for individuals who just use personal data for their own domestic and recreational purposes. However, the Act still applies to the extent that the ICO may investigate if someone seems to have gone beyond the scope of the exemption, and we may take enforcement action where necessary.”
(ICO)

How has this been
interpreted?

Bodil Lindqvist (CJEU 2003)

- Mrs Lindqvist was catechist acting on behalf of her local church
- Set up webpages on her home computer to allow those taking their confirmation to get access to relevant information
- Pages linked to from main Swedish church website
- Information about Mrs L and 18 colleagues
- Included information about jobs, hobbies, one colleague having injured foot and being on part-time working, telephone numbers
- Had not told colleagues or sought consent
- No notification to Swedish DPA
- Pages removed once concerns raised
- Prosecution brought by Swedish DPA for failure to notify

Bodil Lindqvist

- Important statements made about whether uploading personal data on to the Internet is processing
- Argued that the processing fell outwith the scope of EU law as charitable and religious activities not economic
- CJEU - activities mentioned by way of example are intended to define the scope of the exception
- Exception applies only to the activities which are expressly listed there or which can be classified in the same category
- “That [domestic purpose] exception must therefore be interpreted as relating only to activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.”

František Ryneš v Úřad pro ochranu osobních údajů (CJEU 2014)

- Czech journalist used CCTV cameras fixed on his own home but also narrow path beside house and house opposite
- Evidence of attack on house
- Footage used to convict criminals
- Challenge as to legality of footage – raised with Czech DPA
- Conviction overturned
- Mr R fined for failure to notify Czech DPA

- Question referred to CJEU
- ‘Can the operation of a camera system installed on a family home for the purposes of the protection of the property, health and life of the owners of the home be classified as the processing of personal data “by a natural person in the course of a purely personal or household activity” for the purposes of Article 3(2) of Directive 95/46 ..., even though such a system also monitors a public space?’

Ryneš

- “To the extent that video surveillance such as that at issue in the main proceedings covers, even partially, a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner, it cannot be regarded as an activity which is a purely ‘personal or household’ activity”
- Where the video surveillance covers both private and public space it cannot be covered by the exception, ie it is not processing of data done in the course of a purely personal or household activity
- This is still the case even if the purpose of the system is protecting the property, health and life of the home owners

Ryneš

- Focused on word 'purely'
- Recognition that there may be circumstances where can protect property, health and life of family
- Use beyond own property - not covered by domestic purposes exemption
- Other provisions of the Directive allow the processing to take place without consent
- Notification?
- Czech court referred matter back to DPA - warning that cannot impose fines as Czech law too vague
- General view that would need to notify camera surveillance systems

So what does this
mean ?

CCTV

- ICO Code of Practice (2014) – “In the picture: a data protection code of practice for surveillance cameras and personal information”
- Updated May 2015 to take account of Ryneš
- Section 36 exemption does not apply where cameras cover beyond interior or exterior of individual’s home
- Specifically mentions that cameras covering neighbour’s garden would not fall within the exemption

- ICO has produced guide for public – available on ICO website at <https://ico.org.uk/for-the-public/cctv/>
- Recognition that such processing may still be fair and lawful
- Expectation that domestic CCTV will be notified
- No enforcement in near future except in exceptional cases
- Audio recording should be switched off as it is particularly intrusive – notification does not make this acceptable

Drones and wearable technology

- Also covered within the CCTV Code of Practice
- Body worn video
- Potentially more intrusive as greater mobility and less likely to be aware of the existence of the cameras
- Consider appropriate signage
- Drones
- 'Hobbyists' may still be covered by domestic purposes exemption
- Provide notice through website notices, high visibility clothing, signage
- Availability of exemption will depend on how personal data captured is used

Taking photographs/recordings at school

- Has always been a very sensitive issue
- Goes beyond data protection
- Section 36 can apply where pictures/recording are being taken for family use
- What if pictures are put online – e.g. Facebook page?
- Potential to fall outwith the exemption

Bloggers/online forums/social networks

- ICO – “Social networking and online forums – when does the DPA apply?”
- Section 36 exemption will apply where online forum used for domestic purposes
- Does not include organisational use of online forums
 - Even if done by individual on their own page on behalf of organisation
- Does not include use by individuals in connection with their business
- The more distinct a group is from its individual members less likely that exemption will apply
- Key is whether use is for personal, family or household affairs
- If fall outwith the exemption then use of online forum is governed by DPA

Bloggers/online forums/social networks

- Exemption doesn't apply if relates to trade
 - Selling personal possessions might be covered
 - Not if done on regular basis – e.g. EBay seller
- Personal opinions v freedom of expression
 - Again extent to which DPA applies will depend on whether being done for personal, family or household purposes
- Does Lindqvist/Ryneš suggest an even narrower interpretation?

Recording of conversations

- Exemption applies where activity is for purely personal or domestic reasons
- Need to look to the purpose of the recording
 - e.g. employee wants to record conversation with other member of staff/individual wants to record call with bank
- How intrusive is the recording?
- What is done with the recording?

Being a citizen controller

- Need to comply with responsibilities as data controller
 - Are individuals likely to be aware of what this means?
 - Need for education
- Notification
- First principle requires processing to be fair and lawful
- ICO ruling on disputes between individuals
- Section 32 exemption for special purposes – journalism, art and literature
- ICO - Data Protection and journalism: a guide for the media”

Looking ahead

Data Protection Reform

Draft General Data Protection Regulation

- Commission text (January 2012)
- Article 2(2) This Regulation does not apply to the processing of personal data: ...
- (d) by a natural person without any gainful interest in the course of its own exclusively personal or household activity;
- Parliament text (March 2014)
- (d) by a natural person in the course of an exclusively personal or household activity. This exemption also shall apply to a publication of personal data where it can be reasonably expected that they will be only accessed by a limited number of persons;
- Council text (2015)
- (d) by a natural person in the course of a personal or household activity

Data Protection Reform

- Notification requirements being abandoned
 - What will replace it/ICO funding?
- Anticipated there will be a number of carve outs for SMEs
- Potential for higher penalties
- Issue of what constitutes consent will still remain fraught
- Narrowing of when 'legitimate interests' can be used?

The Internet of Things

- “the Internet of Things (IoT) is set to enable large numbers of previously unconnected devices to communicate and share data with one another - its services span industries from agriculture and energy to transport, healthcare and much more, with the potential for significant benefits to citizens and consumers.”
- Anticipated 26 billion devices attached to Internet of Things by 2020
- Even more scope for individuals to be data controllers
- Will the General Data Protection Regulation meet requirements?
- Do DPAs have the resources to properly enforce?

Questions