

Legal Regulation & Education: Doing the Right Thing?

Karen Mc Cullagh
UEA
k.mccullagh@uea.ac.uk

Let's get personal (data)

At the heart of data protection legislation is the concept of 'personal data'. However, the term has been the subject of great controversy in the UK since the enactment of the Data Protection Act 1998 to give effect to Directive 95/46/EC.

For ten years, the UK was guided by the judgment in *Durant v FSA*¹ in determining what constitutes personal data. In *Durant*, the Court of Appeal interpreted personal data narrowly, saying that data only qualified as personal data under the Data Protection Act 1998 if it was: biographical in a significant sense such that it went beyond the recording of the person's involvement in a matter or event such that it had personal connotations so that their privacy could be said to be compromised; and the information should have the individual as its focus rather than merely their name being recorded in some transaction or event in which they may have featured. Thus, to amount to personal data, the data had to affect an individual's personal or family life, business or professional capacity. This decision caused much confusion and led to criticism by the Art 29 Working Party² and the issuance of Guidance by the UK's regulator, the Information Commissioner's Office³ Moreover, the European Commission considered issuing infraction proceedings against the UK Government for improper implementation of the Directive including an overly narrow interpretation of personal data and the related concept of 'filing system.' These infraction proceedings have been stayed since any legislative amendments suggested as a result of the infraction proceedings would likely be superseded if the proposed Data Protection Regulation were introduced.

Meanwhile, in December 2013, the Court of Appeal heard the case of *Efiom Edem v ICO and FSA*⁴ and offered a much broader interpretation of personal data in ruling that a person's name is personal data within the Data Protection Act 1998 unless it is such a common name that, without further information such as its use in a work context, a person would remain unidentifiable despite its disclosure. Whilst the recent judgment has adopted a broader interpretation of personal data that is to be welcomed since it reflects the Guidance offered by the Information Commissioner, uncertainty remains in that there is a mismatch between the definition in the DPA and that in the European Directive (95/46/EC) to which the UK legislation is supposed to give effect. This paper traces how the term personal data has been interpreted, and reinterpreted in recent

¹ [2003] EWCA Civ 1746

² Article 29 Working Party, Opinion on Personal Data (WP 136)

³ ICO Determining what is personal data

⁴ [2014] EWCA Civ 92

years and concludes by examining whether the legal uncertainty is likely to be resolved if the proposed Data Protection Regulation⁵ is introduced.

⁵ European Commission Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) 2012/0011