

PRIVATE AND CONFIDENTIAL

PCC PAPER NO: 3792

TO ALL COMMISSIONERS

Information Commissioner/DCA consultation on penalties for misuse of personal data

1. There are currently two separate but related issues relating to the obtaining of personal data by journalists. The first is the report by the Information Commissioner – *What price privacy?* – which was published earlier in the year and to which he expects responses by the end of September. A copy of the report is attached. Commissioners will recall that the Chairman informed the July meeting about a meeting with the Commissioner, Richard Thomas. At that meeting, Mr Thomas made it clear that he was hoping the Commission would be able to take a lead in issuing ‘plain English’ guidance about what is unacceptable under the Data Protection Act, and that the Code could be changed to include a prohibition on paying for obtain private data. The Information Commissioner’s minute of that meeting is attached.

We put Mr Thomas in touch with the Code of Practice Committee, which would of course be responsible for changing the Code. Any Code change would have to be the basis for a guidance note to be agreed with the Code Committee and the Commission. However, it is for the industry – through the Code Committee, along with a working party that has been established to consider the matter – to give an indication about how it would like to move forward. It would not be for the Commission unilaterally to issue guidance about a piece of legislation on an issue that is not rooted in the Code of Practice. The Chairman has therefore sent the Information Commissioner the attached letter.

It is yet to be seen how the industry will respond, but it is possible to anticipate numerous objections to the Information Commissioner’s request that the Code reflects to some degree what the law requires. One downside lies in the difficulty for the PCC in investigating matters that are more suitably for the courts. Newspapers may not be willing or able to co-operate with any PCC investigation – for fear of prejudicing any subsequent legal action – and there is the provision in our Articles of Association about not dealing with matters where the person has a remedy by way of court proceedings (except in special circumstances). Another is that the PCC’s interpretation of what is in the public interest might differ from that of the courts’ – which may in turn increase the possibility of

judicial review – leading to two different standards and the resulting confusion for the industry. A third problem is that the PCC obviously does not have the legal powers of discovery or cross-examination which might be necessary to establish whether there had been a breach of the Code in this area.

2. The second issue concerns a consultation papers issued by the Department for Constitutional Affairs, which recommends increasing the penalty for deliberate and wilful misuse of personal data to a maximum of two years in prison. The industry generally is concerned about conceding the principle that journalists in a democracy can be imprisoned for offences committed in pursuit of information. There appears to be a general – but not universal – view that two years imprisonment is grossly disproportionate for the offence of illegally obtaining data.

The question for the Commission is whether it is right to respond to the consultation. This area is already covered by the law, so the principle of it being regulated by statute rather than self-regulated has already been established. The Code of Practice or the Commission's competence to act in a certain area are not therefore under threat. There is a general press freedom argument that the industry will articulate, and it is understood that one concession might be for the industry trade bodies to issue guidance on the matter. But it is not clear that the PCC as a body can gain much by commenting publicly on whether the proposed sanctions are suitable or not. Because there is no engagement with the Code (unlike with the proposals on reporting restrictions for inquests) questions about the PCC's independence from the industry and role may be raised if we oppose the proposals, particularly if the non-industry bodies that are being consulted are in favour of them. If we approve them, the Commission would look completely out of step with most in the industry and may suffer damage to its credibility as a result.

We would be grateful for Commissioners' views, but are inclined to recommend that any lobbying against the proposals is left to the industry itself.

3. It is probably frustrating for some in the industry that the outcome of the consultation on penalties will only be known after the deadline for responding to the Information Commissioner has expired. They might think that there is no point co-operating with the Information Commissioner in the production of guidance or amending the Code if the government is going to stiffen the penalties anyway.

We expect further developments in the autumn with which we will keep you fully updated.

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12.09.06