

message

RJT36

Richard Thomas

From: Lee Taylor
Sent: 24 January 2008 12:30
To: Richard Thomas
Subject: FW: Strategy on sec 55 and journalists
Attachments: Strategy on enforcing Sec 55 and applying the public interest test.doc
Richard

As discussed the first draft is attached. David, Mick and Phil are happy with it.

Lee

26/08/2011

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Section 55, Data Protection Act 1998

Information Commissioner's Statement of Prosecution Policy in relation to Journalism

Introduction

In all cases, the Commissioner will act consistently with the Crown Prosecution Service's Code for Prosecutors.

This statement sets out some of the issues that the Information Commissioner will consider when deciding on a possible prosecution against a journalist, editor or proprietor under section 55 of the Data Protection Act 1998. It supplements the Commissioner's Strategy for Data Protection Regulatory Action and is consistent with the Better Regulation Task Force's Principles of Good Regulation.

There have been concerns from some parts of the press and media industries that a stronger maximum penalty for breach of section 55 will have a chilling effect on investigative journalism. This statement is intended to allay the fears of those who act responsibly and in the public interest.

The Data Protection Act 1998 is not intended to stand in the way of the legitimate activities of the press in general and investigative journalism in particular. The Commissioner is fully aware of the fundamental importance of freedom of speech and a free press. He is very mindful of the important rights contained in Article 10 of the European Convention. He recognises the valuable role played by the press and the frequent need for journalists to obtain information about individuals as part of their legitimate activities. He will take these considerations fully into account before embarking on any section 55 investigation or prosecution with possible media involvement.

The offence

Section 55 of the Act makes it an offence for any person to knowingly or recklessly obtain, disclose or procure the disclosure of personal information without the consent of the organisation which holds that information. The requirement for deliberate or reckless activity provides a safeguard. But a journalist, or a third party, who impersonates someone, makes an illicit payment or otherwise deceives an organisation to obtain information about an individual may be at risk of committing the offence. The section may also catch cover cases where an employee is persuaded to supply information in breach a duty of confidence or where a journalist or third party intercepts a communication or gains access to premises and removes copies of information. The offence only concerns information about living individuals.

Defences

There are defences at section 52(2) of the Act that will be of particular relevance to journalists. These include situations where the activity is necessary for the prevention and detection of crime or where it can be justified in the particular circumstances as being in the public interest.

While it should be clear to journalists where their investigations are necessary for the prevention and detection of crime it may be less obvious where it is in the public interest.

There is no definition of the public interest in the Act and the courts have not yet had to consider the application of the public interest defence at section 55(2). However, the Commissioner has substantial experience in considering where the public interest lies in the context of his oversight of the Freedom of Information Act and is mindful of cases where the courts have considered the concept of the public interest in cases involving the privacy of individuals. In addition the media industry and its self-regulatory mechanisms have a great deal of experience of the practicalities of investigative journalism and the application of public interest considerations. Ultimately it will be for the courts to decide whether the public interest justification applies in any cases brought before them

In considering whether a prosecution is appropriate the Commissioner will bear the following factors in mind:

- In a democratic society there is a public interest in the freedom of expression and in the collection of information with a view to publication by a free press. However, there is also a public interest in respecting an individual's right to privacy and the two rights must be balanced. Information which is particularly sensitive will require a higher threshold to be met.
- The section 55 offence focuses primarily on the collection of information, not the publication of a story. However, the Commissioner will be influenced by the actual or potential story flowing from the collection of the information.
- The subject matter that the journalist is investigating will be important:
 - It is likely that the public interest will be served where the activities in question seek to:
 - detect or expose crime;
 - reveal dishonesty or misrepresentation by public figures;
 - protect public safety or national security;
 - expose injustice, corruption, significant incompetence or negligence.
 - In the absence of contrary evidence – for example misuse of public funds – it is much less likely that illicit activities relating to the entirely private lives of public figures and their families can be justified in the public interest.
- Whether the activities of the journalist or third party caused someone else to betray a duty of confidence or commit an offence.
- The nature and extent of any detriment to individuals.
- Whether the journalist or editor has complied with their own industry standards, in particular any relevant codes of practice.

- The existence of any records or other evidence to demonstrate the journalist's belief in the potential public interest dimension of the story and the necessity to obtain personal information by illicit means.
- Whether the journalist took legal advice and/or obtained the approval of the editor to obtain the information.
- Whether the same information was available legitimately from another source.
- Any available information about previous activity of a similar nature by that journalist or publication.
- Whether obtaining the information is also an offence under other legislation such as the Computer Misuse Act or Regulation of Investigatory Powers Act and a more satisfactory result would be achieved by another body taking the lead under that legislation.

This list of relevant factors is not exhaustive and the public interest defence has to be applied in light of the particular circumstances. The Commissioner will consider the detail of any complaint and all other circumstances before deciding what (if any) action is appropriate.

Conclusion

The Commissioner does not consider that the public interest is the same as what the public is interested in. Nevertheless, he does not envisage prosecuting journalists or editors who have acted responsibly and in the reasonable belief that they are acting in the public interest.

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