Data protection law in practice

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In almost every part of our lives we rely on third-party organisations and businesses to collect and process information that is personal to us. Details on everything from our work records to our bank account balances, from our medical records to our university-exam results and from our driving-licence endorsements to our marital status are recorded somewhere by some organisation on our behalf. The Data Protection Acts, 1998 to 2003, were enacted to protect our right to privacy in relation to third party processing of our personal data. European data protection laws have been formally adopted to enhance this right. The Data Protection Commissioner ("the Commissioner") is responsible for upholding the individual's right to privacy and for enforcing the obligations imposed upon third parties dealing with our personal data.

In the October 2004 issue of this newsletter, Killian O'Reilly, Partner in our Commercial Litigation Department, explored the obligations imposed on data controllers by the Data Protection Acts, 1988 to 2003. Over the last year the Commissioner has issued a number of practical guidance notes which interpret various aspects of the legislation. In this article we summarise six of the most pertinent guidance notes and their implications for businesses and individuals.

Rights in respect of Unsolicited Commercial Communications (Spam)

Spam is unsolicited electronic communication (emails, faxes or text messages) used for the purpose of direct marketing. If such communications are sent from within the Republic of Ireland, our data protection regime applies. In many circumstances under Irish law, the sending of Spam is an offence. Two different levels of protection are given in Ireland, depending on whether you (as a recipient) are an individual or a business:

Individual: An email, text message or a fax for the purpose of direct marketing should not be sent to an individual unless he has given prior consent to the receipt of such a communication. An exception may apply to this rule where the individual is a customer of the sender and the message is associated with that business/customer relationship. Direct marketing phone calls should not be made where an individual has previously told the caller that he does not want to receive such calls.

Business: A phone call should not be made, or an email, text message or fax sent to a business for the purpose of direct marketing, if the business has indicated its preference not to receive such direct marketing communications.

Rights of employees

Personal data that is collected and processed about employees should at all times be "adequate, relevant and not excessive". In essence, this means that information retained should be specific to an individual's employment and relevant to the job they are doing. Generally, an employee has a right to request from his employer data pertaining directly to him.

The personal data requested by the employee may relate to appraisal and performance reports and even go so far as to relate to disciplinary, grievance and/or dismissal procedures. This is the case even if the disciplinary procedure is on-going or is currently the subject of legal proceedings. A very limited exception applies to this rule where opinions given during these procedures are expressly given in confidence or on the understanding that they will be treated as confidential. There is a high standard of proof here and the standard would not, for example, be met by merely placing the word "confidential" at the top of a page containing an employee's personal data.

An employee has a right to request and be furnished with medical records relating to him.

Rights relating to the work place

The Commissioner accepts that businesses have a legitimate interest in protecting their resources and reputation and may do so by monitoring employees' emails, internet access, telephones and

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work places (through camera surveillance, etc.).

However, an employer's entitlement to protect its legitimate business interests must be balanced and proportionate to the privacy of the employee. Any monitoring must be proportionate to the potential risk an employer faces, once he has considered the legitimate privacy and other interests of his employees.

The monitoring of employees must comply with a general transparency requirement of our data protection laws, ie, employees should be informed of the employer's policies with regard to the monitoring of emails, telephones etc. At the very least, employees should be told what personal data relating to them is collected by their employer.

Rights regarding CCTV (closed-circuit television)

The Data Protection Acts require that people whose images are captured on camera be informed about the identity of the party collecting the personal data and the purposes for which it is being collected and processed. According to the Commissioner, this can be achieved by placing easily read and well-lit signs in prominent positions. A sign at all entrances will normally suffice.

If an employer intends to use cameras to identify disciplinary (or other) issues relating to its employees, those employees must be informed of this before the cameras are used for these purposes. Covert surveillance may sometimes take place with the involvement of An Garda Siochana.

Any person who is the subject of the recording may request and be furnished with a copy of the recording.

Selling a business

Business owners should be aware that data protection issues may arise on the sale of a business, whether by way of a sale of assets or of the shares in a company. Invariably, a prospective purchaser will seek details of the current employment records in the company. The seller should be careful in transferring such data, so as not to be in breach of data protection laws. The disclosure of such data should be the subject of a confidentiality agreement between the seller and buyer.

Employee information being passed to a prospective purchaser should be "anonymised". This is done by concealing the identity of individual employees and revealing only the pertinent details of salary, terms of employment, bonuses, etc. A business's data protection policy should seek to cater for the eventuality of a sale of the business and inform employees of this possibility.

Specific legal advice should be sought on the transfer of personal data outside the European Economic Area.

Age of consent

Irish data protection law does not prescribe a minimum age at which a person may give their consent to the processing of his personal data. The standard used requires a determination of whether the person is likely to be able to appreciate the nature and effect of giving one's consent, eg, will a young teenager understand the implications of consenting to his contact details being used for direct marketing communications? Ultimately, it is the responsibility of the data controller to determine whether the data subject can properly give consent.

In the case of sensitive personal data such as medical records, it has been suggested that an individual may be assumed to be competent to give consent for medical purposes on reaching the age of 16 years. In less personally sensitive areas, such as marketing, a lower age limit may be applicable.

A business should formulate strict policies on how it will deal with data subjects who are minors. For example, in an effort to obtain parental consent it may not be acceptable to communicate by email when the identity of the recipient cannot be easily established (even if it is, in fact, the parent with whom one is communicating).

This article is intended to be a brief summary of the guidelines issued by the Data Protection Commissioner and is not intended as a legal treatise on the subject. For more and specific information on data protection issues, please contact Killian O'Reilly or Keith Smyth.

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Corporate manslaughter
The Law Reform Commission has published a report recommending the introduction of two new offences: 'corporate manslaughter' and 'grossly negligent management causing death'. The offence of corporate manslaughter, to be prosecuted on indictment only, would apply where gross negligence involving a significant risk of death or serious personal harm causes death. The second offence would apply where there was a conviction for corporate manslaughter which would apply to directors and managers acting on behalf of the undertaking.

Regulatory body for estate agents
A new regulatory authority is to be established to oversee the activities of auctioneers and estate agents. The Authority will deal with the licensing of estate agents, monitor and supervise their services and deal with consumer awareness, protection and redress.

Employment Permits Bill
New legislation introducing a work permit scheme for non-national workers has been introduced to the Dáil. The Bill provides for the introduction of Green Cards, an Intra-Company Transfer Scheme and a Work Permits system. Protections for migrant workers are also included in the Bill.

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Public liability policies: when does an injury occur?

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A recent case before the English High Court considered the issue of when an 'injury occurred' in the context of an asbestos claim. The case was brought by Bolton Metropolitan Borough Council against two insurance companies (Municipal Mutual Insurance and Commercial Union Assurance) with which it had held public liability policies.

Background

Bolton's case arose out of a claim brought by the widow of a worker who had been exposed to asbestos and as a result, had developed mesothelioma. It was alleged that Mr Green had been exposed to asbestos fibres during two periods of employment: first, while employed at a contractor's firm hired by Bolton to work on sites under Bolton's control and second, while the employee of another company.

Bolton and the former employer reached a settlement with Mrs Green, which was accepted at trial as being reasonable.

Bolton's claim

During the period 1960-1965 (the time during which Mr Green was exposed to asbestos) Bolton had public liability insurance with Ocean Accident and Guarantee Corporation Ltd ('Ocean'). During the period 1979-1991, Municipal Mutual Insurance Ltd ('Mutual') provided Bolton with public liability cover.

Bolton sought an indemnity from both its insurers in respect of its liability to Mr Green's widow. Both insurers denied liability and consequently, Bolton commenced proceedings against both Mutual and Commercial Union (the successor to Ocean's liabilities).

The central issue in the case was whether, on the wording of the respective policies, Ocean and/or Municipal were liable to indemnify Bolton.

Ocean's policy said:

> *'...the company will indemnify the Insured against*
> *(a) All sums which the Insured shall become legally liable to pay for compensation in respect of*
> *(1) bodily injury to or illness of any person...occurring within Great Britain, Ireland, Northern Ireland...during the period of indemnity as a result of an accident'*

Municipal's policy said:

'The Company agrees to indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay as compensation arising out of

A) accidental bodily injury or illness (fatal or otherwise) to any person other than any person employed under a contract of service...with the insured if such injury or illness arises out of and in the course of the employment...when such injury illness loss or damage occurs within the currency of the Policy.'

Medical evidence was obtained from two leading experts in the field of mesothelioma. The judgment sets out in detail the current medical understanding of the mesothelioma and, in particular, outlines the changes that take place in cells prior to someone actually developing the disease.

In Mr Green's case, it was agreed that prior to approximately 1980, his lung cells would have undergone genetic alteration on account of the previous exposure to asbestos fibres. At that point, he did not have mesothelioma. In and around 1980, the malignant tumour began to develop with the first symptoms of mesothelioma manifesting in 1990, a year before Mr Green's death in 1991.

On this basis, Bolton argued that it was not under any liability to Mr Green in the 1960s (the time of his exposure to asbestos) on account of him not suffering any actual injury or illness at the time. Rather, their liability arose in and around 1980 when the lung cells became malignant and accordingly, during the currency of the Municipal policy.

Municipal argued that a public liability policy provided cover for negligent acts or omissions that take place during the currency of the policy and that the reference to "accident" could be construed as meaning the time when the asbestos fibres were inhaled as opposed to when mesothelioma actually develops, the latter being due not to an accident as such but rather, to changes within the cells of the lungs.

The judgment

HHJ Kershaw QC disagreed with Municipal and found that 'accidental bodily injury or illness' did not include the inhalation of asbestos fibres which, though potentially harmful, might or might not lead to a malignant tumour. He also held that the policy wording expressly required the bodily injury to occur during the currency of the policy. On the basis of the agreed medical evidence the bodily injury to Mr Green occurred at the onset of the malignancy in around 1980 and Municipal were liable to indemnify Bolton.

Given the judge's reasoning on the Municipal policy, it followed that Ocean were not liable, as Mr Green had not sustained injury during the currency of the Ocean policy.

This case is listed for hearing in the Court of Appeal in mid December 2005. If upheld, it will confirm that it is the public liability policy in place at the time when the disease commences (as opposed to the policy in place at time of exposure) that corresponds with an industrial disease claim.

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Claire McCormack, Partner and Head of O'Rourke Reid's Commercial Property Department, has just returned from this year's trip to South Africa for the Niall Mellon Township Challenge. Claire held a fundraising ball at the Berkeley Court Hotel on 14 October and raised in the region of €60,000. It costs approximately €5,000 to build each house in the project, so her fundraising efforts mean that 12 houses can be built! Claire would like to thank everyone who supported her by attending the Ball and contributing to the Township Challenge.

Instead of sending you Christmas cards this year, O'Rourke Reid Law Firm will be making a donation to charity. The partners and staff of O'Rourke Reid would therefore like to take this opportunity to thank all of their colleagues and clients for their support throughout the year. We wish you all a very Happy Christmas and a prosperous and peaceful New Year.

Fixed v floating charges

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Both fixed and floating charges are commonly granted by companies to lenders for the purposes of giving security for their debts.

Fixed charges

A fixed charge attaches to a particular asset and the company is prevented from dealing with that asset without first discharging the debt or without the consent of the charge holder. Typically a fixed charge might be created over property such as land and buildings.

Floating charges

A floating charge generally attaches to all assets of the company. However, the company can continue to use these assets in the normal course of business. The floating charge will only crystallise on the occurrence of a particular event, at which stage the company will then be prevented from dealing with the assets.

Fixed v floating?

The advantage of creating a fixed charge is that it will override the rights of preferential creditors in the event of liquidation. Holders of floating charges rank behind the rights of preferential creditors and holders of fixed charges. It is not surprising then that banks prefer to create a fixed charge over assets where possible.

A fixed charge is not deemed to exist solely by virtue of its title, in particular, where a lender takes a fixed charge over a company's book debts. In deciding whether a fixed charge exists, the courts will examine the restrictions placed on the use of the proceeds of the book debts by the charge holder.

Fixed charges over book debts

A number of Irish and UK cases have dealt with the issue of whether it is possible to create a fixed charge over book debts. The leading Irish case in *Re Keenan Brothers Limited* established that it is possible to create a fixed charge over book debts but emphasised the need for the bank to control the account within which the proceeds of the book debts were lodged. Subsequent Irish cases such as *RE Wogan (Drogheda Limited) and Holidair Limited* appear to have eased somewhat the requirements for control. A recent UK House of Lords judgment given in the *Spectrum* case will no doubt be of persuasive influence the next time the matter is considered by the Irish courts.

Prior to *Spectrum*, the leading House of Lords case was *Siebe Gorman*. In this case it was sufficient that the borrower (chargor) be prevented from dealing in any way with the debts prior to the collection and that all proceeds from the book debts be paid into a specified account. There was no requirement for a restriction on the use of the account by the chargor. The later case of *Brumark* dealt with a situation where the charge holder was not a clearing bank and the proceeds were paid into a third party bank. This decision was similar to the *Keenan* case as the Privy Council held that despite the fact that a charge over book debts was stated to be a fixed charge it took effect as a floating charge where the chargor retained the power to deal with the proceeds of the book debts.

National Westminster Bank plc v Spectrum Plus Limited

The House of Lords gave judgment in this case in May of this year and considered whether a charge over book debts was a fixed or floating charge.

Background

Spectrum granted National Westminster Bank a debenture to secure all money owing under an overdraft facility. The debenture created a charge on Spectrum's book debts. Similar to the debenture considered in the *Siebe Gorman* case, under its terms Spectrum was obliged to pay all the proceeds of the book debts into an overdraft account. The company was prohibited from factoring, invoicing or discounting the debts prior to collection but was allowed deal with the account in the course of business once the overdraft limit was not exceeded. Spectrum went into creditor's voluntary liquidation in October 2001. National Westminster Bank sought a declaration that the charge over book debts (amounting to €113,484) was a fixed charge.

The judgment

The High Court ruled that the charge was a floating charge but the Court of Appeal overruled that judgment and held that it took effect as a fixed charge. The matter was appealed to the House of Lords where it was held that the charge was a floating charge.

The Lords found that the requirement that the proceeds be paid into a specific account was not sufficient if there was no control exercised by the bank on that account. The judgment effectively overturns the *Siebe Gorman* decision in that there is now a requirement in Britain for control to be placed by the bank on the account into which the book debts are paid. If the bank does not place controls on the account and allows the chargor to deal with the account as they require, then the charge will be deemed to be a floating charge and accordingly will rank behind preferential creditors in liquidation.

It is inevitable that the Irish courts will take *Spectrum* into account in future cases. Lenders should exercise caution and ensure that when they take a fixed charge over book debts that the accounts into which the proceeds of book debts are paid are blocked accounts and that the chargor is not allowed to use the accounts without specific consent from the bank.

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