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UK Data Protection Newsletter October 2014

Headlines this month:

- Surveillance camera code of practice
- Fines for nuisance calls and texts
- International enforcement cooperation
- Data protection fees
- Recent data breaches
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Commentary:

ESurveillance camera code of practice

The Information Commissioner's Office has issued a revised code of practice for users of surveillance cameras warning that they should only be used where necessary and in a proportionate manner.

The ICO's Head of Strategic Liaison stated:

"Surveillance cameras should not be deployed as a quick fix, but a proportionate response to a real and pressing problem. Putting in surveillance cameras or technology like automatic number plate recognition and body worn video is often seen as the first option, but before deploying it you need to understand the problem and whether that is an effective and proportionate solution. Failure to do proper privacy impact assessments in advance has been a common theme in our enforcement cases."

The code of practice recommends undergoing a Privacy Impact Assessment as the best way to assess whether or not to use cameras assessing the impact on individuals' privacy.

The code reiterates the need for footage to be provided in response to a Subject Access Request and the need to have well thought through retention policies in place.

http://ico.org.uk/news/latest_news/2014/~/media/documents/library/Data_Protection/Detailed_specialist_guides/cctv-code-of-practice.pdf

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Fines for nuisance calls and texts

The government has announced that it wants to make it easier for the Information Commissioner's Office to fine companies that make nuisance calls or send spam text messages. The ICO has been lobbying for this for some time.

The Culture Secretary, Sajid Javid, stated:

"Companies have bombarded people with unwanted marketing calls and texts but have escaped punishment because they did not cause enough harm.

"Being called day after day may not be 'substantially distressing' but that doesn't make it acceptable.

"I want to make it easier for companies to face the consequences of ignoring the law and subjecting is to calls or texts we have said we don't want."

The government has published a six week consultation on lowering the legal threshold before fines can be fined.

Christopher Graham, the Information Commissioner, has cited four areas that would change if was easier for the ICO to issue fines to firms responsible:

- The law currently requires the ICO to prove 'substantial harm or substantial distress' before issuing a fine. Making it easier to issue fines should act as a deterrent.
- Companies should improve practices - currently the number of complaints per business is typically not over ten and therefore not serious enough for the ICO to take action. By changing that the ICO believe companies will have the incentive to improve the way they operate.
- Few calls and texts should result - the ICO believe its power to issue fines has already led to 60% of organisations improving compliance.
- The importance of people complaining will increase and the ICO wants to encourage individuals to report companies that are breaking the rules.

Christopher Graham commented:

"The public clearly want to see a stop to nuisance calls and texts. We welcome this proposed change in the law which will enable the ICO to make more fines stick, sending a clear message to the spammers and scammers that the rules around cold calls and spam texts must be followed.

"The majority of rogue marketing firms make hundreds, rather than thousands, of calls and the nuisance is no less a nuisance for falling short of the 'substantial' threshold. This change means we could now target those many companies sending unwanted, messages - and we thing consumers would see a definite drop in the total number of spam calls and texts".

International enforcement cooperationts

An international conference of privacy commissioners has taken place and has agreed to improve international enforcement cooperation when regulators investigate data breaches. Difficulties have been experienced in the past where data breaches have affected individuals from different localities.

A framework has been produced allowing regulators to work better together where there is an international data breach. A common set of rules has been agreed.

Data protection fees

The proposed Data Protection Regulation will result in the cessation of the need for companies to notify the Information Commissioner's Office of data processing on an annual basis. However, it appears the fee (currently £35 for most organisations) will remain.

David Smith, Deputy Information Commissioner, has said that fees for data controllers would continue to be payable and may increase to £50 for the majority of controllers. The increase in fee is deemed necessary for the ICO to manage its increased workload in light of the new regulation.

Recent data protection breaches

EMC Advisory Services Limited

TEMC Advisory Services Limited, a Devon-based marketing firm has been issued with a £70,000 fine after being found responsible for hundreds of nuisance calls. The ICO has now issued over £500,000 in fines relating to nuisance calls.

EMC Advisory Services Limited used third party companies on their behalf to identify Payment Protection Insurance claims. No checks of the Telephone Preference Service were made and 630 complaints were generated over a period of a year.

The ICO's Head of Enforcement stated:

"Getting other businesses to make marketing calls on your behalf does not absolve you of your legal responsibilities. EMC Advisory Services Limited has received today's penalty because they fundamentally failed to understand the law and didn't act or our warning. The result was that hundreds of [people continued to receive nuisance calls due to their actions."

EU update

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NEWGATE

www.newgatepr.com

The below provides an EU update from a Regulatory Strategies' partner, Newgate Public Relations, in Brussels, and provides an insight into the progress of the EU's draft data protection regulation:

The progress on the Data Protection Regulation has been at a steady pace so far but it changed to a gallop last month: on 10 October the Justice and Home Affairs Council agreed on a so-called "partial general approach" on the obligations for data controllers and processors. Overall, the delegations at this meeting welcomed the risk-based approach and argued that the text represented a good balance between protecting personal data and safeguarding the freedom of entrepreneurship.

However the Italian Presidency remains cautious in claiming victory and made clear that nothing is agreed until everything is agreed; this partial agreement does not exclude future changes to be made to the text of Chapter IV; it is without prejudice to any horizontal question and it does not mandate the Presidency to engage in informal trilogues with the European Parliament on the text.

Commissioner Reicherts was glad with the compromise and particularly applauded the

introduction of an exception for SMEs regarding the obligation to contain a record of categories of data protection activities per category: SMEs, according to the Commissioner, need preferential treatment and the exception is in line with the risk-based approach.

The UK also supported the broad approach, saying the compromise offered a better balance between the right conditions for innovation and economic growth and personal data protection. Nevertheless it pointed out that the requirement to carry out an impact assessment should be limited to cases where a high risk is inherit.

The British delegation added that such an impact assessment might result in damaging consequences. There might be instances where the public interest demands that the processing of data is done immediately and referred to the Ebola outbreak in this regard.

Jan-Philipp Albrecht, the MEP who has led the Data Protection Regulation discussions at the Parliament since 2012, was glad that negotiations are starting to move in the Council. He however feared that Member States would decide to go for a status quo when it comes to their data protection legislation. He therefore promised to take a stand on this issue and defend the Parliament's view firmly in the trialogue negotiations:

"Now we quickly need to have agreements on the remaining parts of the Regulation to ensure that negotiations with the Parliament can begin no later than early 2015. Only then it will be possible to achieve the intended adoption by the Heads of State and Government in 2015."

If everything goes to plan the Regulation should enter into force during the course of 2015, therefore it is of crucial importance for businesses to know what substantive obligations will be imposed on those handling personal data. In this respect, it is fairly certain the new Regulation will introduce a new set of accountability obligations that do not exist under the current Directive.
As a general rule, the Council's stance is that the implementation of data protection policies to ensure compliance should be proportionate in relation to the processing activities.

This weighing exercise will be very relevant for "data protection by design", which is a new concept aimed at forcing data controllers to take into account the nature of the data processing activities alongside their potential risk before those activities take place, and deploy protection tools to address that risk. The Council indeed believes that different activities, even when they involve the same data, will often have different repercussions and therefore require a different treatment.

The risk-based approach will therefore be of great importance in the context of two potentially very onerous obligations: the requirement to carry out an impact assessment and the requirement to consult the supervisory authority prior to the processing of personal data where such an impact assessment would indicate that the processing would result in a high risk if no measures are taken by the controller to mitigate the risk.

The risk-based approach has also been the informing principle and main inspiration for policymakers in their debate on the "right to be forgotten" following the European Court of Justice judgment in the Google Spain case. In light of that, the Council recognised the right to erasure and the right to oppose data processing, but at the same time the Member States set great store by freedom of expression and made clear that the balancing of the fundamental right to data protection with freedom of expression had to be done on a, again, case-by-case basis.

In terms of next steps, the agenda remains unchanged. Current caretaker Commissioner Reicherts already expressed her hope that the work of the Italian Presidency of the Council would allow to have the trialogue negotiations between Commission, Council and Parliament starting in January 2015. Therefore there is still a window of opportunity for businesses which are keen to engage with EU Institutions and possibly influence the outcome of the debate in their favour.

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