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2 December 2002

DATA PROTECTION ACT 1998: SUBORDINATE LEGISLATION

I am writing to notify you in accordance with Article 8.6 of the Data Protection Directive (95/46/EC) that the UK Parliament has approved the Data Protection (Processing of Sensitive Personal Data)(Elected representatives) Order 2002, which provides derogations from the restrictions on the processing of sensitive data in Article 8 of the Directive.

I attach a copy of the Order and of its Explanatory Memorandum. The Order will come into force on 17 December.

Please let me know if you need any further information.

EXPLANATORY MEMORANDUM

Draft Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002

Powers under which the Order is to be made

1. The Order is to be made under section 67(2) of, and paragraph 10 of Schedule 3 to, the Data Protection Act 1998 (as amended by paragraph 6 of Schedule 2 to the Transfer of Functions (Miscellaneous) Order 2001 (SI 2001 No. 3500)). Paragraph 10 of Schedule 3 allows the Lord Chancellor to specify in an order circumstances in which sensitive personal data may be processed. Section 67(2) provides that such an order may make provision for different cases. By section 67(4), such an order is subject to affirmative resolution procedure.

Legal and Policy Background

2. The Data Protection Act 1998 gives effect to the 1995 EC Data Protection Directive (95/46/EC). The Act regulates the circumstances in which personal data may be processed. "Personal data" comprise information about individuals that is processed by automatic means or held in a structured manual filing system. "Processing" includes doing anything at all with personal data, including collecting, disclosing and merely holding them. The individuals whose data are processed are known as "data subjects".

3. At the core of the regulatory regime is a set of eight enforceable good practice requirements known as the data protection principles. Persons processing personal data (who are known as data controllers) are required to do so in accordance with the data protection principles. In summary, the principles require personal data to be:

- processed fairly and lawfully;
- processed for limited purposes;
- adequate, relevant and not excessive;
- accurate;
- not kept longer than necessary;
- processed in accordance with individuals' rights;
- kept secure;
- not transferred to non-EEA countries without adequate protection.

4. The first principle is of particular relevance to this draft Order. It says:

“ 1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

The requirement on elected representatives to meet one of the conditions in Schedule 2 does not normally pose a problem. The draft Order is concerned with paragraph (b),

the need to meet one of the conditions in Schedule 3. This is where the Act has been posing problems for elected representatives and their constituents.

5. Sensitive personal data cover information about data subjects' racial or ethnic origin, political opinions, religious beliefs, trade union membership, health, sexual life, and criminal record. Schedule 3 sets out nine substantive conditions relating to the processing of such data. As noted above, Schedule 3 also provides for the Lord Chancellor to specify in an order further circumstances in which sensitive personal data may be processed. One such order has already been made: the Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000 No. 417). (In this paper the conditions in Schedule 3 itself and those in the 2000 Order are together referred to as the "Schedule 3 conditions".)

6. Individuals often wish their elected representatives to take action on their behalf. Sometimes this may require the elected representatives to process sensitive personal data. Having regard to the wide definition of "processing", the mere storage of sensitive personal data by an elected representative (who might receive them, for example, in an e-mail) means that the elected representative has to be able to satisfy a Schedule 3 condition. The elected representative may also need to be able to disclose those data to other organisations in order to take forward action on the constituents' behalf; and organisations which are approached by elected representatives may need to be able to disclose sensitive personal data to them. In some cases, sensitive personal data of third parties may be involved (for example, if a constituent contacts an elected representative on behalf of a seriously ill relative).

7. One of the Schedule 3 conditions is that the data subject has given his explicit consent to the processing of the personal data. In most cases, none of the other conditions are likely to be relevant to cases involving elected representatives. Accordingly, if a constituent sends an elected representative sensitive personal data in the context of a request for action and the constituent has not made clear that the data may be disclosed, if a disclosure is necessary the elected representative must seek the constituent's explicit consent. Similarly, an organisation responding to a request from an elected representative acting on behalf of a constituent will require the explicit consent of the data subject before being able to disclose sensitive personal data.

8. While a requirement to seek explicit consent is a significant safeguard for data subjects, it can also act as a serious impediment to the efficient discharge of elected representatives' business, be confusing to those making the original request who feel that consent was implicit in making the request in the first place, and may even be detrimental to the data subjects' interests. This draft Order provides additional Schedule 3 conditions for the processing of sensitive personal data in cases involving elected representatives. In circumstances in which the conditions apply, it will no longer be necessary to seek the data subjects' explicit consent.

9. The draft Order has been prepared having regard to the relevant requirements of the Data Protection Directive. Article 8.4 of the Directive permits Member States to provide additional conditions for the processing of sensitive personal data for reasons of substantial public interest, and subject to the provision of suitable safeguards. In the Government's view it is in the substantial public interest to permit the efficient and effective discharge of the functions of elected representatives.

10. The draft Order contains a number of safeguards. These include restrictions on the circumstances in which particular data may be processed.

- In the case of processing by elected representatives, there must be a request to the elected representative from an individual; and the processing must be necessary for the action reasonably taken by the elected representative.
- In the case of disclosures to elected representatives by other data controllers there must, again, have been a request to the elected representative from an individual; the data disclosed must be relevant to the elected representative's enquiry; and the disclosure must be necessary for the response to that enquiry.

11. The above safeguards also apply where the processing or disclosure includes sensitive personal data of third parties. Moreover, in such cases there is an important additional safeguard. The processing or disclosure may not take place without the explicit consent of the third party unless one of four conditions is met. The conditions are that the processing or disclosure is necessary:

- where the data subject cannot give consent; or
- where the elected representative cannot reasonably be expected to obtain consent; or
- because seeking consent would prejudice the action taken by the elected representative; or
- in the interest of another individual and the data subject has unreasonably refused consent.

12. The purpose of the draft Order is to create additional Schedule 3 conditions for the processing by elected representatives or disclosure to elected representatives of sensitive personal data. It does not affect in any other way the requirement on elected representatives, or other data controllers dealing with elected representatives, to comply with the Data Protection Act 1998, including the remaining provisions of the data protection principles. For example, where an elected representative acting at the request of a constituent has received from another data controller sensitive personal data about a third party, in deciding whether he may disclose those data to the constituent he will be bound by the requirements of the data protection principles.

13. Similarly, the draft Order does not override any other legal obligations, whether statutory or common law, which prohibit or place restrictions on the processing of personal data. For example, the common law of confidence restricts the circumstances in which information (including personal data) which is held in confidence may be disclosed. Such information may be disclosed only with the express consent of the individual concerned, or if there is an overriding public interest in the disclosure. These requirements are unaffected by the draft Order.

14. The draft Order is permissive. It allows elected representatives and other data controllers to process sensitive personal data without the data subjects' explicit consent, but it does not require them to do so. Should they prefer to seek explicit consent, they may do so.

15. The substantive provisions are set out in the Schedule to the draft Order.

(1) Paragraph 1 defines “elected representatives”. The definition covers Members of the House of Commons, the National Assembly for Wales, the Scottish Parliament and the Northern Ireland Assembly, Members of the European Parliament elected in the United Kingdom, and elected members in all tiers of local government.

(2) Paragraph 2 provides for persons in the categories of elected representative mentioned in the paragraph to continue to be treated as elected representatives for these purposes during election periods. Comparable provision is not needed for the other categories of elected representative mentioned in paragraph 1 since such persons only cease to be elected representatives at the end of a specified period after the election.

(3) Paragraph 3 allows elected representatives, or those acting with their authority, to process sensitive personal data in connection with their representative functions. The safeguards include requirements for the processing to be carried out pursuant to a request from the data subject to take action on behalf of him or another individual, and for the processing to be necessary in connection with the action reasonably taken by the elected representative pursuant to that request.

(4) Paragraph 4 deals with cases where the sensitive personal data supplied to the elected representative do not relate to the individual raising the matter. Such circumstances might arise, for example, when a constituent asks an elected representative to act on behalf of someone who cannot act for themselves, or when a constituent complains about a third party. In addition to safeguards similar to those provided by paragraph 3, paragraph 4 provides an additional safeguard for the individuals whose sensitive personal data are involved. It allows the processing of their sensitive personal data without their explicit consent only if one of four conditions is met. The conditions are described in paragraph 11 above.

(5) Paragraph 5 deals with situations in which elected representatives have raised matters with other data controllers on behalf of their constituents. It permits the other data controllers to disclose the constituents’ sensitive personal data to the elected representatives or those acting with their authority. The disclosure must be made in response to a communication from the elected representative, who must be acting at the request of the data subject. Additional safeguards are that the sensitive personal data disclosed must be relevant to the subject matter of the communication, and that the disclosure must be necessary to respond to the communication.

(6) Paragraph 6 is a parallel provision to paragraph 5, but deals with disclosures to elected representatives of the sensitive personal data of individuals other than those at whose request the elected representatives are acting. The provision made is broadly similar to that made by paragraph 5. Like paragraph 4, it contains an additional safeguard for third parties. Their sensitive personal data may be disclosed to elected representatives without their explicit consent only if

one of four conditions is met. The conditions are described in paragraph 11 above.

Consultation

16. The Information Commissioner has been consulted about the draft Order, as required by section 67(3) of the Act, and is content.

Regulatory Impact and Financial Effects

17. A Regulatory Impact Assessment was prepared for the Data Protection Bill as it then was and the statutory instruments to be made under it, and was placed in the libraries of both Houses of Parliament. The Regulatory Impact Assessment is now available on the internet at www.lcd.gov.uk. Alternatively, copies can be obtained by post from the Lord Chancellor's Department, FIDP Division, Selborne House, 54-60 Victoria Street, London SW1E 6QW.

18. The draft Order will have a negligible effect on business, charities and the voluntary sector. Therefore a Regulatory Impact Assessment has not been prepared for it specifically.

19. The draft Order will not result in identifiable costs to the public or the Exchequer.

Extent

20. Data protection is a reserved matter under both the Scotland Act 1998 and the Northern Ireland Act 1998. The draft Order applies to elected representatives throughout the UK, at all tiers of government.

ECHR Compatibility

21. In the view of the Lord Chancellor, the provisions of the draft Order are compatible with the Convention rights as defined in section 1(1) of the Human Rights Act 1998.

Lord Chancellor's Department
24th July 2002

2002 No. 2905

DATA PROTECTION

The Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002

Made - - - - - *19th November 2002*

Coming into force - - - - - *17th December 2002*

Whereas a draft of this Order has been laid before and approved by a resolution of each House of Parliament:

Now, therefore, the Lord Chancellor, in exercise of the powers conferred upon him by section 67(2) of, and paragraph 10 of Schedule 3 to, the Data Protection Act 1998(a), and after consultation with the Information Commissioner(b) in accordance with section 67(3) of that Act, hereby makes the following Order:

1. This Order may be cited as the Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002 and shall come into force on the twenty-eighth day after the day on which it is made.
2. For the purposes of paragraph 10 of Schedule 3 to the Data Protection Act 1998, the circumstances specified in any of paragraphs 3, 4, 5 or 6 in the Schedule to this Order are circumstances in which sensitive personal data may be processed(c).

Signed by the authority of the Lord Chancellor

19th November 2002

Yvette Cooper
Parliamentary Secretary, Lord Chancellor's Department

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- (a) 1998 c. 29. The functions of the Secretary of State under section 67 of, and paragraph 10 of Schedule 3 to, the Data Protection Act 1998 were transferred to the Lord Chancellor by Article 3 of, and paragraph 11 of Schedule 1 to, the Transfer of Functions (Miscellaneous) Order 2001 (S.I. 2001/3500). Article 8 of, and paragraphs 6(v) and (z) of Schedule 2 to, that Order amended section 67 of, and Schedule 3 to, the Data Protection Act 1998 so as to refer to the Lord Chancellor.
- (b) The Data Protection Commissioner became the Information Commissioner on 30th January 2001 by virtue of sections 18(1) and 87(2)(a) of the Freedom of Information Act 2000 (c. 36). The consultation requirement in section 67(3) of the Data Protection Act 1998 now refers to the Information Commissioner as the definitions of "the Commissioner" in sections 6(1) and 70(1) of that Act have been amended by paragraphs 13(2) and 14(a) of Schedule 2 to the Freedom of Information Act 2000.
- (c) Additional circumstances in which sensitive personal data may be processed are specified in the Data Protection (Processing of Sensitive Personal Data) Order 2000 (S.I. 2000/417).

CIRCUMSTANCES IN WHICH SENSITIVE PERSONAL DATA MAY BE PROCESSED

Interpretation

1. In this Schedule, "elected representative" means—
 - (a) a Member of the House of Commons, a Member of the National Assembly for Wales, a Member of the Scottish Parliament or a Member of the Northern Ireland Assembly;
 - (b) a Member of the European Parliament elected in the United Kingdom;
 - (c) an elected member of a local authority within the meaning of section 270(1) of the Local Government Act 1972(a), namely—
 - (i) in England, a county council, a district council, a London borough council or a parish council,
 - (ii) in Wales, a county council, a county borough council or a community council;
 - (d) an elected mayor of a local authority within the meaning of Part II of the Local Government Act 2000(b);
 - (e) the Mayor of London or an elected member of the London Assembly;
 - (f) an elected member of—
 - (i) the Common Council of the City of London, or
 - (ii) the Council of the Isles of Scilly;
 - (g) an elected member of a council constituted under section 2 of the Local Government etc (Scotland) Act 1994(c); or
 - (h) an elected member of a district council within the meaning of the Local Government Act (Northern Ireland) 1972(d).
2. For the purposes of paragraph 1 above—
 - (a) a person who is—
 - (i) a Member of the House of Commons immediately before Parliament is dissolved,
 - (ii) a Member of the Scottish Parliament immediately before that Parliament is dissolved, or
 - (iii) a Member of the Northern Ireland Assembly immediately before that Assembly is dissolved,

shall be treated as if he were such a member until the end of the fourth day after the day on which the subsequent general election in relation to that Parliament or Assembly is held;
 - (b) a person who is a Member of the National Assembly for Wales and whose term of office comes to an end, in accordance with section 2(5)(b) of the Government of Wales Act 1998(e), at the end of the day preceding an ordinary election (within the meaning of section 2(4) of that Act), shall be treated as if he were such a member until the end of the fourth day after the day on which that ordinary election is held; and
 - (c) a person who is an elected member of the Common Council of the City of London and whose term of office comes to an end at the end of the day preceding the annual Wardmotes(f) shall be treated as if he were such a member until the end of the fourth day after the day on which those Wardmotes are held.

(a) 1972 c. 70.

(b) 2000 c. 22.

(c) 1994 c. 39.

(d) 1972 c. 9 (N. I.).

(e) 1998 c. 38. Section 2(5) provides that "The term of office of an Assembly member—(a) begins when he is declared to be returned as an Assembly member, and (b) continues until the end of the day before the day of the poll at the next ordinary election." By section 2(4), "An ordinary election involves the holding of elections for the return of the entire Assembly."

(f) By section 2 of the Act of Common Council made on 14th June 1984, the annual Wardmotes for the election of Common Councilmen to the Common Council of the City of London are held on the first Friday in December each year, and persons elected as Common Councilmen cease to hold office at midnight on the Thursday immediately preceding the day of the next annual Wardmotes. (Copies of the Act of Common Council made on 14th June 1984 can be obtained from the Town Clerk's Department, Corporation of London, PO Box 270, Guildhall, London EC2P 2EJ.)

Processing by elected representatives

3. The processing—
 - (a) is carried out by an elected representative or a person acting with his authority;
 - (b) is in connection with the discharge of his functions as such a representative;
 - (c) is carried out pursuant to a request made by the data subject to the elected representative to take action on behalf of the data subject or any other individual; and
 - (d) is necessary for the purposes of, or in connection with, the action reasonably taken by the elected representative pursuant to that request.
4. The processing—
 - (a) is carried out by an elected representative or a person acting with his authority;
 - (b) is in connection with the discharge of his functions as such a representative;
 - (c) is carried out pursuant to a request made by an individual other than the data subject to the elected representative to take action on behalf of the data subject or any other individual;
 - (d) is necessary for the purposes of, or in connection with, the action reasonably taken by the elected representative pursuant to that request; and
 - (e) is carried out without the explicit consent of the data subject because the processing—
 - (i) is necessary in a case where explicit consent cannot be given by the data subject,
 - (ii) is necessary in a case where the elected representative cannot reasonably be expected to obtain the explicit consent of the data subject,
 - (iii) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the action taken by the elected representative, or
 - (iv) is necessary in the interests of another individual in a case where the explicit consent of the data subject has been unreasonably withheld.

Processing limited to disclosures to elected representatives

5. The disclosure—
 - (a) is made to an elected representative or a person acting with his authority;
 - (b) is made in response to a communication to the data controller from the elected representative, or a person acting with his authority, acting pursuant to a request made by the data subject;
 - (c) is of sensitive personal data which are relevant to the subject matter of that communication; and
 - (d) is necessary for the purpose of responding to that communication.
6. The disclosure—
 - (a) is made to an elected representative or a person acting with his authority;
 - (b) is made in response to a communication to the data controller from the elected representative, or a person acting with his authority, acting pursuant to a request made by an individual other than the data subject;
 - (c) is of sensitive personal data which are relevant to the subject matter of that communication;
 - (d) is necessary for the purpose of responding to that communication; and
 - (e) is carried out without the explicit consent of the data subject because the disclosure—
 - (i) is necessary in a case where explicit consent cannot be given by the data subject,
 - (ii) is necessary in a case where the data controller cannot reasonably be expected to obtain the explicit consent of the data subject,
 - (iii) must necessarily be carried out without the explicit consent of the data subject being sought so as not to prejudice the action taken by the elected representative, or
 - (iv) is necessary in the interests of another individual in a case where the explicit consent of the data subject has been unreasonably withheld.

EXPLANATORY NOTE

(This note is not part of the Order)

The first data protection principle, set out in paragraph 1 of Schedule 1 to the Data Protection Act 1998, prohibits the processing of sensitive personal data unless one of the conditions in Schedule 3 to the Act is met. The condition set out in paragraph 10 of that Schedule is that the personal data are processed in circumstances specified in an order made by the Lord Chancellor.

The Schedule to this Order specifies a number of such circumstances, which relate to the processing of sensitive personal data by, and disclosures of sensitive personal data to, elected representatives.

An "elected representative" is defined for these purposes in paragraph 1 of the Schedule, and includes Members of the House of Commons, Members of the devolved administrations in Wales, Scotland and Northern Ireland, Members of the European Parliament, elected members of local authorities and elected mayors. Paragraph 2 provides that for the purposes of paragraph 1, a person who is a Member of the House of Commons immediately before Parliament is dissolved is to be treated as if he were such a member until the end of the fourth day after the general election, and makes comparable provision in relation to Members of the devolved administrations and elected members of the Common Council of the City of London.

Paragraphs 3 and 4 of the Schedule cover certain processing carried out by an elected representative (or a person acting with his authority) in connection with the discharge of his functions as such.

Paragraph 3 covers processing carried out pursuant to a request made by the data subject to the elected representative to take action on behalf of the data subject or any other individual. The processing must be necessary in connection with the action reasonably taken by the elected representative pursuant to the request.

Paragraph 4 covers processing carried out pursuant to a request made by an individual other than the data subject to the elected representative to take action on behalf of the data subject or any other individual. The processing must be necessary in connection with the action reasonably taken by the elected representative pursuant to the request. Further, one of the specified reasons for carrying out the processing without the explicit consent of the data subject must apply.

Paragraphs 5 and 6 of the Schedule cover certain disclosures made to an elected representative (or a person acting with his authority) by another data controller.

Paragraph 5 covers disclosures made in response to a communication to the data controller from an elected representative (or person acting with his authority) who is acting pursuant to a request made by the data subject. The sensitive personal data disclosed must be relevant to the subject matter of the communication and the disclosure must be necessary for the purpose of responding to the communication.

Paragraph 6 covers disclosures made in response to a communication to the data controller from an elected representative (or person acting with his authority) who is acting pursuant to a request made by an individual other than the data subject. The sensitive personal data disclosed must be relevant to the subject matter of the communication and the disclosure must be necessary for the purpose of responding to the communication. Further, one of the specified reasons for carrying out the processing without the explicit consent of the data subject must apply.

This Order contributes to the implementation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

A Regulatory Impact Assessment was prepared for the Data Protection Bill as it then was and the statutory instruments to be made under it, and was placed in the libraries of both Houses of Parliament. The Regulatory Impact Assessment is now available on the internet at www.lcd.gov.uk. Alternatively, copies can be obtained by post from the Lord Chancellor's Department, FIDP Division, Selborne House, 54-60 Victoria Street, London SW1E 6QW.

This Order will have a negligible effect on business, charities and the voluntary sector, therefore a Regulatory Impact Assessment has not been prepared for this Order specifically.

2002 No. 2905

DATA PROTECTION

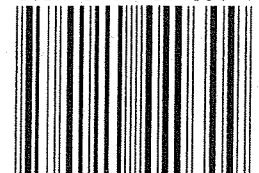
The Data Protection (Processing of Sensitive Personal
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