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Weekly Data Privacy Alert
7 August 2017

EU

Advocate General Considers Handwritten Exam Scripts to be Personal Data

In the case of *Nowak v Data Protection Commissioner*, a student failed his open book accountancy exams and subsequently submitted a data subject access request seeking all personal data held by the Institute of Chartered Accountants (CAI). The CAI released some information, but withheld the exam script on the basis that it did not constitute "personal data", which the office of the Irish Data Protection Commissioner supported. The student brought an action before the Irish courts and the Irish Supreme Court referred to the ECJ the question of whether handwritten exam scripts were capable of being personal data within the meaning of Article 2(a) of the Data Protection Directive. Advocate General Kokott has delivered her opinion that a candidate's handwritten exam script and the examiner's corrections on the script did constitute personal data and, therefore, that the candidate may be entitled to a right of access to their own script. The ECJ has yet to give its decision. Although the ECJ will take Advocate General Kokott's opinion into account, it is not bound by it. If it follows Advocate General Kokott's opinion, this may provide a method for students to gain access to their own exam scripts and examiners' comments under data protection legislation.

France

State Council Rules on Rights of Complainants in Relation to Sanctions Given by the CNIL

A customer had lodged a complaint with the CNIL in relation to its bank's insufficient protection of passwords used to access accounts online. Following an investigation, the CNIL sanctioned the bank on 10 December 2015. It subsequently informed the complainant that the procedure had given rise to a sanction, but did not provide any information on the nature of its sanction and that the complaint procedure had thus been closed. The complainant appealed the CNIL's decision to close the case (i) for lack of information on the nature the sanction and (ii) for insufficient information about the sanction. Based on the summarised annual list of sanctions available on the CNIL's website, it seems that the sanction was only a non-public warning, and therefore, the name of the bank was not disclosed.

In its decision of 19 June 2017, the State Council ruled that, following a complaint, a complainant was entitled to receive information on the nature of the offence sanctioned by the CNIL, as well as the nature (and quantum) of the sanction, including when the sanction had been made public, subject to any confidentiality rules imposed by law.

The State Council rejected the claim for annulment of the CNIL's decision and pointed out that an appeal could only be lodged against the CNIL's refusal to act on a complaint. The State Council could also censure the CNIL in the event of an error of fact or of law, of manifest error of assessment or misuse of powers. However, following the CNIL's decision to investigate a complaint, the complainant could no longer bring proceedings for (i) the purpose of challenging the decision taken by the CNIL at the end of the investigation, irrespective of the grounds, nor (ii) the CNIL's decision to close a complaint procedure.

Germany

Conference of Data Protection Commissioners Releases Interpretation Guidelines for GDPR

The Data Protection Commissioners of the Bund and the Länder announced at the German Data Protection Conference (Datenschutzkonferenz) that they will be publishing joint interpretation guidelines for the GDPR, which will come into force on 25 May 2018. The topics "records of processing activities", "supervisory powers/sanctions" and "data processing for advertising purposes" have already been released and can be accessed on the websites of the supervisory authorities.

Data Protection Authorities Release Paper on Data Processing for Marketing Purposes

The Conference of Data Protection Authorities of the Bund and the Länder (*Datenschutzkonferenz* – DSK) has released a guidance paper on the processing of personal data for marketing purposes. The DSK announced that, owing to the GDPR, the detailed provisions on data processing for marketing purposes in the Federal Data Protection Act will become obsolete. Therefore, in future, the main legal basis for data processing for marketing purposes will be consent. In the context of marketing, consent will have to be assessed according to a balance of interests as provided for at Article 6(1) of the GDPR. What must be taken into account, in this respect, is whether the data subjects have been informed about their right to opt-out. According to the DSK, more intrusive measures, such as profiling, should be interpreted as being overridden by the interests of the data subject. Regardless of the balance of interests, the information requirements at Articles 13, 14 GDPR will also have to be respected.

Schleswig-Holstein Data Protection Commissioner Presents Activity Report for 2015 and 2016

Marit Hansen, the successor of Thilo Weichert at the head of the Schleswig-Holstein Data Protection Authority (DPA), has recently presented her 155-page activity report covering the years 2015 and 2016. Hansen highlighted, above all, the growing importance of European Union law for her supervisory and consulting activities. The upcoming GDPR thus is not a toothless tiger, but an instrument allowing for rigorous sanctions. In this respect, according to Hansen, one of the main goals of the GDPR has already been achieved – data protection is finally being taken seriously, the demand for first class solutions has risen and companies and organisations are using the training offered by the DPA. What remains to be done, however, is to adapt the Schleswig-Holstein state law to comply with the new privacy regime.

German Federal Labour Court Considers Employee Monitoring Unlawful and Information Gained from Monitoring Inadmissible at Court

On 27 July 2017, the German Federal Labour Court decided that a company's use of surveillance software to monitor computer use of its employees was in violation of section 32 of the German Federal Data Protection Act, and therefore data obtained through such software was inadmissible evidence.

The court ruled in favour of a plaintiff employee who was terminated for using their work computer quite frequently for private purposes. Through the keylogger software which recorded all keyboard inputs and took screenshots regularly, the entire internet activity of the employee was monitored. The employee was terminated without notice after the employer examined data which showed considerable use of the computer for private purposes. The employee acknowledged that he used the computer for private email correspondence and the programming of a computer game during break times. The court held that, by using data obtained by such software, the employer was contravening data protection laws.

Data collected via a keylogger software cannot therefore substantiate a wrongful termination defence, as this data is inadmissible at trial. The court cited section 32 of the German Federal Data Protection Act, which requires either a factual suspicion of a criminal offense or a material breach of duty by an employee in order to render surveillance legal. Neither of these requirements were fulfilled and therefore the data obtained could not be introduced as evidence. As a result, the employer had infringed the employee's constitutionally granted general right of personality.

UK

Employees Warned About Illegally Sharing Other People's Personal Information

The ICO has warned employees that sharing personal data that they have access to as part of their job is illegal in some circumstances, as it contravenes section 55 of the Data Protection Act 1998. This comes after a recruitment manager pleaded guilty to the offence because he had disclosed some applicants' personal information to a third party employment agency. It was found that he had not obtained consent from the people whose personal information was shared nor did he have valid grounds to disclose it. He was fined a total of £994 to be paid within seven days.

ICO Fines Price Comparison Website for Ignoring Customers' Marketing Email Opt-outs

The ICO has fined Moneysupermarket.com Ltd, a price comparison website, £80,000 for sending 7.1 million emails to customers who had previously opted out of direct marketing from the website. The company was updating customers with its terms and conditions, and stated in its email that "We hold an e-mail address for you which means we could be sending you personalised news, products and promotions. You've told us in the past you prefer not to receive these. If you'd like to reconsider, simply click the following link to start receiving our e-mails". The ICO made it clear that asking people to consent to future marketing messages when they had opted out was against the law and that they would "continue to take action against companies that choose to ignore the rules".

New Information Commissioner Publishes First Annual Report

Elizabeth Denham, the UK's Information Commissioner since July 2016, has published her first annual report, the ICO's annual report for 2016/2017. The report details the year's major achievements and work undertaken. In particular, it focuses on the Information Commissioner's Office's (ICO) preparation for the GDPR coming into force on 25 May 2018. To tackle this new legislation, the ICO (i) has contributed to the work of the Article 29 Working Party, (ii) has published detailed guidance on the GDPR, including draft guidance on consent and (iii) expects to publish finalised guidance on consent later in 2017 to enable businesses and other organisations to prepare for the new standard of consent in good time before 25 May 2018.

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