Justice Committee

Criminal Cases (Punishment and Review) (Scotland) Bill

Second supplementary written submission from the Scottish Criminal Cases Review Commission

1. The Justice Committee has asked the Commission for its views on the potential applicability of section 35(2) of the Data Protection Act 1998, as well as that of paragraphs 7(1)(a) and (b) of Schedule 3 to DPA, to the circumstances narrated in the Bill, including its consideration about whether amending the Bill so that it obliges the Commission to disclose the information if certain conditions are met would have any material effect on the applicability of data protection law.

2. In addition, the Justice Committee has asked the Commission whether it is at liberty to disclose the status and progress of the discussions it has had with the UK Ministry of Justice about the possibility of obtaining from the UK Government a Schedule 3 Order in relation to the disclosure of the sensitive personal data in the Megrahi case (or the cases to which the Bill applies).

3. The Commission’s further submissions on the above matters are given below.

4. The first data protection principle provides that 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.

5. In relation to the type of processing of data which the Bill envisages the Commission would be required to consider undertaking – the publication of personal and sensitive personal data in the statement of reasons in Mr Megrahi’s case (“the SOR”) – the Commission did consider the conditions in Schedule 3 which might apply.

6. Condition 7(1)(a) in Schedule 3 provides that the processing of data is necessary for the administration of justice. The Commission has been unable to find any case law in which the application or meaning of condition 7(1)(a) has been considered. In addition, in terms of any guidance given by the Information Commissioner’s Office, it notes that the ICO’s “Guide to Data Protection” refers in this respect only to the processing being necessary for “administering justice”. In its initial written evidence to the Justice Committee the Commission expressed the view that it is doubtful that its publishing sensitive personal data in the SOR might be said to be necessary for the administration of justice, noting that it would not be disclosing the sensitive personal data to interested third parties in connection with any court action, civil process or public enquiry.

7. On the other hand, the Commission recognises that one might argue that the Commission, as a quasi-judicial body within the justice system, is involved in the administration of justice, and that, therefore, the publication of the information in one of its statements of reasons might be construed as being necessary for the administration of justice. Against that argument, however, is the point that the publication of the Commission’s statements of reasons (as opposed to its disclosing...
statements of reasons to applicants or interested third parties in connection with any court action, civil process or public enquiry) has never in the past been regarded as a necessary part of the administration of justice; indeed, the Criminal Procedure (Scotland) Act 1995 as it currently stands prohibits the Commission from publishing its statements of reasons.

8. It seems to the Commission that the justification for the argument that publication of the information in the SOR is necessary for the administration of justice amounts to the argument that publication is in the substantial public interest. The Commission does not dispute that there may be a substantial public interest in the publication of the information in the SOR. However, the Commission does not believe it follows from the existence of such substantial public interest that the publication of the SOR becomes necessary in the administration of justice. The basis for the conditions in paragraphs 7 and 10 of Schedule 3 is found in Articles 5 and 8.4 in Chapter II of the European Data Protection Directive (Directive 95/46/EC). Article 5 permits Member States to determine more precisely the conditions under which the processing of personal data is lawful; Article 8.4 permits Member States to lay down exemptions to the prohibition on processing sensitive personal data for reasons of substantial public interest and subject to suitable safeguards. As the Commission understands it, condition 7(1)(a) was included in Schedule 3, pursuant to Article 8.4, because there is a substantial public interest in allowing data to be processed where processing is necessary in the administration of justice.¹ That does not mean that the two concepts are synonymous: it seems reasonable to infer that the drafters of DPA would not have chosen the term “administration of justice” if they simply meant “substantial public interest”. What the drafters did was to create a separate mechanism by which sensitive personal data may be disclosed where it is in the substantial public interest to do so, but where none of the other conditions in Schedule 3 is satisfied, namely by way of an Order by the UK Government under paragraph 10 of Schedule 3 (the basis for which condition is also Article 8.4).² It seems to the Commission that, given the specific purpose of paragraph 10 (as delineated in the Official Report of the Grand Committee), if a data controller wishes

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¹ When Mr George Howarth, the then Secretary of State for the Home Department, was asked in Parliament if he would list the reason for each exemption in the Data Protection Bill which had been made under Article 8.4, and if he would indicate the nature of the suitable safeguards which are intended to protect the data subject, he simply replied: “Article 8(4) of the Directive, relating to reasons of substantial public interest, is reflected in paragraph 7 of Schedule 3 to the Bill. The latter provides an exemption for processing which is necessary for the administration of justice, the exercise of functions conferred by any enactment or the exercise of any function of the Crown, Minister of the Crown or Government Department. The exemption is necessary to enable the conduct of legitimate functions as authorised by Parliament. The safeguards are the legal constraints on the discharge of the functions in question and more specific provisions included in some of the relevant statutes.” (At: http://hansard.millbanksystems.com/written_answers/1998/feb/17/data-protection#S6CV0306P0_19980217_CWA_122.)

² See the Official Report of the Grand Committee on the Data Protection Bill, 23 February 1998 (at: http://hansard.millbanksystems.com/grand_committee_report/1998/feb/23/oficial-report-of-the-grand-committee#SSLV0586P0_19980223_GCR_88), and in particular Lord Williams of Mostyn at page 35GC: “In Article 8.4 is found a provision allowing Member States to specify additional circumstances in which sensitive data may be processed on the ground of substantial public importance. That provision is reflected in paragraph 9 of Schedule 3 [which, the Commission understands, became paragraph 10 of Schedule 3 to the Act], which allows the Secretary of State by order to specify further circumstances in which sensitive data may be processed. I am happy to say that we undoubtedly recognise that there will be circumstances beyond those set out in Schedule 3 in which substantial public interest requires personal data to be processed. We have a strong preference to follow the approach for which we have made provision and to deal with those further circumstances and when they arise, as and when the case is made for them, by means of the Secretary of State’s order made by virtue of the power given to him under paragraph 9.”
to disclose sensitive personal data because it considers that it may be in the substantial public interest to do so, the correct mechanism is by way of an Order under paragraph 10.\(^3\)

9. **Condition 7(1)(b) in Schedule 3** provides that the processing is necessary for the exercise of any functions conferred on any person by or under an enactment. In its initial written evidence to the Justice Committee the Commission expressed the view that the function of the proposed legislation might be said to be to provide a framework within which the Commission can determine whether it is appropriate in the whole circumstances for the information in the SOR to be published (see section 194M of the Bill); but that it did not consider that the type of processing under consideration – its publishing sensitive personal data in the SOR – is necessary for the exercise of that determinative statutory function, nor is it necessary for the exercise of any other statutory function conferred on the Commission. It seems to the Commission to be illogical to conclude that it needs to publish the sensitive personal data in the SOR in order for it to determine whether it is appropriate in the whole circumstances for the information in the SOR (including the sensitive personal data) to be published; or, to put it another way, the Commission is not persuaded that such processing would be carried out pursuant to express statutory powers, or would be reasonably required or ancillary to the exercise of express or implied statutory functions.\(^4\) In terms of its primary function, the Commission did not need to publish the sensitive personal data in the SOR (and, as noted above, it is, as law currently stands, prohibited from doing so) in order for it to decide whether there may have been a miscarriage of justice.

10. It might be helpful if the Commission gives an example in which it considers that, in contrast to the type of processing outlined above – its publishing sensitive personal data – condition 7(1)(b) is applicable. If the Bill is enacted, the Commission is obliged to seek the views of the affected persons about whether it is appropriate for the Commission to publish the information in the SOR about them or obtained from them. The Commission considers that, in order that the affected persons can make informed material representations to the Commission, it will have to provide them with the sections of the SOR which contain the information about them or obtained from them. Some of those sections will, in addition, contain third-party sensitive personal data. Accordingly, the Commission will be disclosing third-party sensitive personal data to affected persons. However, the Commission’s basis for disclosing such data to those individuals will reflect the function the proposed legislation confers on the Commission – ie, to determine whether it is appropriate in the whole circumstances to publish the information in the SOR. The processing of data in those circumstances would be, in the language of condition 7(1)(b), necessary for the exercise of any functions conferred on the data controller by or

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\(^3\) See, for example, the Data Protection (Processing of Sensitive Personal Data) Order 2000, which was made for the purposes of paragraph 10 of Schedule 3, and which narrates sets of circumstances in which sensitive personal data may be processed; most of those sets of circumstances contain a provision whereby any such processing is necessary in the “substantial public interest”. Any such Order is subject to the “affirmative resolution procedure” – ie, the Order shall be laid before the House of Commons and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

under an enactment. Similar considerations would apply to the requirement in the Bill for the Commission to obtain the relevant consents from foreign authorities.

11. **Section 35(2)** is an exemption provision: it provides that personal data is exempt from the “non-disclosure provisions” where the disclosure of the data is necessary for or in connection with any legal proceedings (including prospective legal proceedings), for obtaining legal advice, or for establishing, exercising or defending legal rights. The Commission does not consider that the publication of sensitive personal data in the SOR is necessary for or in connection with any of those circumstances. In any event, section 35(2) does not exempt the Commission from the duty to satisfy at least one of the conditions in Schedules 2 and 3. Accordingly, the Commission does not consider that section 35(2) is relevant to the circumstances narrated in the Bill.

12. The Commission notes that the suggestion has been made that the Bill could be amended so that it obliges the Commission to publish the information in the SOR if certain conditions are met, and that such an amendment would make the publication of the SOR the function of the Act and would thus engage condition 7(1)(b). The Commission has concerns that such an amendment might render the Act as being non-compliant with DPA and with human rights legislation, and thus render the Bill as being outside the legislative competence of the Parliament (see section 54(3) of the Scotland Act 1998).

13. On 20 February the Commission had a meeting with Mr Ken Macdonald, the Assistant Commissioner for Scotland and Northern Ireland, and, notwithstanding his written evidence to the Justice Committee, he appeared to be persuaded by the Commission’s stated position that neither condition 7(1)(a) nor condition 7(1)(b) applies to the circumstances narrated in the Bill. The Commission notes that Mr Macdonald has agreed to make further written submissions to the Justice Committee.

14. The Commission has had a conference call and telephone discussions with representatives from the Ministry of Justice, and it is due next week to discuss these matters further with representatives from the Ministry of Justice and with Mr Macdonald. It may be that the Ministry of Justice takes a different view from the Commission about the applicability of paragraphs 7(1)(a) and 7(1)(b), and that its view will be that an Order under paragraph 10 is therefore unnecessary. If the Ministry of Justice (or the ICO) provides cogent reasons in support of the view that at least one of those conditions applies, the Commission can then decide whether to proceed on the basis of that advice.

15. In conclusion, if the view is taken that neither condition 7(1)(a) or 7(1)(b) applies, and the Commission is unable to obtain the explicit consents of the individuals who are the subjects of the sensitive personal data (and the Commission does not expect that such consents will be forthcoming from certain individuals), the appropriate Order under paragraph 10 would, at least, enable the Commission to decide whether the publication of the sensitive personal data is in the substantial public interest and complies with all data protection principles.

SCCRC
29 February 2012