Justice Committee

Inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003

Written submission from the Information Commissioner’s Office

The (UK) Information Commissioner’s Office (ICO) regulates, inter alia, the Data Protection Act 1998 (the DPA) and, in this capacity, is keen to provide a written submission to the Justice Committee in the course of the above Inquiry.

It is particularly apposite that the Committee is interested in identifying any barriers, perceived or real, to home owners exercising their right under the 2003 Act, to dismiss and replace maintenance companies - landowning or otherwise. Part of the remit of the ICO’s Scotland office is to provide advice to stakeholders and members of the public on data protection/privacy matters. A common enquiry to the office comes from residents associations and homeowners seeking to exercise their right to dismiss their current maintenance company, replacing it with one of their own choosing. As the Committee is aware, depending on the circumstances, the 2003 Act requires the agreement of either a two-thirds or simple majority of homeowners to effect such a change. Where the homeowner does not reside at the property in question, a difficulty exists in conducting a ballot where non-resident homeowners’ names and/or residential addresses are unknown.

One option to remedy this situation would be for the current maintenance company to forward correspondence on to non-resident homeowners, thereby negating the need to disclose names and addresses. However, relationships often break down to the extent that there is a lack of trust on the part of homeowners that any such request will be carried out. The alternative is for the existing maintenance company to provide the residents association with the contact details of owners but there is no obligation for the company to do so. More often than not, the DPA is quoted as preventing such disclosure and residents therefore perceive it as a barrier to homeowners exercising their right under the 2003 Act when, in reality, the DPA is not a barrier to releasing this information.

The DPA requires that specific conditions are met to justify the processing of personal data and, given this would not include any sensitive personal data, Schedule 2:6 of the DPA permits processing that:

...is necessary for the purposes of legitimate interests pursued by the data controller [i.e. the maintenance company] or by the third party or parties to whom the data are disclosed [the homeowner/residents association], except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject [the non-resident homeowner].

(DPA, Sch2:6)

Although the condition contained in Schedule 2:6 of the DPA allows disclosure, it does not require it and, therefore, it does not provide the residents with the reassurance that they can reach the bar set by the 2003 Act to effect a change of
management company. To give that reassurance, the Justice Committee may wish to consider whether a statutory mechanism would be appropriate and proportionate to facilitate the right to ballot for change. For example, a duty to conduct a ballot on behalf of residents or a duty to provide contact details of non-resident homeowners to allow other homeowners/resident associations to conduct a ballot themselves, could be placed on maintenance companies.

I trust you find this helpful and please do not hesitate to contact me should you wish to discuss this in any more detail.

Dr Ken Macdonald
Assistant Commissioner for Scotland & Northern Ireland
26 February 2013