

Written evidence from Lewis Silkin LLP
House of Commons Public Bill Committee considering the Data Protection Bill

Lewis Silkin LLP

Lewis Silkin LLP is widely recognised as a leading employment law and data privacy practice. It has a team of over 100 employment and immigration lawyers and over 20 data privacy specialists who are actively involved in advising businesses preparing for the GDPR.

This submission is drawn from our experience of advising both in relation to workplace issues and in respect of data privacy.

Executive Summary

1. The conditions for processing special category personal data should specifically cover legal advice. This will ensure that there is a proper legal basis for solicitors and barristers to advise on matters involving special category data.
2. Processing of data relating to criminal offences should cover not only "obtaining" legal advice but also "giving" legal advice.
3. Processing of personal data relating to criminal offences should be permitted in an employment context where checks are proportionate.

Processing of special categories of personal data in connection with legal advice

Issue

4. Under Article 9.1 of the GDPR processing of special category (sensitive) data is prohibited unless one of the conditions in Article 9.2 applies.

Article 9.2(f) permits processing "necessary for the establishment, exercise or defence of legal claims..." This provision permits a solicitor or barrister to process special category data in connection with a legal claim but does not permit processing in connection with advisory work: the giving of legal advice which is unconnected to a claim.

Parts 1 and 2 of Schedule 1 to the Data Protection Bill (read with Clause 10 of the Bill) set out what are, in effect, exceptions to the provisions of Article 9.1. None of those exceptions covers processing of special category data in connection with the giving of legal advice.

Examples

5. Solicitors and barristers process special category data in connection with giving legal advice. This arises, in particular, in the context of advice on employment matters. By way of example:
 - (a) "Jack has ME (myalgic encephalomyelitis). Is this a disability for the purposes of the Equality Act 2010. If so, what do we need to do to comply with our obligations. Are we required to make adjustments to his working arrangements?"

- (b) "Alice has recently had a conviction for theft. She has worked for us 10 years. What factors should we take into account in deciding whether we should continue to employ her? Do we need to tell our insurers?"
- (c) "Tom has recently joined a trade union and would like us to pay his union contributions by deduction from his pay. Do we need to do this?"

These are examples of a business seeking pure legal advice. None is related to a legal claim within the scope of Article 9.2(f) of the GDPR.

Suggested solution

6. It is in the substantial public interest that individuals and organisations can seek and receive legal advice in relation to matters concerning special category data.

What is required is a provision in Part 2 of Schedule 1 along the lines of para 28 in Part 3 of Schedule 1. This permits processing of data relating to criminal convictions and offences where "the processing is necessary for obtaining legal advice".

The provision in Part 2 of Schedule 1 would broadly follow para 28 but refer to "giving" as well as "obtaining" of legal advice. It might read:

"The condition is met if the processing is necessary for the purpose of giving or obtaining legal advice".

See remarks at paragraphs 7 and 8 below.

Processing of personal data relating to criminal offences or convictions for the purposes of giving legal advice

Issue

7. Under Article 10 of the GDPR processing of data relating to criminal offences and convictions is permitted when authorised by member state law. Part 3 of Schedule 1 to the Data Protection Bill sets out circumstances in which such processing may occur.

Para 28 of Schedule 1 permits the "obtaining" of legal advice. This would allow an individual or organisation to obtain advice. Although it is perhaps implicit that if a person is permitted to obtain legal advice, a lawyer is permitted to give that advice, that is not beyond doubt.

Suggested solution

8. We suggest that para 28(b) of Schedule 1 is amended by the addition of "or giving" so that it reads "'necessary for the purposes of obtaining *or giving*' legal advice".

Processing personal data relating to criminal offences or convictions for the purposes of recruitment and employment

Issue

9. Under Article 10 of the GDPR processing of data relating to criminal offences and convictions is permitted when authorised by member state law. Part 3 of Schedule 1 to the Data Protection Bill sets out circumstances in which such processing may occur.

10. When recruiting, there are circumstances in which employers carry out criminal record checks. In some instances, these checks are required by law. For example, when an employer engages in regulated activity (work involving close and unsupervised activity with children) under the Safeguarding Vulnerable Groups Act 2006. If required by law, the provisions of para 1 of Schedule 1 to the Data Protection Bill will permit the processing as it is in connection with an obligation imposed on an employer in connection with employment.

But there are also circumstances in which an employer may wish to check whether a potential recruit has a criminal record in which the check is neither mandatory nor authorised in connection with employment. These checks might involve asking the applicant if he or she has a criminal record - but without seeking any official confirmation. They may also involve asking the application to obtain a basic check from the Disclosure and Barring Service (DBS).

In such circumstances, an employer would be processing personal data relating to a criminal offence or conviction but without any legal basis under data protection legislation.

11. Currently, the DBS and Information Commissioner seem to have different views on the lawfulness of this processing.
- (a) The DBS takes the view than an employer can ask a potential recruit to provide a basic check. It refers to this in various places but states
- (i) "A basic check is a criminal record check you can request for yourself, or you may be asked to request a basic check by your employer.
- A basic check can be used for any position or purpose.
- A basic check will contain details of convictions and conditional cautions that are considered to be unspent under the terms of the Rehabilitation of Offenders Act (ROA) 1974."
- See: <https://www.gov.uk/government/publications/basic-checks>
- (ii) "You can only check someone's criminal record if they apply for certain roles, for example if they'll be working with children or in healthcare.
- If you can't request a full criminal record check for your employee, you can ask them to get a [basic check](#) for themselves."
- See: <https://www.gov.uk/employers-checks-job-applicants>
- (b) We spoke to the Information Commissioner's office regarding criminal record checks. They indicated (informally) that they could not see any legal basis for such processing.

We have been unable to find any clear basis for the processing. It is unsatisfactory if the law is unclear. It is also unsatisfactory if a government agency (DBS) is encouraging the view that basic checks by employers are lawful if they are not lawful.

Examples

12. Potential examples

- (a) An employee working for a supermarket on a till may have opportunities to steal. The supermarket may want to find out whether a potential recruit has convictions for dishonesty. It may ask the question or seek a basic check from DBS.
- (b) An employee working for a clothing retailer in a stockroom may have opportunities to steal stock. The retailer may want to find out whether the potential recruit has convictions for dishonesty.
- (c) Front-line staff working for a football club will have direct contact with the public in circumstances that may be challenging. The club may want to find out if any recruits have convictions for violence.

Suggested solution

13. There should be a provision in Part 3 of Schedule 1 of the Data Protection Bill that permits

- (a) an employer to ask a potential recruit if he or she has a criminal record, to obtain the details and to make a record of the answers.
- (b) an employer to ask a potential recruit to carry out a basic check through DBS and provide a copy (as indicated by the DBS).

This check would relate only to unspent convictions for Rehabilitation of Offenders purposes.

14. It would not be desirable if such checks were to become a standard part of recruitment. We believe that there should be conditions in Part 3 of Schedule 1 which constrain the use of checks. These might be:

- (a) That the controller had carried out an impact assessment evaluating whether or not criminal record checks were appropriate (this could be in accordance with Article 35 of the GDPR or an assessment with provisions along the lines of those in Article 35.7 of the GDPR).
- (b) That the carrying out the check is proportionate;
- (c) That the controller has a policy encouraging rehabilitation of offenders and setting out how it will assess any existing unspent convictions.

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