Under the spotlight: police retention of conviction data

Bridget Treacy, Partner, and Anthea Terlegas, Associate, of Hunton & Williams, explain the wider data protection implications of a recent decision on the police retention of criminal conviction data in the UK

The UK's data protection authority, the Information Commissioner's Office ('ICO'), recently announced that it has applied to the Supreme Court of England and Wales for leave to appeal against the Court of Appeal's decision in *Chief Constable of Humberside Police, Chief Constable of Staffordshire Police, Chief Constable of Northumbria Police and Chief Constable of Greater Manchester Police v The Information Commissioner and the Secretary of State for the Home Department,* [2009] EWCA Civ 1079 ('the judgment').

According to the judgment, the police could retain criminal conviction records, including records of spent, minor or old convictions, indefinitely. It raises important issues concerning the interpretation of the Data Protection Act 1998 ('the DPA') and the application of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Human Rights Convention') to the retention of criminal convictions information.

The significance of the judgment is heightened further by the fact that if leave to appeal is granted, this will represent the first occasion on which the Supreme Court considers data protection issues.

Background to the judgment

In 2007, the Information Commissioner ('Commissioner') issued enforcement notices requiring certain police forces in England to delete from the Police National Computer criminal conviction records (or, in the case of one, the record of a formal reprimand) on the grounds that the retention of the information contravened the Third and Fifth Data Protection Principles in the DPA. These Principles require, respectively, that personal data are adequate, relevant and not excessive in relation to the purposes for which they are processed, and that the personal data should not be kept for longer than is necessary for such purposes.

The police forces involved appealed against the enforcement notices to the Information Tribunal ('the Tribunal') in 2008. The police argued that the indefinite retention of the information was necessary and added value to their core purposes, which include police operational purposes (such as disclosure of information to the Criminal Records Bureau, the Crown Prosecution Service and to the courts). The Tribunal upheld the Commissioner's actions, ruling that the police forces were not required to retain old criminal conviction records indefinitely and that such retention breached the Third and Fifth Data Protection Principles.

In October 2009, the Court of Appeal overturned the Tribunal's ruling on the basis that the indefinite retention of information for police operational purposes (i.e. in order to combat crime) was lawful and justified and did not infringe the Data Protection Principles. The Court of Appeal also emphasised that the Commissioner's focus on, and assessment of, the police's 'core purposes' was misconceived, and that it was not for the Commissioner to substitute his own judgment as to what was appropriate to meet the police's operational purposes.

According to Lord Justice Waller, "if the police said rationally and reasonably that convictions, however old or minor, had a value in the work they did that should, in effect, be the end of the matter".

Wider data protection implications: determining 'purpose'

The approach of the Court of Appeal to determining the purposes for which data may be processed may have ramifications for all data processing activities. According to Lord Justice Waller, "there is no statutory constraint on any individual or company as to the purposes for which he or it is entitled to retain data [provided that the data are held for lawful purposes which are identified and specified by the controller at the time of collection in accordance with the DPA]".

In the UK, data processing purposes may be specified either by giving

notice to the data subject, or by notification (i.e. registration) to the Commissioner. Unlike the practice in other EU Member States, the notification of data processing purposes to the Commissioner provides individuals with very little guidance as to the purposes for which their data may be processed or (as here) retained and subsequently disclosed. Rather, the notified purposes are generally selected from a list of standard purposes, which are couched in very broad terms (e.g. 'crime prevention and prosecution of offenders'). For this reason, it is difficult to assess objectively whether a given item of personal data is actually relevant to the purpose for which the data controller purports to process it. Consequently, a wide range of processing activity may be undertaken, sometimes with only marginal relevance to the broadly stated purpose.

Thus, the limitation on data processing activity proposed by Lord Justice Waller — that data are held for lawful purposes which are identified and specified at the time of collection or by notification — may provide only a limited check on the scope of data processing activities.

The Court of Appeal did not comment on whether the police had issued privacy notices or made other general statements about the purposes for which personal data would be processed. However, in most other contexts organisations do make such statements and individuals expect to be told at the point of collection how their data will be used. Typically, such statements contain a more detailed description of data processing purposes than the purposes notified to the Commissioner, and these notices may increase privacy protection for individuals.

Finally, Lord Justice Carnwath appears to suggest that any inadequacies in a notification to the Commissioner can be rectified simply by updating the notification. This approach overlooks the fact that the updated notice would not apply retrospectively to data already held.

Wider data protection implications: human rights issues

The Court of Appeal also considered the relevance of Article 8 of the Human Rights Convention, which provides that "everyone has the right to respect for his private and family life, his home and his correspondence".

The Commissioner argued, citing *S. and Marper v. The United Kingdom* (Application nos. 30562/04 and 30566/04), 4th December 2008, that the retention of personal data can engage Article 8 of the Human Rights Convention. In that case, all 17 judges of the European Court of Human Rights ('ECHR') agreed that "the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8".

The Court of Appeal sought to distinguish *Marper* on the basis that the nature of the information in that case was very different to criminal conviction information, and that the ECHR's concern was for individuals who had not been convicted of an offence. The Court of Appeal conceded that the disclosure (as opposed to the mere retention) of criminal conviction information may engage Article 8, but rejected the proposition that a mere record of the fact that an individual has been convicted invokes Article 8 of the Convention.

The approach of the Court of Appeal raises serious issues concerning the applicability of Article 8 to conviction data held by the police. This was recognised by Deputy Commissioner at the ICO, David Smith, at the time the ICO's decision to appeal was announced.

Since then, the government has announced proposals for the indefinite retention of DNA profiles of convicted adults. Early indications are that the database will include records of individuals convicted of minor offences, as well as more serious offences.

The application of Article 8 to the retention of criminal record data is clearly a significant issue, and many will watch the progress of the Commissioner's application for leave with great interest.

Bridget Treacy and Anthea Terlegas
Hunton & Williams
btreacy@hunton.com
aterlegas@hunton.com