

## PITFALLS OF OUTSOURCING YOUR INVESTIGATIONS

Investigation, no matter how you dress it up, is an intrusion into a person's privacy. This intrusion can only take place if sanctioned by law: Human Rights Act 1998 Article 8. Law enforcement can rely on numerous statutes and common law to satisfy this HRA requirement, but what about non-law enforcement?

An investigation will involve collecting information about a "*living human being*" that will identify him. This will bring such collection of information within the definition of the Data Protection Act 1998 (DPA) and also the one made by Lord Auld in his somewhat controversial decision in *Durant –v- Financial Services Authority* (2003) (CA). It follows, therefore, that any investigation should be compliant with the DPA.

Investigators generally are of the opinion that the DPA has stopped many of the enquiries that they need to make. I would suggest that the DPA does not stop you doing anything. What it does is impose conditions upon you before the processing of a person's personal data can take place. Satisfy those conditions and you can do what have always done.

The conditions are not insurmountable, just very complex. I would go so far as to say that the DPA is one of the most complex pieces of legislation that we have ever been faced with. Its complexity derives from the horizontal effect that it has on almost everything we do. Lord Phillips, in *Naomi Campbell –v- Mirror Group Newspapers* (2002) EWCA Civ No:1373, para 72, described the DPA as "*a cumbersome and inelegant piece of legislation*", and he further commented that the High Court Judge had described it as "*weaving his way through a thicket.*"

In this brief paper I cannot hope to provide you with a definitive pathway through the fog of legal uncertainty created by this cumbersome act, but at least let me try to identify some risks that you may not have considered when you bring an external investigator into the equation.

The investigator is acting for you, the client, and owes obedience and a legal duty of care to you, which is created by the legal contract into which you have entered. The common law definition of contract, as you all probably know, is: OFFER; ACCEPTANCE; CONSIDERATION; LEGALLY BINDING. If any of the clauses are missing is it a valid contract? You will be asking the investigator to process personal data as defined by the DPA 1998 Sect 1. The investigator will be your Data Processor (DPA 1998 Sect 1). This is a legal relationship which has to be “evidenced in writing” (DPA 1998 Sect 1: Part II, para 12). This raises the question: does the absence of this clause invalidate the contract? I leave that discussion to the contract lawyers. What it clearly does is to raise the number of potential breaches of the DPA 1998. If the creation of this legal relationship has not been evidenced in writing, is the investigator a Data Processor? If he is not, then is he the Data Controller and, if so, on what part of the DPA is the client relying to justify the transfer of the personal information of the subject of enquiry to this third party? I would suggest that a breach of the DPA has taken place. An individual not entitled in law is in possession of a person’s “personal data” – breach of Principle 7 DPA: Personal Data is being processed, unauthorised and therefore unlawful. This means a breach of the 1<sup>st</sup> Principle: Fair & Lawful Processing. The Data Subject is not aware of this stranger who is in possession of his personal data – breach of Principle 6. How many more before the Article 6 Human Rights Act 1998 argument begins to ring in the judge’s ear? *“These are clear breaches of the DPA 1998; a blatant disregard for my client’s Human Rights; Article 6: Right to a fair trial.”*

It will never happen is what I hear. If I had more space I would list the numerous examples of when it has.

Now let me pose you a question. How many of you include the DPA clause creating this relationship in your contracts with the investigator?

It is the responsibility of the client (Data Controller) to ensure that his Data Processor complies with Principle 7. This means that the Data Processor must have more than a passing acquaintance with the DPA 1998. The Data Processor is acting on your behalf. If he screws up you have screwed up unless you can show he stepped outside his remit. Did he subcontract any of the enquiries? Did you give him permission? Is the subcontractor knowledgeable about the DPA 1998 and the other privacy laws that affect the investigative process? Could your organisation's reputation lie in the hands of a subcontracted investigator whose existence you are not even aware of?

Now consider the investigators that you have instructed over the years. I have met a lot of them. Some are very impressive individuals, but in my view they are in the minority. Most are not averse to taking shortcuts. Their knowledge of the "Privacy Laws" is limited or non-existent. Couple that with the confusion that surrounds the DPA: *"The Act is frequently interpreted too restrictively or over-cautiously due to unfamiliarity, misunderstanding and lack of knowledge or uncertainty about its provisions. As the National Archives said in evidence to us; "There are many myths surrounding the DPA – it appears to be one of the most frequently cited yet least understood pieces of legislation."* Data Sharing Review Report 11 July 2008: para 5.24, published by the Information Commissioner's Office.

In view of the above do the benefits of outsourcing your investigations balance well with the potential harm to your case and reputation?

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