On 9 July 2008, the House of Lords handed down judgment in an appeal against the decision of Scotland’s supreme civil court to uphold an order of the Scottish Information Commissioner (the “Commissioner”) that certain health-related data be disclosed pursuant to a freedom of information request. The case raises important questions about the interaction between provisions of the UK Data Protection Act 1998 (“DPA”) on the one hand and of the Freedom of Information (Scotland) Act 2002 (“FOISA”) on the other, and has a bearing on the interaction between the DPA and freedom of information legislation throughout the United Kingdom.1 Because the case involves complex questions over whether the requested data is “personal data,” the data protection community has been keenly awaiting this House of Lords judgment.

**Background**

The Common Services Agency (the “Agency”) is a special UK health board whose functions include collecting and disseminating epidemiological information from other health boards. On 11 January 2005, Mr Collie, acting on behalf of Chris Ballance - then a member of the Scottish Parliament - asked the Agency to supply him with details of all incidents of childhood leukaemia for both sexes by year from 1990 to 2003 for all the Dumfries and Galloway postal area by census ward. There was a genuine public interest in the disclosure of this information as there have been concerns for many years about risks to public health in the area arising from nearby military and nuclear processing sites.

The Agency refused Mr Collie’s request on the basis that for the earlier years there was a significant risk of the indirect identification of living individuals resulting from the combination of the rare diagnosis, the specified age group and the small geographic area. The Agency argued this meant the information was personal data within the meaning of Section 1(1) of the DPA and exempt information for purposes of FOISA.

Mr Collie then applied to the Commissioner for a decision on whether the Agency had dealt with his request for information properly. On 15 August 2005, the Commissioner issued his decision:

- He was satisfied that a living individual could be identified from the data at census ward level and that it constituted personal data.
- The Agency therefore had to comply with the data protection principles

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1 Much of the wording of Section 38 of FOISA, which addresses the overlap between rights of access under that Act and rights of access under the DPA, is reproduced in Section 40 of the UK Freedom of Information Act 2000 (“FOIA”), which extends to the whole of the United Kingdom. Section 38(2)(a) of FOISA, in particular, is identical to Section 40(3)(a) of FOIA.
He was satisfied that disclosure would breach the first principle of fair and lawful processing and that the information should not be released.

The Commissioner then said, however, that this did not mean that Mr Collie should not have been provided with information. NHS guidance sets out a process - known as “barnardisation” - to be followed when handling statistics where there is a potential risk of disclosure of personal information as a result of small cell counts. The Commissioner said that providing information in this alternative form would provide the closest fit to fulfilling Mr Collie’s request, and that the Agency could have offered it to him under its duty to provide advice and assistance. He therefore ordered it to provide some of the requested data in this form.

The Agency appealed against this decision to the Court of Session. The appeal was refused. The First Division held that a table setting out data barnardised in the manner described by the Commissioner would not constitute personal data, and that the Commissioner was entitled to require the Agency to disclose this data. The Agency appealed to the House of Lords.

**House of Lords Decision**

*Was the data to be barnardised information “held” by the Agency?*

Section 1(4) FOISA states the general entitlement of an applicant to receive the requested information from a Scottish public authority applies only to information that is “held” by it at the time the request is received. The Agency submitted that the process of barnardisation would require the production or making of information that was different from that which it held at the time of the request. Lord Hope dismissed this claim, describing the process of barnardisation as similar to that of redaction, in that it involves doing something to information in the form in which it is held so that those parts of it that are not private or confidential can be released. In his opinion, information in that form would contain information that was “held” by the Agency at the time of the request.

*Would the barnardised data be “personal data”?*

The next question, which the Commissioner was criticised for not examining properly, was whether the barnardised data would be personal data within the meaning of Section 1(1) DPA and, if so, whether its disclosure would satisfy the disclosure principles under Section 38 FOISA. Delivering the leading opinions, Lord Hope and Lord Rodger agreed that the observations of the Court of Appeal in *Durant v Financial Services Authority* regarding “personal data” - to which the Court of Session looked for guidance - were irrelevant to determine whether barnardised data would be personal data. Although they did not explain clearly the reason for this, both appeared satisfied the data related to living individuals and that it was therefore unnecessary to consider the *Durant* guidelines on this issue. The relevant question instead was to be found in the wording of Section 1(1) of the DPA read in light of Recital 26 of the Data Protection Directive 95/46/EC:

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2 As employed by the Information Services Division (ISD) of National Health Services, it uses a modification rule which adds 0, +1, or -1 to all values where the true value lies in the range from 2 to 4 and adding 0 or +1 to cells where the value is 1. 0s are always kept at 0. It does not guarantee against disclosure but aims to disguise those cells that have been identified as unsafe.

3 [2003] EWCA Civ 1746.

4 “‘personal data’ means data which relate to a living individual who can be identified - (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, (cont.)
possible to identify individuals from the data?

Lord Hope opined that the fact the Agency has access to all of the statistical information from which the barnardised information would be derived does not prevent it from processing it in such a way that it becomes data from which a living individual can no longer be identified. In this way, information could be released in that form because it will no longer be personal data. Alternatively, if it is not possible to say that the information would in that form be fully anonymised and therefore is personal data, it becomes necessary to consider whether it could be disclosed in accordance with the data protection principles and, in particular, would meet any of the conditions in Schedule 2 of the DPA. As the Commissioner had not considered these issues properly, the House of Lords ordered Mr Collie’s application be remitted to the Commissioner so that he could examine the facts in the light of the tests set out in FOISA as clarified in the judgment.

Comment

The judgment of the House of Lords will disappoint those who were hoping for a discussion of the Durant guidelines or the various guidance on the definition of “personal data” that has been provided recently by regulators such as the UK Information Commissioner or the Article 29 Working Party. Essentially, the Scottish Information Commissioner was deemed to have committed an error of law by not pursuing the question of whether barnardised data was “personal data” to its proper conclusion and now has to reconsider the issue using the test laid down in FOISA, as clarified by the House of Lords. In their opinions Lord Hope and Lord Rodger explore some interesting points regarding the definition of “data” and “sensitive personal data” under the DPA in the context of FOISA. While they agreed on the main issues, they differed in their reasoning behind certain points such as how barnardised information could not be personal data even if the Agency held other information that would have allowed them to link it to individuals. This was a careful judgment, but one that does not appear likely to add significantly to the ongoing debate over the definition of personal data in the U.K. and beyond.

(Cont.) and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

5 “Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable”
If you have any questions concerning the material discussed in this client alert, please contact the following members of our privacy & data protection practice group:

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