

Summer Field Seminar 2011



Data Protection Law Essentials - how the latest changes in data protection legislation will affect you

Barry Ryan, Standards & Policy Manager
Market Research Society

Topics for Today



- Data Protection – fines and enforcement by the ICO
- Cookies – new regulations for online fieldwork
- Research and Social Media – the legal minefield

Topics for Today



- Recruiting, validation and respondent confidentiality
- Vetting and barring – Interviewing children and vulnerable adults
- Incentives and the Bribery Act

Data Protection

Reputation



- First and foremost, data breaches have the ability to destroy the research sector

The regulator



- The Information Commissioner is responsible for data protection in the UK.

- Notification of processing but not of breaches
 - Notification fees
 - Tier 1 - £35
 - Tier 2 - £500 (turnover of £25.9 million or more and have 250 or more members of staff)
 - *Staff* – monthly average over financial year, includes employees, workers, office holders and partners)
- Breaches are reported on a voluntary basis.

Breaches 11/2007(?) – 05/2010



	Disclosed in Error	Lost data/hardware	Lost in transit	Non-secure disposal	Stolen data / hardware	Technical/procedural Failure	Other	TOTAL
Central Govt	19	30	12	0	12	18	0	81
Local Gov	39	29	6	1	42	10	5	132
NHS	43	87	17	13	116	17	12	305
Other	11	4	1	0	6	3	2	27
Other Public	42	25	10	2	35	7	9	130
Private	91	47	12	7	80	33	18	288
Third Sector	9	11	1	0	16	5	2	44
TOTAL	254	233	59	23	307	83	48	1007

Formal Undertakings



- Non statutory agreement to set matters right
- Sept 2008 – Virgin Media
 - Comply with the eight principles and to implement specified security measures
 - 3000 customer details lost in intra-office transfer

Enforcement Notice



- Breach attributable to fault of Data controller
- Breach of Enforcement notice is an offence punishable by fine up to £5000
- January 2008 – M&S
 - Loss of laptop containing 26,000 employee records
 - Notice later withdrawn by ICO

Fines



- Persistent breach – up to £5000
- Notification offence – up to £5000
- Unlawful obtaining and disclosing – unlimited fines
- Other data protection scams may be prosecuted as fraud, leading to imprisonment

New powers



- Section 55 of the Data Protection Act
- New fining powers without recourse to Enforcement notice
- Deliberately or recklessly breaching data principles

New penalties



- Term of Imprisonment of up to 2 years (not yet in effect); and/or
- Fine of up to £500,000

Fines to date



- Ealing Council £80,000
 - Loss of unencrypted laptop (1,700 records)
- Hounslow Council £70,000
 - Transferred data to Ealing Council (700 records)
- Hertfordshire County Council £100,000
 - Faxed information to wrong recipients
- A4e £60,000
 - Loss of unencrypted laptop (24,000 records)

Fines to date



- ACS Law - £1000
 - Info on illegal downloaders hacked via website
- Surrey County Council - £120,000
 - Misdirected emails containing sensitive personal data on three separate occasions

Good Practice Assessments



- Voluntary assessment by ICO
- Inspection to establish and improve compliance
- Exemption from fines for breaches discovered

Cookies (and spam)

- The Privacy and Electronic Communication Regulations were amended with effect from 26 May 2011
- Until this year website operations had to give users the opportunity to refuse cookies
- This has changed

In summary, the regulation provides that:

- Clear information is provided to the user;
- Consent is obtained from the user;
- Consent may be indicated by browsers or other application settings

- The ICO will not enforce the regulations for one year
- In the meantime, operators are required to:
 - Check what type of cookies you use and how you use them
 - Assess how intrusive your use of these cookies is
 - Decide what solution to obtain consent will be best in your circumstances

Official Advice



- http://www.culture.gov.uk/images/publications/cookies_open_letter.pdf
- http://www.ico.gov.uk/for_organisations/privacy_and_electronic_communications/~media/documents/library/Privacy_and_electronic/Practical_application/advice_on_the_new_cookies_regulations.pdf

New MRS Guidance



- To assist researchers, MRS has published a guidance note to supplement advice produced by the ICO and the Department of Culture, Music and Sport.
- MRS believes that the new rules require enhanced transparency about the use of cookies so that respondents can make an informed choice about participating in a research project.

- Provide additional information in the introduction or invitation to the project
- ICO on “feature led consent”:
 - *“Provided you make it clear to the user that by choosing to take a particular action then certain things will happen you may interpret this as their consent. The more complex or intrusive the activity the more information you will have to provide.”*

Online Panel Research



- Amend the terms and conditions of the panel to include a clear and comprehensive description of the use of cookies

- ICO on Terms and Conditions:
- *“To satisfy the new rules on cookies, you have to make users aware of the changes and specifically that the changes refer to your use of cookies. You then need to gain a positive indication that users understand and agree to the changes. This is most commonly obtained by asking the user to tick a box to indicate that they consent to the new terms.”*

Spam



- The ICO has also been given extensive new fining powers of up to £500,000 to deal with spam email.
- **“Spam” is restricted to unsolicited** communications for the purpose of direct marketing

Direct marketing?



- **“Direct marketing”** is interpreted by the ICO to cover the promotion of the aims or ideals of an organisation.
- **Where a project uses a client’s products or services as an incentive or contains a promotional message from or about a client,** the email invitation for that project could well be considered spam by the ICO.

Social Media

Social Media Research



- MRSB is publishing a discussion paper on Online Data Collection and Privacy
- It sets out the Boards current views on the legal and ethical parameters for research in this area
- The Board is inviting Members and Company Partners to participate in this discussion before setting out guidelines or new rules

Limits on Research



- MRSB has identified five key areas that it believes that researchers must consider when working in this area:
 - Expectations of users and Terms of Use
 - The law of privacy
 - The law of copyright
 - The law of data protection
 - The principle of voluntary participation

Expectations of Users



- Each site has their own terms of use
- Access may be open or limited to age groups
- Information supplied may be public or limited to sub-networks or friends
- See Facebook terms
- <http://www.facebook.com/terms.php?ref=pf>

English law of privacy



- Recent development based on law of confidence and data protection
 - Information has necessary quality of confidence (eg not public available, not trivial, not outweighed by public interest)
 - Circumstances imply that it should be confidential
 - Disclosure would cause harm or offence

Publishing information



- Information available from social networking site may be covered by the development
- Sharing information on a network does not mean it is in the public domain
- Some information may be so intrusive that even if a very large number of people had heard of it on a limited website, it does not mean it is not private

Copyright



- Exists from moment of creation by author
 - Literary works – blog posts, profiles, updates
 - Photographs
 - Video Clips
 - Sound recordings
- Taking of information without permission of author is a breach
- Remedy – injunction, damages

Data Protection



- Data must be fairly and lawfully processed
 - Researchers must rely on informed consent
- Used for specified purposes
- Not further process in any manner incompatible with those purposes

Code of Conduct



- Participation is voluntary
- Respondents must be informed of
 - what data is being collected
 - by whom and
 - for what purpose

In Summary



- Code reflects not just :
 - data protection but also;
 - the expectations of users
 - the developing law of privacy; and
 - the important of permission for use of copyright materials

Next Steps



- MRSB welcomes responses from MRS members, Company Partners and other interested parties
- Please send responses by email to codeofconduct@mrs.org.uk by 4 August 2011.
- MRSB will publish its response to this consultation in the autumn of 2011.

Recruiting, validation and confidentiality

“My respondent”



- MRS has been contacted about a number of disputes over access to respondent level information.
- These have involved clients, agencies and recruiters.
- Frequently they relate to recontacting respondents for follow-up interviews, or future projects

The role of the Code



- The rules of the MRS Code of Conduct exist primarily to protect the interests of respondents and are not designed to regulate the relationship between recruiters and their researcher clients.

Respondents' data



- Recruiters may often be concerned about client researchers re-contacting respondents that the recruiters have recruited.
- As a matter of law, respondents are free to decide to whom they give their personal details, and if they are asked for contact information by researchers, they are free to provide this information.

Contracts



- If recruiters wish to prevent researchers from re-contacting respondents, for existing or future studies, without prior agreement or financial compensation, they must agree appropriate terms with their researcher clients at the start of the project.

Contracts



- In accordance with rule B5 of the Code of Conduct members are required to take reasonable steps to ensure that the rights and responsibilities of themselves and clients are governed by a written contract and/or internal commissioning contract.

Contracts



- Thus, recruiters who wish to control the future contact of respondents whom they have recruited should consider adding such a clause to their terms of business.

Vetting and barring scheme

Safeguarding Vulnerable Groups



- The phased introduction of the vetting and barring scheme began on 12 October 2009 .
- The planned scheme consisted of
 - Information sharing
 - Registration of workers and volunteers
 - Barring of unsuitable persons

Vulnerable Groups?



- Children – all persons under 18
- Vulnerable Adults - very wide definition
 - Not just people who are older or have a disability
 - Examples:
 - In sheltered accommodation
 - In receipt of healthcare
 - In lawful custody

Regulated Activity



- Involves contact with children or vulnerable adults and is:

of a specified nature

e.g. teaching, training care, supervision advice, treatment or transport

or

in a specified place

e.g. schools, children's homes & juvenile detention facilities, adult care homes

“frequently, intensively and/or overnight”

- Once a week
- 4 or more occasions in a period of 30 days
- Overnight: between 2-6am

Registration



- Anyone who engages in a regulated activity will have to be registered with the Independent Safeguarding Authority.
- Employers will have to confirm registration before using staff or volunteers for regulated activity

Barring



- Upon a application for registration applicants will be assessed by the ISA.
- Applicants who pose a risk to vulnerable groups will be barred.
- Barred persons will not be permitted to apply for or hold regulated positions
- ISA registration will also cease if barring occurs at a later date.

Offences



- Fines for employers who fail to carry out required checks.
- Imprisonment up to 6 months for employers who knowingly employ a barred person.
- Imprisonment up to 5 years for barred persons who even seek to engage in a regulated activity.

Information sharing



- Information will be shared with ISA from
 - CRB
 - Police
 - Regulatory bodies
- Information may also be referred by any other party, including members of the public.

Duty to refer



- Since 12 October 2009, employers have had a duty to refer information about persons engaging in regulated activity, e.g. dismissal for inappropriate behaviour.

But then...



- In *'The Coalition: Our programme for government'*, the Government set out its aim to **'review the criminal records and vetting and barring regime and scale it back to common sense levels'**.

All stop?



- In order to deliver this promise and carry out the remodelling, the Vetting and Barring Scheme was halted. The first phase of registration was due to commence on 26 July 2010.

Key recommendations from the VBS Review published 11 February 2011 include:

- the merging of the Criminal Records Bureau (CRB) and Independent Safeguarding Authority (ISA) to form a streamlined new body providing a proportionate barring and criminal records checking service;

- a large reduction of the number of positions requiring checks to just those working most closely and regularly with children and vulnerable adults;
- portability of criminal records checks between jobs to cut down on needless bureaucracy;

- an end to a requirement for those working or volunteering with vulnerable groups to register with the VBS; and
- stopping employers who knowingly request criminal records checks on individuals who are not entitled to them.
- A new system is not expected before 2013

Changes still in effect



- However the changes introduced in 2009 regulations still stand including:
- *A person who is barred from working with children or vulnerable adults will be breaking the law if they work or volunteer, or try to work or volunteer with those groups.*

Changes still in effect



- *An organisation which knowingly employs someone who is barred to work with those groups will also be breaking the law.*

Changes still in effect



- *If your organisation works with children or vulnerable adults and you dismiss a member of staff or a volunteer because they have harmed a child or vulnerable adult, or you would have done so if they had not left, you must tell the Independent Safeguarding Authority*

CRB checks?



- Standard and Enhanced checks now aligned with regulated activities
- Only Enhanced checks contain information on barred lists
- Basic checks available from Disclosure Scotland for £20

Oh yes... Scotland



- Scotland's system was not subject to the Coalition's review.
- The Protection of Vulnerable Groups (PVG) Scheme was introduced in February 2011
- Researchers working in regulated positions must register with the PVG scheme before starting work.

Incentives and the Bribery Act

The Bribery Act 2010



- Took effect on 1 July 2011
- Creates a number of offences including the paying and receiving of bribes
- Replaces acts from 1889, 1906 and 1916.

Offences



- Introduces a corporate offence of failure to prevent bribery by persons working on behalf of a business. A business can avoid conviction if it can show that it has adequate procedures in place to prevent bribery.

Offences and penalties



- Makes it a criminal offence to give, promise or offer a bribe and to request, agree to receive or accept a bribe either at home or abroad. The measures cover bribery of a foreign public official.
- Increase the maximum penalty for bribery from seven to 10 years imprisonment, with an unlimited fine.

Bribe?



- A bribe is the promising or giving a financial or other advantage intended to induce or reward the improper performance of a function or activity.
- An “advantage” is undefined.

Incentive as Bribe?



- The paying of an incentive in research would constitute an advantage.
- The issue then is whether participation in an interview would be improper performance in a job.

Incentive as Bribe?



- **Probably not but...**
- Researchers will have to be clear exactly why incentives are being paid and what their purpose is.
- Further incentives should be reasonable and proportionate, so as not to appear to be cover for a bribe

Other payments



- Facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes. There was no exemption for such payments under the previous law nor is there under the Bribery Act.

Hospitality



Ministry of Justice Guidance:

- The Government does not intend that genuine hospitality or similar business expenditure that is reasonable and proportionate be caught by the Act, so you can continue to provide bona fide hospitality, promotional or other business expenditure.