E-PRIVACY AND ONLINE DATA PROTECTION

By Peter Carey, Consultant Solicitor Charles Russell
with precedents by Eduardo Ustaran, Senior Assistant Solicitor Berwin Leighton Paisner

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Review by
Sally Anverezu,
Data Protection Analyst,
Taylor Wessing, London.

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**REVIEW**

**Books**

*e-Privacy and Online Data Protection*

By Peter Carey, Consultant Solicitor Charles Russell with precedents by Eduardo Ustaran, Senior Assistant Solicitor Berwin Leigh Patmore

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Striking the right balance between unwarranted interference in the private lives of individuals and the legitimate commercial interests of a business has always proved a challenge. This issue has become increasingly problematic as the opportunities to collect, publish and transmit personal information via the Internet have developed alongside a multiplicity of laws in this area. At the same time there remains a general confusion about the relevance of the laws of different jurisdictions to the Internet.

This makes *e-Privacy and Online Data Protection* a welcome guide to interpreting the law in this area. It offers a helpful reference tool for IT, e-commerce, data protection and privacy practitioners on compliance with the different legal obligations relating to individual privacy in electronic communications.

As the author Peter Carey, who has considerable experience in the field of data protection and privacy explains, this book is intended to be “a specialist work for practitioners, particularly those who advise e-commerce businesses”. However the area of electronic communications and e-commerce is very broad and the book does not seek to cover all the different legal considerations relating to electronic communications, only those that impact on the privacy rights of individuals.

Carey points out that the book is not concerned with privacy issues relating to the media and that matters relating to press intrusions into individual privacy are “beyond the scope of this book”. That said, *e-Privacy and Online Data Protection* contains analysis of the Campbell v. Mirror Group Newspapers case and considers the implications of the case on the rights of individuals to take actions for compensation.

*e-Privacy and Online Data Protection* begins with a useful overview of the different technical, industry and legal terms found within the book before introducing the reader to the concept of privacy. This is achieved by providing an overview of the different case law and statutory provisions that collectively can be said to provide privacy protection in the United Kingdom in the absence of a specific law of privacy. This overview is particularly useful in helping the reader to understand that achieving compliance in this area goes beyond merely applying the provisions of the Data Protection Act 1998 alone and that a knowledge of other relevant laws is also important.

The introductory Chapter makes reference to the E-Commerce Directive and includes a consideration of whether this Directive applies to information society services provided by SMS. As stated in its preface, *e-Privacy and Online Data Protection* is not intended to deal generally with telephony issues and presumably as a result, SMS is not specifically considered elsewhere in the book. That said, SMS marketing is a topical issue and arguably would benefit from equal treatment with e-mail for the purposes of considering e-privacy.

It may be because the book is seeking to paint this broader picture of the different laws to this subject that it does not move straight on and introduce the reader to the specific detail of the Data Protection Act 1998, including the eight Data Protection Principles, the notification requirements and the rights of individuals. This explanatory detail is left until Chapter three. The book turns instead to the key practical question of how to acquire customer information using website collection notices, and privacy policies. A useful checklist of questions is provided to help the reader work out the scope of their processing of personal data and to frame the likely content of a privacy policy.

More practical advice on how to approach the collection and use of information relating to children would have been welcome in this section of the book, although this is perhaps more a reflection of the absence of case law or of specific guidance on this subject from the Office of the Information Commissioner rather than a deliberate omission on the part of the author.

A recurring theme in the book is the issue of data subject consent. This is considered in the context of website user registration pages and privacy policies in Chapter two, when drafting, locating and using opt-out or opt-in clauses. Chapter three then considers consent as one of the legitimising conditions (contained in Schedule 2 to the Data Protection Act 1998) and explains how “explicit consent” is a legitimising condition for the processing of sensitive personal data.

Carey gives as one example of the way websites may collect sensitive data requiring explicit consent, the record of the mere fact of a visit to a site possibly indicating sensitive data about the site visitor, such as a site providing information on rehabilitation following a sex-change operation. This is a useful point to make although it may also be necessary in a case such as this to be able to establish that the record infers something about the visitor’s actual sexual life rather than the visit
merely reflecting a more general or academic interest by the individual in the subject matter of the site.

The issue of consent is also considered in Chapter four where it is one of the key legitimising conditions for electronic direct marketing. Both in this chapter and elsewhere, the effect of the Directive on Privacy in the Electronic Communications Sector is considered, and the pending requirement to obtain opt-in rather than opt-out consent to send future direct marketing e-mails, except for some targeted marketing e-mails sent within existing customer relationships. Practical guidance in this section is usefully interspersed with examples of relevant case law drawn from both the Data Protection Act 1984 and the Data Protection Act 1998.

Over a third of the book is devoted to appendices and precedents. The appendices include a collection of some of the more relevant guidance from other organisations including the United Kingdom's Office of the Information Commissioner, and the European Union's independent Advisory Body on Data Protection and Privacy, the Article 29 Working Party. Missing from this section, however, is the Information Commissioner’s user-friendly “Website Frequently Asked Questions” guidance.

Of particular practical help, is the collection of instructive precedents contributed by Eduardo Ustaran of Berwin Leighton Paisner. The precedents, which include the main source documents a practitioner will need are provided both within the book and in an accompanying CD-ROM. The precedents cover data transfers and third party processing agreements as well as offering examples of privacy policies, collection notices and codes for e-mail and Internet use. The CD-ROM enables the reader to import electronic versions of the precedents to his or her own system with ease and then tailor them to suit particular circumstances.

One of the inherent problems with any guide covering the area of electronic communications is the fast changing nature of the technology, legislation and case law. It is not surprising therefore, that there have been a few changes since the book was written. These include the successful reversal on appeal by MGN Limited of the judgment in Campbell v. Mirror Group Newspapers, the change to the Information Commissioner’s strategy for enforcement and the appointment of the new Information Commissioner. However, in all other respects, e-Privacy and Online Data Protection is one of the most up-to-date guides to interpreting the law on electronic communications as it applies to the privacy rights of individuals and will form a useful addition to the bookshelf of any data protection practitioner or privacy officer.

1 [2002] EWCA Civ 2062 at [60].

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