Data Protection Update – New registration requirements

The Minister for Justice, Equality and Law Reform ("Minister") has passed a number of regulations which have changed the categories of persons who are required to register with the Data Protection Commissioner ("Commissioner") and the registration fees. The regulations take effect from 1 October 2007.

What are the new regulations?

The new regulations are:

- Data Protection Act (Amendment) Act 2003 (Commencement) Order 2007;
- Data Protection Act 1988 (Section 16(1)) Regulations 2007; and
- Data Protection (Fees) Regulations 2007

Legal Background

Section 16 of the Data Protection Act 1988 ("1988 Act") determines who has to register with the Commissioner.

The Data Protection (Amendment) Act 2003 ("2003 Act") provides for the amendment of the 1988 Act (the 1988 Act as amended by the 2003 Act is referred to as the "Acts") and, in particular, provided for an amendment to section 16. The amendment to section 16 had not been brought into effect until now. The Data Protection Act (Amendment) Act 2003 (Commencement) Order 2007 provides for the amendment to take effect from 1 October 2007.

Who has to register with the Commissioner?

With effect from 1 October 2007, the registration requirement can broadly be summarised as follows:

- There are specifically prescribed categories of persons who are always required to register with the Commissioner no matter what.

- Data controllers and data processors that do not fall within the above categories are still required to register with the Commissioner unless they fall within some exhaustively prescribed exceptions.

A data controller is a person who, either alone or with others, controls the contents and use of personal data. A data processor is a person who processes personal data on behalf of a data controller but does not include an employee of a data controller who processes such data in the course of his employment.

In practice, to find out who controls the contents and use of personal information kept, you should ask the following questions:

- who decides what personal information is going to be kept?
who decides the use to which the information will be put? If your organisation controls and is responsible for the personal data which it holds, then your organisation is a “data controller”. If, on the other hand, you hold the personal data, but some other organisation decides and is responsible for what happens to the data, then that other organisation is the data controller, and your organisation is a “data processor”

Who are always required to register with the Commissioner?

Regulation 4 of the Data Protection Act 1988 (Section 16(1)) Regulations 2007 sets out the categories of persons who are always required to register with the Commissioner.

These mandated categories of persons are more or less the same as the categories of persons who were required to register with the Commissioner before the new regulations came into force. However, some persons who were previously required to register will not have to do so anymore.

In very broad terms, the mandated categories of persons who will always be required to register can be summarised as follows:

- banks and financial / credit institutions which are data controllers;
- insurance undertakings (not including brokers) which are data controllers;
- data controllers whose business consists wholly or mainly in direct marketing;
- data controllers whose business consists wholly or mainly in providing credit references;
- data controllers whose business consists wholly or mainly in collecting debts;
- Internet access providers which are data controllers;
- authorised providers of electronic communications networks or services who are data controllers;
- data controllers who process genetic data; and
- data processors who process personal data on behalf of any of the above data controllers.

In addition, regulation 3 of the Data Protection Act 1988 (Section 16(1)) Regulations 2007 suggests that data controllers and processors who process personal data related to mental or physical health will always be required to register.
Who else is required to register?

Data controllers and data processors that do not fall within any of the above categories of persons are generally still required to register with the Commissioner.

Who is not required to register?

However, certain prescribed categories of data controllers and data processors are excluded from the requirement to register provided they do not fall within the mandated categories above. These further categories are set out in section 16 of the Acts and regulation 3 of the Data Protection Act 1988 (Section 16(1)) Regulations 2007.

Very broadly speaking, these categories include:

- data controllers that are not-for-profit organisations;
- data controllers that only process “manual data”;
- data controllers who are elected representatives and candidates for electoral office;
- data controllers who only process data in relation to its past, existing or prospective employees in the ordinary course of personnel administration;
- data controllers that are schools, colleges, universities and similar educational institutions which process data relating to its students and their parents for educational purposes;
- data controllers which are solicitors and barristers who process data for purposes of providing legal professional services;
- data controllers who process personal data relating to their past, existing or prospective customers, suppliers, shareholders, directors or officers in (broad terms) the ordinary course of their business;
- data controllers who process personal data with a view to publication of journalistic, literary or artistic material; and
- data processors who process personal data on behalf of the above data controllers insofar as the processing falls within the above.

These categories of data controllers and data processors are only exempt from registering where they process data for these purposes only and such processing is limited to that necessary for the designated purpose.
What if I do not register?

If a data controller or data processor is obliged to register with the Commissioner, it is an offence to continue to process data while unregistered. Further, it is, in broad terms, an offence for a data controller which is obliged to register to process data in a manner inconsistent with its registration.

Where an offence under the Acts is committed by a company, a director, manager, secretary or other officer of the company may also be guilty of the offence if the offence is found to have been committed with their consent or connivance or to be attributable to their neglect.

The Acts provides for fines of up to €3,000 on summary conviction for an offence under the Acts.

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