



PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Who is who in data protection law?

Mark Watts and **Vera Jungkind** analyse the EU DP Working Party's opinion on the concepts of 'controller' and 'processor'.

The concepts of "data controller" and "data processor" play a crucial role in the application of the European Data Protection Directive 95/46/EC. The controller is responsible for compliance with the data protection principles, whereas the data processor, generally speaking, is not, apart from having legal responsibility for data security in certain countries. Equally, the rights of data subjects, such as their rights of access, rectification, erasure and blocking, are exercisable against the controller rather than the processor.

In the event of a breach, remedies such as compensation are generally only enforceable against the controller. Indeed, the question of whether the Directive applies at all and, if so, which country's national law applies (and so which data protection authority has jurisdiction), is determined by where the controller is established. If among various parties processing personal data in a particular situation the controllers and processors cannot be identified with

Continued on p.3

Malaysia passes DP bill

Graham Greenleaf assesses Malaysia's forthcoming DP legislation for its limitations.

The Personal Data Protection Bill 2009, passed by Malaysia's Parliament on 5 April with no further amendments, will add a distinct new flavour to Asia's growing array of data protection laws.

Information, Communications, Culture and Arts Minister Datuk Seri Dr Rais Yatim stressed that Malaysia is the first among ASEAN countries

to introduce such a law. The Minister is reported to have later told media representatives that private database collection agencies would have to strictly comply once the Bill becomes law.

The Bill applies only to personal data in "commercial transactions" (s2), though they are defined broadly

Continued on p.5

Issue 104

April 2010

NEWS

2 - Comment

Clarity on concepts

News

New HR privacy regulations in Germany • German court rules against data retention • Netherlands plans breach legislation • FTC judgment on privacy seals • Art. 29 WP to work more on BCRs • Swedish court upholds DPA's view • Canada: public consultations on new technologies • Spain: Facebook users must be 14-plus • Finland: processing of tax data must stop • NZ Commissioner advocates UN privacy treaty • EU project to look at privacy • German DPAs not independent enough •

NEWS

13 - HSBC Swiss data breach

17 - Italy holds Google privacy professionals personally liable

19 - Sensitive data in South Korea

19 - Uncertainties in Asia-Pacific

25 - UK Supreme Court rules on withholding data

LEGISLATION

10 - Australia's proposed reforms Privacy remedies

12 - Europe launches infringement proceedings against Italy

21 - New Zealand's privacy protection keeps growing

MANAGEMENT

14 - FTC scrutinises file sharing

ANALYSIS

7 - Brazil's sectoral approach

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Unionism not ‘sensitive data’ in South Korea

“To do at one’s will is one thing, to be forced to do so is another.” This is the response of South Korea’s National Teachers’ Union (NTU) to the official interpretation of the Korean Ministry of Government Legislation (MoLeg) regarding a Public Agency Data Protection Act clause which MoLeg says proscribes the trade union activities of teachers.

Some teachers are ready to disclose that they belong to NTU, but most of them believe unionist activities should be protected as a fundamental right of belief or right to privacy. Accordingly, being forced to disclose this sensitive data has been assumed to be a breach of constitutional rights.

Such conventional understanding was drastically changed when a professor of pedagogics became a member of the National Assembly a few years ago. He believes that leftist NTU teachers have misled and ruined the future of their students. This stubborn lawmaker constantly demanded that the Ministry of Education, Science and Technology (MEST) disclose the real names of NTU teachers by school. That’s why the MoLeg provided its opinion, at the request of MEST, that the personal information of those NTU teachers is not “sensitive data” protected by the Public Agency Data Protection Act.

The legislators have a privilege to inquire and collect such sensitive data within the scope permitted by the relevant laws. Once such data are secured

by a lawmaker, then they become known to the public sooner or later.

WHY THE INTERPRETATION WAS REVERSED

The reason why MoLeg reversed its previous position to keep such information as personal data seems to be well grounded as follows:

- (i) The Data Protection Act prevents collecting such personal information as ideology, belief and medical record, etc., which is likely to infringe excessively upon the right, interest and privacy of the relevant individual. However, MoLeg said, NTU exists for the purpose of improving working conditions of teachers, not for ideological or political causes;
- (ii) Even though the social or political tendency of the relevant teacher could be inferred from the NTU-related information, the teacher is deemed to be a public figure and participates in the potential education process which builds up the personality of the students under his/her influence. So the collection of the NTU-related information of a teacher cannot be regarded as infringement of the fundamental right of the teacher;
- (iii) The Constitution ensures the right of the parents as well as students to be properly educated. The Constitutional Court ruled that the students’ right to learn at class prevails

over the teachers’ fundamental rights of expression on politics;

- (iv) In this context, the NTU-related information of a teacher is very important to students’ right to be properly educated; and
- (v) The members of the National Assembly have privileges to demand important data and materials necessary for the legislative work from the government officials, who cannot find any other reason to reject such demand.

Since the inauguration of conservative President Lee Myong Bak, the Administration has disallowed the organisation of trade unions by government employees, and punished the political contributions of civil servants to the Democratic Labor Party. Against these backdrops, some rulings of progressive judges have given rise to nation-wide controversies. So the current issue remains undecided until early June’s election shows which party has won the hearts of the Korean people.

AUTHOR

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Uncertainties in APEC’s privacy developments

Nigel Waters reports from Hiroshima on developments at the APEC Data Privacy Subgroup and associated meetings from a civil society perspective.

The main work of the APEC Subgroup, which met in Japan on 26-28 February, is further development of a cross border privacy rules (CBPR) system as one means for international implementation of the APEC Privacy Framework. It is intended to

provide mutual recognition between participating APEC economies of each other’s mechanisms for certification of a business’s “privacy rules” as being compliant with the principles in the APEC Privacy Framework. Accreditation is to be by an accredited accountability

agent, with a guarantee of “backstop” enforcement by a public sector enforcement authority able to enforce a privacy law (which may be a sectoral or general consumer protection law). This would be a “minimum” standard, and in no way derogate from the obligations of a