Threats from Data Protection and from Ethics Committees as Applied to Social Science Research

Ross Anderson:

You've heard David tell us that much of what we do is illegal. Welcome to the real world! I've been involved in data protection for a quarter of a century now, and thankfully how it works in practice is different from the theory.

The issue David has discussed first arose with Amnesty International in early 1980s; their then head of Europe (now law prof at London Met, Douwe Korff) realised that AI's operations could not be squared with DP law. AI's data are often very sensitive (race, religion, political beliefs, health data, criminal data, you name it); they're held on both victims and abusers; and AI can often not fully vouch for its information's completeness, accuracy or up-to-dateness. It is widely disseminated, again without the consent of the data subjects, and sometimes with a view to causing them harm (such as by causing the prosecution or public stigmatisation of torturers).

The European DPAs set up a committee under Louis Joinet, a friend of President Mitterand, and it decided in effect to ignore AI's lawbreaking as "they are the good guys". In the UK a small amount of comfort might be drawn from The Data Protection (Processing of Sensitive Personal Data) Order 2000 which is a bit vague and mainly aimed at journalists; a sympathetic judge might stretch it to NGOs.

To understand the British attitude, we have to go back to the early 80s when the first Act was on its way through Parliament. The then Home Secretary David Waddington told anyone who'd listen "Look, Maggie doesn't approve of all this data privacy stuff – it's a German idea, like ID cards. We've got to do something to keep in with the Euros or our banks and computer companies won't be able to process German data. But don't worry – I'll see to it that it doesn't cause any trouble."

He was as good as his word – the Information Commissioner and his predecessors have been stuck in darkest Cheshire, deprived of technical expertise, kept on short rations and never given any real power. Colleagues and I often describe his mission as "privacy theatre" – providing the appearance of privacy rather than the reality. The Commissioner might beat up a Birmingham dentist once a year for failing to register – just to prove that he exists – but he's trusted not to enforce the law against anyone who matters, like government departments or banks.

Part of how this works is his advice service. For example, colleagues and I were commissioned by the ICO in 2008 to report on children's databases; we found them to be both unsafe and illegal, and last year ContactPoint was closed down by the new coalition government. How did it escape the axe for two years? The strategy adopted by the Department of Education was simple.

After they learned that we'd started our inquiry, they asked the ICO for advice about whether their proposed system was lawful. The ICO sent down a clueless junior who
suggested a few tweaks of no consequence. When we then submitted a serious report
damning the system, the ICO found himself embarrassed; he didn't feel up to taking
enforcement action against a system his own office had just blessed.
And something very similar happened during the reign of the previous Information
Commissioner when she accepted an argument from the credit reference agencies they
they are not the data controllers for the information they hold on citizens, but that's
another story.

This institutional design flaw – making the one office not just the prosecuting coun-
and the tribunal, but also the defence expert witness for all likely offenders of
consequence – is a neat way to create the appearance of law without its reality. Ten out of
ten, Sir Humphrey!

Data protection law in the UK brings to mind Oliver Wendell Holmes' legal realist view that "General proposition do not decide concrete cases." In modern
language, the law is not software. If you think you can draw conclusions from what it
says on its face, you'll come to the kind of bizarre and panicky conclusions we've just
heard.

There are many similar issues relating to the law of information. The Export Control Act
went through parliament in 2002 following a request from Al Gore to Tony Blair.
Previously, a physicist just needed an export license when she bought an ion beam
machine, and another when she threw it in the skip seven years later. Since then she
should in theory get a license whenever she shares a script she's written with someone
outside the EU. Thousands of academics break this law every day. Export control was
designed for backroom deals between intelligence services and arms vendors; it just
could not cope with 20,000 physicists, chemists and computer programmers. When we
pointed this out at the time, ministers said "don't worry, we've no plans to use this against
you". The DTI still tried in 2005 to get CVCP, UCU and the Royal Society to help
"market" the regulations. We referred them to Arkell v Pressdram and haven't heard from
them since. The point is that you retain your freedom only if you're prepared to be
stroppy and say no.

A third example is the Computer Misuse Act which you break by "going equipped"
whenever you're in possession of a standard laptop. We security researchers rely in effect
on CPS guidelines, plus perhaps our personal relationships with senior officers in police
computer-crime squads, not to be prosecuted. And finally there's copyright which is "only
tolerated as long as not enforced against the vast number of casual infringers", according
to a barrister who's written on the subject.

So relax: the ICO isn't going to go after historians as all his credibility would be lost. If
centralised universities like Imperial can't understand this and as a result cannot support
research involving personal data, that's their problem.

If I blog this workshop, is it in theory actionable? On David's reading, yes; but who the
hell cares? If data protection law outlaws most photography, as he's explained, it's not
enforceable. The ICO won't even go after NHS Secondary Uses Service despite the fact it's in clear breach of ECHR s 8 – see our "Database State" report, 2009.

Data that really are sensitive, in this case your medical records, do require consent – or legislation that's specific enough for effects to be foreseeable by the data subject. And that's a constitutional matter in Europe, not a statute that can be "fixed" by the majority in Parliament. Does either the NHS or the ICO want to know? No.

There are two large issues of principle.

First: it's a bad idea for scientists to demand the right to ignore constitutional law such as the European Convention on Human Rights here, or the Constitution in the USA. But many do (e.g. the Wellcome Trust's CEO supports compulsory research access to medical records).

Second: Is our state under the rule of law, or is it subject to official caprice? The country with the toughest privacy laws, Germany, holds itself to be a "Rechtsstaat". Is it? It gives wide exemptions to the Springer press, but little to radical-left journals, and none (if they can get away with it) to the Scientologists and others they regard as being "opposed to the spirit of the constitution", such as Jehovah's Witnesses. In a state under the rule of law, the rules should be clear, foreseeable, and applied equally to all. The lack of clarity leads to arbitrariness and denial of fundamental principles. The rule of law needs better-quality law than we're currently getting, at least as far as the law of information is concerned.

And finally, we talked yesterday about whether "academic freedom" means anything really now that the peasants have the same free-speech rights that only we dons used to enjoy. Here's the answer: we have a "good guy" get-out-of-jail-free card – for bad laws like DPA schedule 3, the Computer Misuse Act and the Export Control Act.

The sting in the tail is that not all academies are equal: hierarchical bureaucratic organisations don't get stroppy and say no, the way the dwindling number of self-governed places like Cambridge still do. And even at Cambridge it's not always clear that the academy will stand up for unfashionable views when push comes to shove. During the First World War, Bertrand Russell lost his fellowship at Trinity for being a conscientious objector. And nowadays, if you're a climate change sceptic?