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Legal and Regulatory Update

The use/sale of the electoral roll and the practical implications for the direct marketing industry

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Background

Three spectres haunt the corridors of direct marketing organisations following the judgment in the case of *Robertson v City of Wakefield MBC and Secretary of State for the Home Department* ('the Robertson case'): data protection, human rights and the Representation of the People Regulations.

Before the Data Protection Act 1998 ('the Act') came into force the electoral roll was available under the Representation of the People Regulations 1986 to any person, company or organisation which notified the appropriate officer in the local authority of their wish to buy by a given date and proffered the appropriate fee.

Changes should have been made to this regime after the Act came into force, but it took the *Robertson* case to bring matters into focus for both the government and the direct marketing industry.

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The *Robertson* case

The legal issues which arise in the *Robertson* case are complex.

Robertson's main grievance was that he was required by law to provide personal data to an electoral registration officer (ERO) when the ERO knew that these data would be sold to commercial interests which would use it for direct marketing and other purposes, and that he did not wish his enfranchisement to be made conditional upon acceptance of this further use. Mr Robertson argued that he had a right to opt out of the use of his data for direct marketing purposes under the Act.

Mr Robertson argued that the dominant purpose for collecting electoral roll information is for allowing people to exercise their right to vote in a democracy. The fact that information is going to be used for a secondary purpose, for example direct marketing, ought to be drawn to the specific attention of each individual, who should then volunteer to allow that information to be used for that secondary purpose.

This is to separate the compulsory element of giving the information (on pain of being found guilty of a criminal offence in a case of failure to register to vote) from the voluntary element, which is use of the information for marketing.

Mr Robertson argued that this is what the Act required the government to do in order to make the use of the electoral roll lawful.

Mr Robertson contended that the government failed to introduce the necessary regulations to amend the law on the use of the electoral roll

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quickly enough. This meant that when Mr Robertson was forced to give his information for electoral registration purposes he was not given a specific opportunity to opt out of having it used for other purposes.

So Mr Robertson went to court to challenge the ERO's disclosure of his data to commercial organisations for non-electoral purposes. The government was a party to the litigation and stood accused of not implementing the EU directive on data protection appropriately.

Data subjects' rights

The effect of the judgment in *Robertson* is that EROs and those to whom they subsequently sell or disclose information must give effect to data subjects' rights under the Act. Mr Justice Maurice Kay held as follows.

- The failure of EROs to allow for individuals to object to the disclosure of their names and addresses from the electoral roll for direct marketing purposes since March 2000 has breached the Data Protection Act 1998. Individuals have a right to notify their EROs of objections and to have those objections taken into account. They have a remedy under the Act if the ERO fails to give effect to this right.
- The sale of names and addresses from the electoral roll 'for commercial purposes' without allowing for objection is *prima facie* a breach of Article 8 of the Convention Rights under the Human Rights Act 1998. The breach is not legitimised under Article 8.2 because it is unlawful and is not proportionate to the end to be served by the sale.
- The sale of names and addresses from the electoral roll for commercial purposes without allowing for objection is *prima facie* a breach of Article 3 of the First Protocol under the Human Rights Act 1998.

Reaction to *Robertson*

Confusion in the direct marketing industry

Following the *Robertson* case the vast majority of EROs ceased supplying the role to commercial concerns. The Information Commissioner also published guidance. Interpretations of the judgment varied widely, leading to confusion in the credit and direct marketing industries on what the roll could be used for and who could access it.

The UK government's reaction to the Robertson case

The *Robertson* case forced the UK government to implement the Representation of the People (England and Wales) (Amendment) Regulations 2002 and the Representation of the People (Scotland) (Amendment) Regulations 2002 (together 'the Regulations'), which had been previously drafted but not implemented.

The Regulations specify two forms of electoral register, the full register and the edited register.

Full register

The full register is that which contains the personal data which individuals are obliged to provide. This is generally used for electoral purposes only. However, under Regulation 114 a copy of the full register may also be sold to credit reference agencies which are registered under Part 3 of the Consumer Credit Act 1974 and which are carrying on the business of providing credit reference services. This latter requirement

reduces the number of licensed credit reference agencies which may purchase full copies of the register from around 300 to four or five. Lots of organisations are registered as credit reference agencies but only a very small number carry on the business of being credit reference agencies.

The purposes for which this small number of credit reference agencies can use the full register are very limited. The first is for vetting applications for credit or applications that can result in the granting of credit. Credit includes any guarantee indemnity or assurance. The second allowable purpose is for meeting any of the obligations contained in the money laundering regulations, and the third allowable purpose is the use of information at the statistical level for the creation of credit risk assessment products such as score cards.

Unfortunately, this list of allowable purposes does not include the use of the full register for marketing pre-screening of lists for the mailing of credit products.

Edited register

The edited register is available to be bought by any person and used for any purpose. This clearly includes marketing; however, the edited register will only contain the names and addresses of those who have positively opted in to having their information included on the edited register. This has advantages as well as disadvantages. However small the edited register finally turns out to be, at least the marketing industry will know that those who are on it are willing recipients of material from the direct marketing industry, when they have cleaned the edited register against the various preference services lists.

Detail of the Regulations

The full register

Relevant restrictions

Regulation 112 of the Representation of the People (England and Wales) (Amendment) Regulations 2002 contains the general provisions regarding the sale of the full register.

Regulation 112(4) lists the 'relevant restrictions' (defined in 112(3)) that apply to a body which has purchased a copy of the full register. The restrictions set out in Regulation 112(4) are that:

'No person in an organisation to which a copy of the register has been supplied under regulations 113 or 114 below may –

- (a) supply a copy of the register to any person,
- (b) disclose any information contained in it (and not contained in the edited register), or
- (c) make use of any such information,

other than for the purpose set out in the regulation by virtue of which the full register has been supplied.'

The regulation does not restrict the number or type of persons to whom the information may be supplied as long as the information is disclosed for one of the prescribed purposes. The transfer of data overseas is not prohibited and neither is the use of agents.

Regulation 114 sets out the purposes for which a credit reference

Purposes

agency, registered under the Consumer Credit Act, may make use of information contained in the full electoral roll. It provides that the purposes are:

‘(3) (a) Vetting applications for credit or applications that can result in the giving of credit or the giving of any guarantee, indemnity or assurance in relation to the giving of credit

(b) meeting any obligations contained in the [money laundering provisions]

(c) statistical analysis of credit risk assessment in a case where no person whose details are included in the full register is referred to by name or necessary implication.’

It does not restrict the number or type of persons to whom the information may be disclosed as long as the data are only used or disclosed for those purposes. It does not restrict the disclosure or use to within the EEA or prohibit overseas transfers for credit purposes. It is silent on the use of processors or other agents.

Sale of full register to government departments

The full register can also be sold to government departments which may use it for the prevention and detection of crime and the enforcement of the criminal law; the vetting of employees and applicants for employment, where such vetting is required pursuant to any enactment; and supply and disclosure in accordance with paragraphs (3) to (6).

Separate provisions relate to processing on behalf of credit reference agencies.

Regulation 92 provides that the term ‘register’ includes any part of the register and defines a ‘processor’ for the purposes of the Regulations as ‘any person who provides a service which consists of putting information into data form or processing information in data form and any reference to a processor includes a reference to his employees’. In turn ‘employees’ is widely defined.

The governing provision appears to be that the processor ‘provides a service’. It would seem to follow that if the person does not ‘provide a service’ then that person is not a processor for these purposes. This is reinforced by the wording of 92(8), under which (*inter alia*) a person who obtains a full copy of the register under Regulation 114 may:

‘(a) supply a copy of the full register to a processor for the purpose of processing the information contained in the register,

(b) procure that a processor processes and provides to them any copy of the register which the processor has obtained under these Regulations for use in respect of the purpose for which that person is entitled to obtain such copy or information as the case may be.’

This is less than clear, but appears to be intended to enable the credit reference agency to use the services of a processor. It is not clear how it affects a person to whom the register is supplied by the credit reference agency.

The edited register

Regulation 93 relates to the use of the edited version of the register. The edited register omits the name of any elector whose details are contained in the full register if a request has been made for their details to be excluded. The request may either be by return of annual canvass under Section 10(3) of the 1983 Act or by an application to be registered in accordance with Regulation 26.

Regulation 110 provides that:

‘(1) The registration officer shall supply a copy (or copies) of the edited register to any person on payment of a fee calculated in accordance with paragraph (2).’

Therefore the edited register can be bought by anyone who asks for a copy and can be used for any purposes, whereas only certain people and organisations can obtain copies of the full register which must be used for specified purposes (see above).

It is therefore clear that status as a credit reference agency is beneficial as a full copy of the register may be purchased; however, the full register can only be used for those purposes specified above and cannot therefore be used for direct marketing purposes. The edited register can be purchased by anyone and so status as a credit reference agency would be irrelevant; also the edited register could be used for any purpose, including marketing, as long as this is not unsolicited.

Historical electoral roll

Opting out of commercial use

The question to be posed is whether an opt-out of commercial use of the register amounts to notice that the individual objects to the use of *any* of his data (ie information obtained from other sources or old electoral rolls) for direct marketing.

Opting out is not the exercise of the statutory right under section 11 of the Data Protection Act to object to direct marketing. Section 11 provides:

‘(1) An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease. . . processing for the purposes of direct marketing personal data in respect of which he is the data subject.’

Therefore the opt-out does not technically amount to an objection, and in relation to credit reference agencies there is a separate right of objection to direct marketing. There is, however, an obligation on the part of data controllers to process data fairly, and it could be argued that continuing to process for marketing purposes in the light of an objection is unfair. As regards credit reference agencies the opt-out could be seen to be notice that the individual objects to any use which departs from the permitted purposes, which do not include marketing. The best thing to do would be to take the edited list of those who do not object to direct marketing. The Information Commissioner appears to be of the opinion

Information Commissioner's view

Good practice

that such processing would be permissible, but it would appear to be a judgment call in individual circumstances.

Therefore it seems that those who purchase the edited list, who can use it for any purposes, can market to those contained in the list subject to having a ground for processing under Schedule 2. It is questionable whether the individual should be given notice of the marketing, as it is likely that this would involve disproportionate effort. It may be good practice, however, to state in the marketing material that the personal information has come from the electoral roll.

This list may be significantly reduced depending on the number of people who exercise the right to opt out. Therefore it would be extremely advantageous to use the information contained in the historical electoral roll (ie the full roll which existed before the implementation of the Regulations).

The legislation is not retrospective and therefore the opt-out will only be reflected in the post-Regulations registers. This would suggest that the information contained in historic copies of the register could still be used without limitation. The question is one of fairness (as considered above), and it would seem that there is a strong argument that the continued use of this information would *not* be fair and that the objection should be honoured once it has been made. There is considerable debate about this, and it seems that a risk benefit analysis must be undertaken.

Where an individual does not opt out initially after the implementation of the Regulations but does so subsequently, it would seem that the same issue arises and it would be unfair to continue to use the data from before the period of the opt-out. If this individual were to opt back in again at a later date then the data from the period of the opt-out would be unavailable as well as, it seems, the data from before the opt-out.

Another area of debate is the situation where an individual opts out of inclusion in the edited register but then subsequently fails to opt out of receiving third-party marketing material, by not ticking a box. Some are of the belief that this means that marketing may then resume, whereas others believe that the opt-out of the electoral roll takes precedence as this is a positive action. The individual may merely have failed to notice the opt-out box.

Conclusion

There is no doubt that direct marketers are going to have to find alternative sources of information in order to verify existing lists and build new ones. This is giving rise to an increasing number of data sales between organisations which can see the commercial value of replacing electoral roll information from other sources as quickly as possible.