

HALIFAX BUILDING SOCIETY ACQUITTED IN 1ST UK DATA PROTECTION CROWN COURT CASE

The Halifax Building Society, the UK's largest home loan financial institution, was acquitted on December 17th at Leeds Crown Court of the criminal offence of knowingly and recklessly holding personal data in breach of the Data Protection Act 1984. This case was the first in the UK involving the Data Protection Act to be heard by a High Court Judge and jury at a Crown Court, the level above a Magistrates Court. This is also the first time that the Data Protection Registrar has lost a court case, with costs awarded against public funds.

The Facts

Iain Wright, who was a Communications Project Manager at Allied Dunbar, (a major assurance company) made a subject access request to the Halifax on 28 November 1987 (PL&B September '89, p.9, December '89 p.6, August '90 p. 29). The Halifax provided him with some of the personal data he requested but refused to release other data including:

- * details of his withdrawals of money from Automated Teller Machines
- * times of each of his transactions;
- * his Halifax card number used to carry out transactions; and
- * Halifax data on his requests to seek information about the amounts of money in his account.

Wright took his complaint to the Data Protection Registrar (DPR) whose officers investigated the complaint following standard procedures (see p. 20).

The Prosecution Case

As a result, the DPR took two courses of action:

1. Issued an Enforcement Notice ordering the Halifax to comply with Wright's access request. The Halifax has appealed against this Notice to the Data Protection Tribunal, claiming that the data is either not personal data or if it is, is exempt from the subject access provisions in that it is held for the prevention of crime and prosecution of offenders.
2. Prosecuted the Halifax under Section 5 (2)(b) (see box on next page) of the Data Protection Act for holding personal data for the purpose of prevention of crime and prosecution of offenders without being registered for this purpose - the case heard in Leeds in December.

To win in the court case, the DPR had to prove that the Halifax "knowingly or recklessly" contravened Section 5 (2)(b). The DPR's position was that the Halifax had held personal data for the prevention of crime and

SECTION 5 - EXTRACTS

- 5 (1) A person shall not hold personal data unless an entry in respect of that person as a data user, or as a data user who also carries on a computer bureau, is for the time being contained in the register.
- 5 (2) A person in respect of whom such an entry is contained in the register shall not -
- 5 (2)(b) hold any such data, or use any such data held by him, for any purpose other than the purpose or purposes described in the entry;
- 5 (5) Any person who contravenes subsection (1) above or knowingly or recklessly contravenes any of the other provisions of this section shall be guilty of an offence.
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the prosecution of offenders without being registered for this purpose between 21st February 1987 and 10th October 1988.

After meeting DPR staff in August 1988, the Halifax took legal advice from external solicitors who advised that it should register that it was holding personal data for the prevention of crime and prosecution of offenders - and the Halifax did so in October 1988.

An important element of the case was whether the Halifax had held personal data "knowingly or recklessly." The DPR wanted to enforce the Act's provision that:

- * personal data should be held only for registered purposes;

and his view that:

- * where an exemption from subject access is being claimed on the grounds that the personal data is held for crime prevention and prosecution of offenders, the person claiming that exemption should register the holding of data for that purpose.

The Verdict

In a prosecution brought under Section 5 (2)(b) of the Data Protection Act the prosecution has to prove that the defendant held data knowingly or recklessly for a purpose for which it was not registered.

The Judge, Mr. Justice Blofeld, four days into the case, reviewed the prosecution evidence, in the absence of the jury, and accepted the defence's submission that there was insufficient evidence to prove the "knowingly or recklessly" element of the charge.

Therefore, without calling the defence evidence, the judge directed the jury to acquit the Halifax, because the prosecution had failed to show a prima facie case (a case to be answered) against the defendant. This was fundamental to the verdict because in a criminal case, the defendant does not have to prove its innocence.

The Judge awarded the Halifax costs from central funds which the Halifax has estimated at £50,000.

After the case, the Halifax's Operations Director, Michael Whitehouse said that "the case has involved us both in a sad waste of time and money." The DPR, Eric Howe, said, "I will consider the implications of this case with my legal advisers before taking any decision as to future actions."

This report was prepared with the help of Ruth Robinson, the Data Protection Registrar's Assistant Solicitor.

Privacy Laws & Business Comment on the Halifax's "Defence"

1. Defence case not heard

It is surprising that the Data Protection Registrar should lose a case in which the defence's case was not even formally presented. However, with the help of the Halifax's lawyers, we are able to present a summary of its position which emerged during the course of the prosecution case.

Cross examinations of the DPR's witnesses by the defence lawyers revealed that:

- 1.1 The Halifax had taken considerable effort, such as reviewing all information held, conducting staff meetings and giving instructions to staff, to correctly register its purposes for holding personal data at the proper time;
- 1.2 A letter from Michael Whitehouse, the Halifax's Operations Director, was referred to in court which showed that he considered that holding personal data for prevention of crime was subsumed under the registered purposes of
 - borrowers and investors account administration; and
 - staff and personnel administration

Therefore, there was no need to register separately for prevention of crime.

- 1.3 Although the personal data was used sporadically for combatting fraud (relatively few times in a 15 months period) this was incidental to its main purposes listed above;
- 1.4 The DPR had given no specific guidelines to financial institutions on

registering personal data for the prevention of crime, nor in general published guidelines;

- 1.5 When the Halifax became aware of the DPR's policy, it took immediate corrective action. Whitehouse commented after the case: "When in August 1988, the Registrar indicated that our registration was incomplete, we amended it immediately and he also, in February 1989, changed his Guidelines to make them clearer."
- 1.6 An argument which was not used at the trial was that the Halifax considers that much of the data to which the Halifax refused access to the data subject was not personal data as defined in the Data Protection Act.
- 1.7 A theme underlying the Halifax's case was that by releasing the data which had been requested in this case, the Halifax would facilitate the carrying out of fraud, as the information would show something of the Halifax security procedures.

2. Ancillary uses

The most remarkable effect of the court decision is one recognized by one of the defence lawyers that it is now possible (although not recommended) to use personal data for purposes which are ancillary to the primary registered purposes. This could severely undermine the duty to hold personal data only for registered purposes, if the same line is taken by other organizations when faced by such a prosecution by the DPR.

The DPR's Assistant Solicitor, Ruth Robinson, has responded to this comment by stating that this perception of a policy change is not correct.

"It was always possible to use personal data for purposes which are ancillary to the primary registered purpose, provided that those purposes could properly come under the umbrella of that registered purpose. It still remains the case, however, that where personal data is held for a particular purpose for which a separate purpose code exists the Registrar would expect a person to register the holding of data for that separate purpose."

This report was prepared with the help of Shelagh Gaskill, an Associate of Dibb Lupton Broomhead & Prior, the Halifax's external solicitors in this case.