

**31st INTERNATIONAL CONFERENCE OF DATA PROTECTION AND PRIVACY
COMMISSIONERS**

MADRID, 5 November 2009

RESOLUTION ON CASE REPORTING

The 31st International Conference of Data Protection and Privacy Commissioners:

Recalling:

- (a) The Montreux Declaration adopted at the 27th Conference which resolved to intensify the exchange of information to promote the protection of personal data and privacy in a globalised world;¹
- (b) The London Declaration adopted at the 28th Conference which called for data protection authorities to bring forward coordinated strategies to act in new and more effective ways and, in particular, to develop and implement new communications strategies both at the national and the international levels;²
- (c) The resolution of the 29th Conference³ which welcomed the adoption by the OECD Council of the Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy encouraging privacy enforcement authorities to share information on enforcement outcomes to improve the collective understanding of how privacy law enforcement is conducted:⁴

And noting that:

- (d) Data protection authorities have a central role to interpret privacy and data protection laws;
- (e) The processes for resolving privacy complaints are often carried out in private to promote conciliation and efficient dispute resolution;
- (f) There are public benefits in:
 - i. making known significant interpretations of the law in cases brought before data protection authorities; and
 - ii. bringing greater transparency to the role performed by data protection authorities in privacy law interpretation and enforcement:

Therefore resolves to encourage data protection authorities:

- 1 To have a process for releasing copies or summaries of positions taken on a selection of complaints handled by the authority, illustrating typical or significant interpretations and

¹ *The Protection of Personal Data and Privacy in a Globalised World: A Universal Right Respecting Diversities*, Montreux, 2005.

² *Communicating Data Protection and Making It More Effective*, London, 2006.

³ *Resolution on International Co-operation*, Montreal, 2007.

⁴ OECD, *Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy*, clause 20, 2007.

notable outcomes (such copies or summaries to be released in a form by which the identities of complainants and other individuals are anonymised);

- 2 To include an appropriate citation with each copy or summary to make it easy to clearly identify and refer to particular cases;
- 3 To take proactive steps to make those copies or summaries widely available, including using the Internet, to encourage comparative knowledge and stimulate research and debate;
- 4 To take steps to make more widely known, or readily accessible, other judicial decisions on privacy and data protection cases within their territory (such as appeals and reviews).

Explanatory Note

In recent years, the conference has developed and encouraged new means to foster co-operation and co-ordination in giving effect to data protection law. However, the London Declaration highlighted that there was considerable scope to improve performance in communicating data protection messages. The premise of this resolution is that a useful step that can be taken is to report on the outcome of a selection of cases handled by data protection authorities (DPAs). One of the most effective means of educating the public and engaging news media interest is to “tell a story” using real cases.

The resolution encourages DPAs to develop processes to release and effectively disseminate selected reports or summaries (referred to in this explanatory note as “case reports”) in anonymised form.⁵ A number of DPAs already do this. Case reports are useful to:

- assist individuals, businesses and their advisers to understand the operation of privacy laws;
- stimulate news media interest in, and understanding of, data protection law and practice;
- broaden the knowledge of experts beyond the minority of cases that are taken through courts or formal public determination processes;
- increase transparency of core DPA activities;
- promote the accountability of DPAs;⁶
- enable experiences from a variety of jurisdictions to be drawn upon in order to promote better understanding, harmonisation and development in data protection thinking.

What is a case report?

The most common form of complaints handling by DPAs involves the investigation, conciliation, mediation or determination of complaints in a confidential setting involving only the relevant parties. In such processes, DPAs frequently render detailed opinions with full legal reasoning. These are usually not made public but delivered only to the parties. The resolution encourages DPAs to draw

⁵ The case note is typically “anonymised” by avoiding reference to the complainant, or other individuals, by name but instead to use either a pseudonym (such as “Mr A”) or a description (such as “the consumer”, “the complainant” or “the nurse”). Sometimes other factual details will be omitted or generalised to prevent identification. The practices of the particular DPA and the applicable law will determine whether respondent organisations are named. Some DPAs usually name organisations while others rarely do so, depending upon their own views on whether this strengthens or detracts from the objectives of their complaints handling system. Some data protection laws prohibit the naming of either party to a complaint.

⁶ See Greenleaf, “Reforming Reporting of Privacy Cases: A Proposal for Improving Accountability of Asia-Pacific Privacy Commissioners”, 2004, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=512782.

upon a selection of the opinions or decisions rendered as the basis of case reports that can be made public. In order to preserve the confidentiality of the processes, steps need to be taken to anonymise reports so that the complainants – and in some cases the organisations complained about - are not identified.

The style and approach of case reports can differ substantially but the usual elements are:

- an account of the facts;
- the relevant law;
- a discussion of the issues of interest;
- the DPA's view of how the law applied to the facts – if providing a summary, rather than a copy of a decision or opinion, this needs to be in sufficient detail to enable readers clearly to follow the reasoning;
- the outcome.

The case report will also include a citation and may include other features such as indexing references.

There are many existing examples of case reports in DPA annual reports, on commissioners' websites and in repositories such as the International Privacy Law Library.⁷

In some cases a DPA may choose to release an entire opinion or decision. DPAs that release entire decisions or opinions may choose also to release a summary to assist with effective public communication.

The citation of case reports

There is a clear benefit to be able to cite reports from DPAs from around the world. It is preferable that each case report have an official citation that unambiguously refers to the report and has an accepted designator for the DPA.

A number of case reports currently released by DPAs in their annual reports or on websites contain no citations and are thus hard to refer to and may soon be forgotten.

The approach to citation may vary between different legal traditions. A typical citation system may include the following elements:

- a descriptor of the case;
- the year of publication;
- a standard abbreviation for the DPA;
- a sequential number.

DPAs may wish to consult local legal experts to assist in developing citation systems. Citation standards and examples of approaches to citation in existing series of case reports may be instructive.⁸

Dissemination of case reports

The conference actively encourages DPAs to make their case reports widely available to increase comparative knowledge and stimulate research and debate.

⁷ See www.worldlii.org/int/special/privacy.

⁸ See, for example, Asia Pacific Privacy Authorities Forum, *Statement of Common Administrative Practice on Case Note Citation*, 17 November 2005, at www.privacy.gov.au/international/appa.

There are many steps that DPAs can take domestically depending upon their priorities, budget and target audiences. For example, authorities might distribute electronic copies through RSS feeds on their website or email subscription lists.⁹

DPAs should also consider:

- permitting the re-publication of their case reports; and
- making their case reports available through regional or global consolidated points of access.

Third party publishers can support DPAs in making case reports more widely available to the public, professional advisors, researchers and specialised audiences. DPAs should consider facilitating re-publication of case reports by third party publishers by including on their website copyright notice a general licence for re-publication of case reports with proper acknowledgement.

Another approach to the same end is to adopt a Creative Commons “attribution only” licence” which will provide a broad permission for re-publication.¹⁰

There is considerable value in having consolidated points of access for case reports. A “one stop shop” brings several benefits, most notably the ability to search across a range of case report series. A consolidated access point now exists in the World Legal Institute’s International Privacy Law Library.¹¹

DPAs may wish to consider translating a selection of more significant case reports that may be of interest to other jurisdictions. Where translation of an entire report is not feasible, consideration might be given to a very brief summary or “lean case note” which will direct researchers to the full report available in the original language.

Appeals or reviews etc.

DPAs are usually seen as the most authoritative source of information about data protection and privacy in their jurisdiction. There may be advantage in DPAs making efforts to disseminate summaries of judicial decisions that may not otherwise become known. This may include appeals from, or reviews of, DPA decisions. It may also be useful to disseminate information about cases that have not involved the DPA such as decisions on privacy law suits brought before the courts by private plaintiffs.

⁹ For other suggestions and guidance see Asia Pacific Privacy Authorities Forum, *Statement of Common Administrative Practice on Case Note Dissemination*, 9 November 2006, at www.privacy.gov.au/international/appa.

¹⁰ See <http://creativecommons.org>.

¹¹ WorldLII has formally offered to publish collections of case reports from any privacy and data protection commissioner who asks including historical sets of earlier case reports from annual reports. To date the International Privacy Law Library principally comprises English language materials but WorldLII welcomes receiving series of case reports in other languages as well. Other repositories may develop over time and the conference also supports and encourages their use.