



Andrew Banks



Peter Woodhouse

Solicitors Andrew Banks and Peter Woodhouse of Stone King's Transport Team look at:

# Driver data in scope?

Stone King partner Vicki Bowles has some timely updates on the upcoming Data Protection Bill. Plus the law relating to 'snooping' on employee email, and an update about DBS checks

## DATA PROTECTION

If you hold data about drivers concerning their health and perhaps their Enhanced DBS checks, you need to begin looking at your data policy.

On the 13 September, the "new" Data Protection Bill got its first reading in the House of Lords and on the 10 October it got its second reading. For those who have the true survival spirit, the transcript can be seen here: <https://goo.gl/4XKrqn>. It is clear that there are a fair few amendments to come and more will (hopefully) be known after the Lords Committee Stage on 30 October.

The Bill is effectively draft legislation that brings the EU General Data Protection Regulation (GDPR) into UK law, ready for when we Brexit. It doesn't stop there though, and there are some additional provisions that businesses may want to keep an eye on as the Bill progresses through Parliament, before it becomes law.

If you hold/store/use any of the categories of information set out below about your employees, you will need a policy in place that sets out certain information about what you are doing, why, and how long you are intending keeping the information, and the policy must be regularly reviewed and

updated if necessary.

**Those categories are:**

- racial or ethnic origin,
- religious or philosophical beliefs,
- trade union membership,
- data concerning health,
- data concerning a natural person's sex life or sexual orientation.

For example, you may hold information about drivers' health, possibly from recruitment checks, or disciplinary matters where drivers have not disclosed certain health problems that may affect their ability to drive safely. In addition, you may hold information about drivers' religious beliefs if, for example, they do not want to work on certain days of the week for religious purposes.

If you view and store information about DBS checks, you need a specific policy to deal with that too.

As with the Employment information above, if you are required to hold details of DBS checks carried out on staff and/or volunteers, you will need a similar policy in place governing this, but will also need to ensure that you can demonstrate that the individual has given consent to you using this. This could be particularly relevant for organisations that supply school bus drivers where an enhanced DBS check with barred list information is required.

Exemptions to the right of Subject

Access may be the same as before... but with some tweaks possible.

The bill takes full advantage of the ability to set exemptions to the general right of individual to see what you hold about them. The usual suspects remain (crime and taxation, references you've given, prejudicial to negotiations, legal professional privilege, third party personal data), but there are a whole raft of "public" services that will have their own exemption to rely on if asked to release information about an individual.

The key change though, is the addition of an exemption specifically for child abuse information, which may be relevant if school bus drivers have had to make any safeguarding disclosures about children they have driven. The takeaway point is that there will still be exemptions which allow you to refuse to release some sensitive individuals, and these are likely to operate on the whole as they do now.

Stone King has a pack of template policy documents to assist you in getting ready for the GDPR, which includes a privacy notice, general data protection policy and a data retention policy. These are available at a cost of £750 plus VAT. If you are interested in more information, please contact Vicki Bowles at [VickiBowles@stoneking.co.uk](mailto:VickiBowles@stoneking.co.uk)

## HUMAN RIGHTS

### Monitoring employees' communications

'Can I read my employees' private messages?' is one of the most common questions that employers ask. A case before the European Court of Human Rights (ECtHR) has revised its answer to this.

In the case of *Barbulescu v Romania*, the employee used his work Yahoo! Messenger service for personal communications, including for sending messages to his fiancé and brother. His employer had monitored these messages and proceeded to dismiss him.

The employee had been told of

the ban on personal internet use but had not been informed of the extent and nature of his employer's monitoring activities, or that his employer might have access to the actual content of his communications.

The ECtHR decided that the monitoring breached the employee's right to respect for private and family life, under Article 8 of the European Convention on Human Rights.

A key point to note is that, if an operator intends to monitor employees' emails and messages, it should inform the employee (before starting monitoring) of the extent and nature of the proposed monitoring activities, and of the possibility that the operator might have access to the actual content of the messages.

Operators should note that this judgment does not place a blanket ban on monitoring employees' communications in the work place; rather it shows how to think through an employee's Article 8 right.



## DRIVING

### DBS safeguarding checks on school bus drivers

The importance of this has hit the headlines recently so it is worth recapping the requirements.

School bus drivers should have a Disclosure and Barring Service (DBS) 'enhanced with barred list' check. The DBS enhanced check provides certain information stored on the Police National Computer, plus any additional information held by the police which a chief officer reasonably believes to be relevant and ought to be disclosed. The 'barred list' element is an additional check of the individual's name against the DBS' 'barred list' of individuals who are unsuitable to work with children.

The responsibility for ensuring the required safeguarding checks have been carried out is with the relevant local authority. The local authority should also ensure that the school bus drivers meet other requirements such as having undertaken appropriate training which is kept up to date

By way of example, ten school bus drivers, who work for contractors on Wigan Council's school transport

service, have been suspended as the correct checks had not been carried out. However, Wigan Council noted that school transport contractors are responsible for ensuring that they are fully aware of the Council's safeguarding protocols. Therefore, even where the obligation to check drivers is technically on the relevant local authority, it is important for bus companies to be aware of it nonetheless.

For more information, the government has produced a guidance document entitled 'Home to school travel and transport guidance' (available on the gov.uk website).

## EMPLOYMENT

### Suspending employees

Suspending an employee without allegation is assumed to be a neutral act. In practice, of course, very often employees that are suspended (especially senior ones), never come back.

In that light, the High Court has held, in the case of *Agoreyo v London Borough of Lambeth*, that suspending an employee pending an investigation into an allegation was not a neutral act.

The employee was a teacher in a school and was suspended five weeks into her role because of the force she allegedly used in three incidents involving two children. The suspension was on full pay pending investigation into the use of force allegations. The suspension letter said, after an investigation, a decision would be taken as to whether there was a case to answer. The employee resigned the same day.

The Judge held that the school was in repudiatory breach of contract and that the teacher's resignation amounted to constructive dismissal.

The key take-home point is that the court held that suspension is not a neutral act, as suspension casts a shadow over the employee's competence. This case does not change the law, and does not mean that employees cannot be suspended, but shows that suspension should not be a 'knee jerk' reaction. Careful consideration should be given to a decision to suspend.

Written by Andrew Banks and Peter Woodhouse of Stone King's Transport Team.

Contact them on [pmw@stoneking.co.uk](mailto:pmw@stoneking.co.uk); [andrewbanks@stoneking.co.uk](mailto:andrewbanks@stoneking.co.uk)

This article is for guidance only. The law and practice referred to has been paraphrased or précised and should not be construed or relied upon as legal advice.