



# LEGAL NEWS

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## Data protection enforcement A tougher future?

### BREACHES OF DATA PROTECTION LAWS LEAD TO NEW PROCEDURES

Following some recent and very public breaches of data protection laws, data controllers, including local authorities, can expect a much harder enforcement line in the future.

In the past year or so, the UK has seen a series of serious and embarrassing breaches of data protection laws, in particular:

- Her Majesty's Revenue & Customs' loss of 2 CDs containing personal information of 25 million UK residents;
- Loss by the Driving Standards Agency of personal information data of 3 million learner drivers;
- The MOD's loss of a laptop containing personal data of 600,000 applicants to the British Armed Forces;
- The discarding of records containing personal information outside high street bank premises in rubbish bins.

Many observers point to a perceived weak enforcement regime coupled with (and, it is often argued, resulting in) a relaxed approach taken by data controllers, both public and private, to data protection obligations. Scrutiny of recent enforcement by the Information Commissioner and recent changes to the law shows that we can expect a far more rigorous approach to enforcement.

#### INNOVATIVE ENFORCEMENT TECHNIQUES

As well as calling for greater enforcement powers, the Information Commissioner has been resourceful in enforcing data protection laws. The following trends have emerged:

##### Publicity

The fallout from bad publicity has been a key weapon in the Information Commissioner's armoury. Results of enquiries are now made available to the public on the Information Commissioner's own website (<http://www.ico.gov.uk>) and are routinely contained within press releases. This was used to great effect in the admonishment of several high street banks who had discarded deposit slips and application forms containing personal information in rubbish bins outside their premises. Unsurprisingly, given this publicity, the high street banks in question have been keen to appear cooperative in implementing corrective action.

##### Undertakings

Instead of issuing an enforcement notice, and especially where the breach has been made public, the Information Commissioner has been willing to offer offenders the alternative of an undertaking. Under such an undertaking, the offender typically concedes the breach and agrees to take prescribed remedial steps (which, for example, may include the

*More Inside...*



**Waste Enforcement**



**Agricultural Land Issues**



**Sports Grounds Management**

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# Continued... Data protection enforcement

An undertaking has been successfully used on a wide variety of organisations, from high street banks to police authorities and government departments.

provision of additional staff training). The undertakings themselves have been published on the Information Commissioner's website.

Such an offer has proved an attractive option for offenders who, having been found wanting, are keen not to compound bad publicity by appearing not to cooperate in implementing corrective measures. The undertakings which the Information Commissioner has, through this route, achieved, are not only greater in scope than an enforcement notice would perhaps be, but require a positive recognition of what an organisation needs to do to ensure compliance with data protection laws in the future.

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## Increase in Auditing

The Information Commissioner has also secured undertakings that offenders make their data protection procedures available to audit by his department. This has had the effect of encouraging compliance – it is no surprise that offenders who can be subjected to audit at any time take data protection far more seriously.

In the future, many observers anticipate that the Information Commissioner will have the power to compel organisations to commission (and pay for) their own data protection audits on a periodic basis. There is precedent for this in France where the CNIL, the French Data Protection Authority, carries out spot audits routinely. It seems that the ability to compel an organisation to commission an audit or to undertake an audit without warning is a natural evolution of the current enforcement regime.

## Inter-Regulator Cooperation

There has also been a far greater cooperation between regulators. Where the Information Commissioner's own data protection enforcement powers have been considered not strong enough, the Information Commissioner has been happy for punitive action to be taken by other authorities,

whose rules may also have been broken. A notable example of this approach is the fining by the FSA of Norwich Union for £1.26 million for a transgression that was also a breach the Data Protection Act 1998.

## LEGISLATIVE CHANGES

The Information Commissioner has called for greater enforcement powers, including the following:-

- Criminalisation of organisations who knowingly or recklessly fail to comply with the Data Protection Act and whether failing gives rise to a substantial risk that a person will suffer damage or distress.
- A duty to notify data protection breaches.
- Ability of the Information Commissioner to require an organisation to commission an audit of its data protection compliance (discussed above).
- A requirement for CEOs to certify that the organisation complies with the Data Protection Act.

The Criminal Justice Act 2008 has amended the Data Protection Act to give the Information Commissioner the ability to order an organisation to pay a fine where the organisation has knowingly or recklessly breached the Data Protection Act where the breach was likely to cause substantial damage or distress.

The call for greater powers, together with innovative approaches taken to enforcement, point to a far stronger enforcement regime for Data Protection laws in the UK in the future. With this stronger regime, it is more important than ever for organisations to ensure that their procedures are up to the mark.

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# Enforcement Responsibilities

SWMPs are set to impact on the construction industry and should act to both improve materials resource efficiency and reduce fly-tipping, but they will also have a significant impact on local authorities.

The Site Waste Management Plan Regulations 2008 have created a requirement for a Waste Plan to be produced for the vast majority of significant construction projects. The Regulations impose requirements on developers, but also on local authorities (likely to be environmental services and trading standards teams in practice) who are given an enforcement role.

From 6th April 2008, Site Waste Management Plans ("SWMPs") have been required for all construction projects worth over £300,000 (excluding VAT). The regulations do not apply in relation to a project that received planning permission before 6 April 2008 provided that construction began before 1 July 2008.

SWMPs are set to impact on the construction industry and should act to both improve materials resource efficiency and reduce fly-tipping, but they will also have a significant impact on local authorities. So what do local authorities need to know?

## WHAT IS A SWMP?

A SWMP is a plan which sets out the types and amounts of waste on a construction site and provides details of how the waste will be recycled, re-used or disposed of.

The SWMP must identify the contractor who is removing the waste, the type of waste removed, and the site to which the waste will be taken.

## WHAT TYPES OF CONSTRUCTION PROJECT REQUIRE A SWMP?

A SWMP is required for all construction projects worth over £300,000, although for projects worth over £500,000 the SWMP is required to be more detailed.



A "construction project" is very broadly interpreted and it will cover a range of works including alteration, conversion, renovation, repair, redecoration, site clearance, investigation (but not site survey), assembly or disassembly of pre-fabricated elements on site, removal of structures, and the commissioning and removal of services that are normally used within a structure.

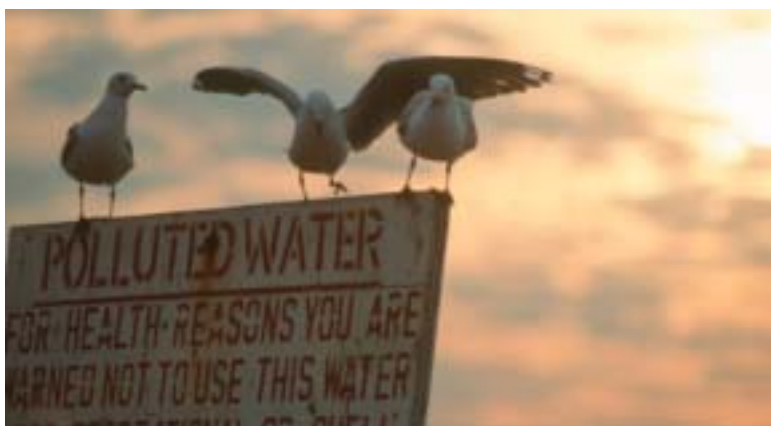
## HOW IS THE VALUE OF THE PROJECT ASSESSED??

The cost of the project is to be estimated using either the price in the accepted tender or, if there is no tender then the cost of the project will comprise the cost of labour, plant, materials, overheads and profit. The British Costs Information Service's standard form of cost analysis can be used.

## WHO IS RESPONSIBLE FOR ENFORCEMENT?

Powers of enforcement are given to local authorities and to the Environment Agency. It is anticipated that the EA will generally focus on larger more serious incidents, perhaps those involving hazardous waste.

Local authorities will need to determine which officers they consider to be the most appropriate to undertake enforcement. It is anticipated that in the majority of cases it will be environmental quality, environmental health or trading standards enforcement teams that will have the necessary knowledge and training to carry out checks of the waste documentation and conduct any necessary prosecutions.



#### AT WHAT TIME IS THE SWMP REQUIRED?

The SWMP is required to be produced before construction work begins. It is not a general requirement that the SWMP must be submitted to the relevant local authority, but a copy of the SWMP must be kept at the site.

Although there is no general requirement for the SWMP to be submitted, they are now included on the supplementary list of information that may be required by the local planning authority before they validate a planning application.

#### WHAT IS THE DEVELOPER REQUIRED TO DO?

The Developer must prepare a SWMP before construction work begins. The SWMP must be updated whenever waste is removed from the site and (for projects over £500,000) must be reviewed at least every six months. In addition, within three months of the work being completed the SWMP must meet a formal "signing off" requirement.

The SWMP must be kept on site, in the site office if one exists. It must then be kept either at the site of the project or at the principal contractor's main place of business. The SWMP must be produced, on request, to the development enforcement officer, if the SWMP is not produced then a fixed penalty notice for £300 could be issued.

#### WHAT ARE THE PENALTIES FOR DEVELOPERS?

In addition to the £300 fixed penalty, the SWMP Regulations allow for a fine in the Magistrates' Court of £50,000 or an unlimited fine in the Crown Courts for committing an offence under the Regulations.

For more information please contact Mark Howard of the Planning and Environment Team.

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# New Guidance: Sports Grounds Management

The Government has just published the fifth edition of the Guide to Safety at Sports Grounds, known as the Green Guide. The Guide, which can be downloaded from the DCMS website, deals with the management, design, scrutiny and certification of sports grounds and updates the fourth edition, published in 1997.

The Guide is to be used as guidance and applied by local authorities and sports ground management in addressing safety considerations at sports grounds.

The principal guidance is in assessing how many spectators can safely be accommodated within sports grounds. The Guide seeks to promote the safety, comfort and welfare of spectators at sports grounds by setting achievable standards and providing a flexible and positive approach in its implementation.

The new edition differs from the fourth edition on two general issues:

There is an increased emphasis on the use of risk assessment and on management undertaking its own risk assessments; and

The safety of spectators with disabilities is no longer considered in isolation and but is integrated into the overall document - an approach that it is hoped will be adopted more generally.

The Guide also contains new guidance on key areas including management, circulation and spectator accommodation.

The Guide remains the most authoritative statement on spectator safety both in Britain and Europe. The developments within the fifth edition are essential reading for local authorities and must be fully considered to ensure that responsibilities on spectator safety are properly discharged.

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# New Guidance on Public-Private Partnership



On 18 February 2008, the European Commission published its Interpretative Communication on the application of EC law on public procurement and concessions to Institutionalised Public Private Partnerships ("IPPPs"). Here's a few things for local authorities to note.

## AIMS OF THE COMMISSION

The Commission's stated aims in releasing the Communication include enhancing legal certainty and assuaging concerns that applying Community provisions to the involvement of private partners in IPPPs make these arrangements unattractive or even impossible.

## WHAT ARE IPPPs?

IPPPs are described as "a co-operation between public and private parties involving the establishment of a mixed capital entity which performs public contracts or concessions." This definition does not include 'contractual PPPs', where no single public-private entity is formed e.g. under PFI arrangements the private sector establish a Special Purpose Vehicle (SPV) and likewise, under Urban Regeneration Schemes the Local Authority and RDA establish a publicly owned Urban Development or Regeneration Company (URC / UDC) etc.

## EXAMPLES OF IPPPs INVOLVING LOCAL AUTHORITIES

The private-sector input to an IPPP may include (in addition to the provision of capital and assets) active participation in the operation of contracts awarded to the IPPP and/or the management of the IPPP. Simple capital injections by private investors do not, on their own, constitute an IPPP.

By way of example, the Local Government Association (LGA) have acknowledged that IPPPs will include Local Education Partnerships (LEPs), local improvement finance trusts (LIFT), and other hybrid 'PPP' arrangements.

The LGA also argued against categorising certain 'arms length' local authority companies, such as leisure trusts and waste disposal companies, as IPPPs, at least at the outset where there is not normally any private capital expended. However, there is nothing in the Communication that would exclude such companies and therefore such arrangements must be analysed carefully to determine whether they are

subject to the procurement regime. The Communication contains a lengthy section on the process of founding an IPPP and selecting a private partner; the focus being on non discrimination, equality of treatment, transparency, mutual recognition and proportionality. It is made clear, for instance, that IPPP founding documentation should contemplate a possible future change of private partner.

## FAIR AND TRANSPARENT SECTION PROCEDURE

Irrespective of how an IPPP is set up, Community law on public contracts and concessions requires that a contracting public entity follows a fair and transparent procedure when selecting a private partner or when awarding a public contract or concession to the public-private entity. The Communication acknowledges that a double tendering process (one tender to select the partner and another to award a contract) is usually impractical and suggests the use of a "one tender process". Of course, where the Public Procurement Directives apply, the relevant domestic implementing legislation must be followed (in England and Wales, the Public Contracts Regulations 2006 and Utilities Contracts Regulations 2006, each as amended).

## CHANGES IN TENDER DOCUMENTS

Because many IPPPs will be of long duration, the issue of subsequent changes to the terms of contracts awarded to IPPP is also addressed. The contracting authority must expressly provide for such changes in the tender documents e.g. via a change mechanism or framework within which the change must be carried out. Where not provided for in the original tender documents, changes to 'essential terms' (i.e. terms which may have resulted in a substantially different tender submission had they been established at the outset) require a fresh competition, subject to the existing narrow range of 'exceptional' derogations.

The Communication concludes by dealing with the period after establishment. It emphasises that the award of a contract to an IPPP cannot (by virtue of the private sector interest) be regarded as an 'in house' award i.e. an 'in house' argument cannot be used to award new contracts to IPPPs without competition, where the new contract is outside the

scope of the original competition.

...BUT DON'T FORGET ECJ JUDGMENTS

Generally, the clarifications contained in the Communication endorse the practices and procedures already followed, for the most part, in the UK. The Communication does not create new law but rather reflects the Commission's understanding of the EC Treaty, the Public Procurement Directives and relevant

ECJ case-law in the context of IPPPs. Whilst not legally binding, the Communication is persuasive and likely to be followed but does not obviate the need to keep a close watch on developments at the European Court of Justice.

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## Agricultural Land Issues

### SOME KEY POINTS FOR LOCAL AUTHORITIES PURCHASING FARMLAND

It's important that when purchasing agricultural land, local authorities ensure that they give special regard to the particular problems which arise in the context of farmland unlike other land.

**Subsidies** - Milk quota and Single Farm Payment receipts are tied to land ownership and occupation. When ownership changes, care is needed to ensure that the subsidy 'entitlement' attaches to the person intended.

**Services and access** - Don't forget to ensure that adequate easements are in place to cover drainage or water systems and to check that associated charges, maintenance, shared facilities, leaking and pollution of watercourses are not a problem. Pertinent access issues to clarify include is vehicle access direct from the highway, is it wide enough, is it shared and what about repair, is the access restricted to agriculture only or animals only?

**Vacant possession** - Questions to consider include who is on the land now, and by what right? Is the land at risk from travellers? If you are taking the land subject to a tenancy, what are its terms and how can you bring it to an end?

**Accuracy of plans** - Previous 'boundary straightening' between landowners without a contemporaneous legal record, may mean that title ownership will not match the actual picture on the ground. Also small scale Land Registry plans often create problems in terms of boundaries including verges, strips of land between gates and roads.

**Environmental factors** - Drainage systems on land which pollute water courses may lead to closure actions which will have potential financial implications for the landowner. The landowner will also be

responsible for animal graves or waste pits on site. Another issue to consider is whether the land has been grazed by diseased stock, used for GM crop cultivation or had Soil Association 'organic' status?

**Schemes affecting the land** - Woodland Grant Schemes, Environmentally Sensitive Area Schemes and Single Farm Payment Entitlement may include conditions restricting what can be done on the land. Cash paid to the landowner may be clawed back from the new landowner.

**Historic monuments, common land, village greens** - The responsibilities of the landowner arising as a result of public access in connection with these cannot be ignored.

**Landed businesses** - If you are buying a business as well as land, existing employees some of which may be housed on the farm, will give rise to employment and landlord and tenant law issues. Warranties or guarantees on key aspects of the business should also be obtained in enforceable terms, possibly backed by retentions.

**River banks and sporting rights** - Questions to clarify include what rights and obligations come with the ownership of a riverbank, who can fish from your riverbank and the opposite bank and what can be caught when, what sporting e.g. shooting and hunting (as restricted by law) rights are exercisable over your land and when? All these rights may have a value for use and sale and can be defined and registered as independent legal entities.

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