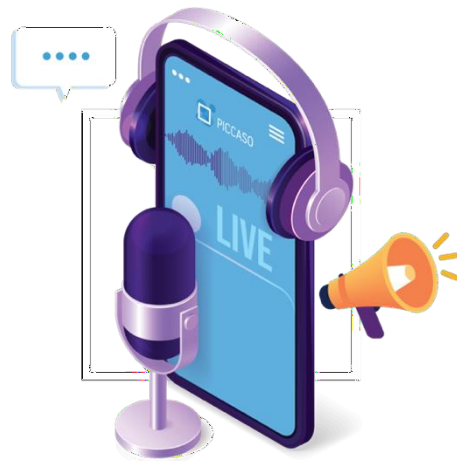




Privacy & Security Insights with **PICCASO**



Criminal Prosecutions and the ICO



Carolyn Hubble
Director of ICO Legal Service (FOIA & Prosecutions)

Criminal Prosecutions and the ICO

When you think about what “teeth” the ICO has as a regulator, no doubt you think of our ability to issue fines, enforcement notices, reprimands and warnings. It’s unlikely that criminal sanctions spring to the forefront of your mind, you may not even be aware they exist in our armoury! In fairness, historically, criminal prosecutions have formed a small part of the ICO’s work, with a relatively small number of cases taken to court each year. But data protection related criminal offending is growing, with cases increasing both in terms of sophistication and prevalence.

Why? Because data has become a valuable commodity and offenders are seeking to exploit that and profit financially, in the same way people have traditionally sought to exploit the demand for other commodities, such as drugs or stolen goods. Data isn’t something which is illegal per se, like drugs, so it’s easier to trade in it under a veneer of respectability, feigning ignorance if challenged about its origin. Data is something they can trade in without having to deal with the type of people who are involved in the traditional, far murkier criminal underworld.

In reality, the offences under the Data Protection Act 2018 (DPA) and Freedom Of Information Act 2000 (FOIA) can only attract a financial penalty, imposed not by the ICO directly as with civil penalties, but by either the magistrates or crown court after we bring the matter before the court. So you can’t go to prison for any offence under DPA or FOIA. You can’t even be made to do community service. However, the average person would probably consider being summonsed to appear before a criminal court to receive a financial penalty far worse than receiving a civil fine through the post. Especially if they are someone who has never been in trouble before or has a reputation to protect. So for low level data offending, a fine imposed by a criminal court is arguably enough.

But what about the more organised data offenders? Those who are conspiring with others to trade unlawfully obtained data? Those who are making significant sums of money from illegal activity? We’re finding there is a need in such cases to seek greater punishment to fit the crime but also to send out a more impactful deterrent message to others.

So, we’ve been turning to different legislation to find offences which can carry harsher penalties, but which still have data privacy at their heart. Section 1 of the Computer Misuse Act 1990 (CMA) makes it an offence to deliberately cause a computer to secure unauthorised access to any program or data held in any computer; an offence which can carry up to two years imprisonment. Under section 170 of the DPA, it is an offence to unlawfully obtain, disclose, procure or sell personal data without the controller’s consent, but is of course a fine only offence. Quite

often, the kind of activity we're encountering could fit the definition of either offence, especially when we're looking at people deliberately accessing personal data on work systems without a business need (and it is therefore arguably both "unauthorised" and "without the controller's consent"). The most common example we come across is employees in companies who hold data relating to people who have been in road traffic accidents (for example, vehicle break down recovery companies or insurance companies), who have been accessing vast volumes of such data and selling it to third parties who use it to try to generate personal injury claims. This is not only a serious breach of the trust placed in them by their employers, it can also have a serious impact on the business' reputation. Further, it seriously impacts on the data subjects, who have lost control over their data and are often subjected to aggressive or persistent cold calling from multiple companies, as data gets resold multiple times.

The defendants we have so far prosecuted under the CMA have received punitive sentences from the court. One received an immediate sentence of imprisonment and a further 6 have received suspended sentences of imprisonment, with orders that the offenders carry out unpaid work in the community. This has been a gratifying acknowledgement from the court that data offending is serious enough to cross the custody threshold, which has ratified our decision to pursue some offenders under the CMA. We have also successfully pursued financial confiscation orders under the Proceeds of Crime Act 2002 in appropriate cases, to deprive defendants of the financial benefits of their crimes, effectively hitting offenders where it really hurts – their pockets.

So what does the future of prosecutions look like for the ICO? Obviously we don't have the resources available to us of the police or the Crown Prosecution Service, but we do want to focus our more modest resources on the offending that has the potential to cause the most harm and affect the most people. Hopefully, the future will see us tackling more of the serious, organised data offending and securing more impactful outcomes. Criminal prosecutions send out an all-important deterrent message to prospective offenders but also they increase public confidence in us, by demonstrating that we, as the privacy & information rights regulator, are proactively safeguarding & promoting their fundamental data privacy rights by seeking just desserts for those who flout them.

Listen now on:



About Us:

We are a UK based non-for-profit privacy special interest group, led by seasoned volunteers who are senior leaders in privacy and data protection.

The primary aim of PICCASO is to create a community of professionals that share the value of exchanging 'know how', insights, clarity and explanation on specific privacy and data protection topics designed to distinguish between legal requirements, operational implementation, and strategic objectives, with the aim of greater understanding in how to achieve optimal outcomes based on good practice and thought leadership.

The PICCASO community is drawn from across the UK, Europe, and beyond, and from all industry sectors.

Contact us:

www.piccaso.org
Bouverie House | 154-160 Fleet St | London | EC4A 2DQ
T. +44 (0) 207 112 9360 | hello@PICCASO.org