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Privacy & Data Protection

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EU Developments

Update on Changes to e-Privacy Directive

On 24 November 2009, the European Parliament endorsed the European Union's telecoms reform proposals, which include revisions to the e-Privacy Directive (2002/58/EC). A major revision to the e-Privacy Directive is the inclusion of a duty for providers of publicly available communication services (for example, telecommunications service providers and ISPs) to report data security breaches to their competent national authority. The new legislative text also revises provisions relating to the deployment of cookies and other tracking devices on end-user terminal equipment. The new Directive was adopted via publication in the EU Official Journal on 18 December 2009. Member States have 18 months from the adoption date to achieve national implementation of the new rules.

UK Information Commissioner's Consultation on Collecting Personal Information Online

The UK Information Commissioner's Office ("ICO") has launched a consultation on a new draft code of practice which will provide organizations with guidance on collecting personal information online ("Code"). The Code will apply to any online activity that involves personal information, for example, collecting an individual's details through an online application form, profiling web users based on their online behaviour and using cloud computing facilities to process personal information. The Code is not intended to be legally binding and is designed to reflect best practice. Recommendations include ensuring that privacy default settings reflect the likely wishes and expectations of individuals and allowing individuals to erase identifying details at the end of a browsing session. Feedback on the Code can be submitted through the ICO's online consultation portal, which can be found at http://ico-consult.limehouse.co.uk/portal. The closing date is 5 March 2010.

Article 29 Working Party Recognizes Laws of Andorra and Israel Provide Adequate Protection

On 1 December 2009, the Article 29 Working Party adopted two opinions recognizing, for purposes of EU Directive 95/46/EC, that the data protection laws of Andorra and Israel provide adequate protections for personal data. The EU Commission has yet to issue an official adequacy determination in respect of these two countries, but will take into account the conclusions of the Article 29 Working Party as part of that process. The opinions can be found at http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/wpdocs/2009_en.htm.

FRANCE: HIGH COURT UPHOLDS EMPLOYER ACCESS TO COMPUTER FILES MARKED WITH EMPLOYEE INITIALS

In an opinion issued 30 November, the labour chamber of France's high court of appeal (Cour de Cassation Chambre Sociale) ruled that a computer file or folder cannot be treated as personal solely because it is marked with employee initials. The case of *Jean Michel X v. Seit Hydr'Eau*, Cass. soc., No. 07.43877, concerned access by an employer to an employee computer folder marked with the employee's initials. The material gathered from the folder was used as evidence to justify dismissing the employee. While a lower court found the termination unjust because the folder was personal and had been opened without the employee's consent, this was overturned on appeal. Reaffirming previous decisions, the labour court underlined that employee documents maintained on company-owned equipment are presumed to be work-related, and as such may be accessed by the employer in the employee's absence and without the employee consenting to such access, unless such files are expressly labelled as personal. Files labelled only with employee initials will not qualify as personal, and thus protected, data**.** The judgment is in line with previous decisions of the French court, which have gradually fine-tuned the general principle, established in *Nikon France v. Onof,* Cass. soc., No. 4164 10/2/01, that employees have a right to privacy in the workplace, including a right to privacy in personal correspondence maintained on employer systems.

INTERNATIONAL DEVELOPMENTS

U.S. SUPREME COURT TO DETERMINE WHETHER EMPLOYERS HAVE RIGHT TO SNOOP

The United States Supreme Court, the highest judicial body in the United States, has agreed to review a California case concerning the application of constitutional privacy protections to electronic communications. The issue at stake in *City of Ontario, California, et al. v. Quon, et al.*, is whether a police department employee had a right of privacy in relation to his text messages sent using employer-provided devices. In its judgment of June 18, 2008, the Ninth Circuit Court of Appeals held that the city of Ontario, California, had violated the constitutionally-protected privacy rights of the employee and the recipients of the text messages when it obtained transcripts of the communications from the text messaging service provider without the consent of either a sender or recipient of the messages. The service provider was also faulted for knowingly providing the transcripts to the employer. The Supreme Court hearing is expected in the spring of 2010.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our privacy & data protection practice group:

Daniel Cooper	Henriette Tielemans	Shamma Iqbal
+44.(0)20.7067.2020	+32.2.549.5252	+44.(0)20.7067.2382
dcooper@cov.com	htielemans@cov.com	siqbal@cov.com