

Data privacy

Private eye

Tom Morrison returns with his quarterly review of the world of information law

IN BRIEF

- Although housing associations are likely to be caught directly by FOI at some point in the future, it is already relevant in the context of their dealings with councils and the Homes and Communities Agency.
- Being substantial employers and dealing with large numbers of tenants inevitably means that housing associations hold significant amounts of personal data, with all the legal obligations that brings.

Recent editions of this column have focused on enforcement activity and the hefty fines that the Information Commissioner's Office (ICO) has imposed. In this edition we focus on the social housing sector and its significant data protection and freedom of information compliance issues.

The impact of freedom of information on housing associations

Whereas the Data Protection Act 1998 (DPA 1998) gives individuals the right to ask any person or organisation for a copy of information which is held about them, the Freedom of Information Act 2000 (FIA 2000) gives every person or organisation the right to ask any public authority for any other information it holds. In broad terms, unless an exemption applies, a public authority is likely to have to provide the information requested within 20 working days.

Some housing associations might believe they are sheltered from the impact of FIA 2000 as, at the moment, they are not "public authorities". They would in part be right. It has been intended for some years now that housing associations (as recipients of large amounts of public money) would be covered by the publication and disclosure requirements of FIA 2000 but this has not happened. As things stand housing associations can refuse to respond to a request for information under FIA 2000.

If—or when—this changes, housing associations will not get a huge amount of time to prepare for open scrutiny. They have known for some time that they have been on the government's radar, and so the process will not be a drawn out one when it eventually happens. There will be no five year period to allow for time to shred or delete inconvenient documents (not that it would ever occur to anyone to do this, and, to be clear, the ICO found no evidence that this is what happened in central government during the five years it took to fully implement FIA 2000).

Almost all housing associations will deal with public authorities such as local councils and the Homes and Communities Agency every day of the week, sharing quite detailed information about their operations and new housing developments. Some of those developments might be controversial, and most will in some way impact upon local communities. If someone wants to know more about what is going on, instead of being refused access to information by the housing association they can already go straight to the relevant public authority and ask them instead. That public authority will then have a duty to consider any request for disclosure of information held by it or by someone else on its behalf, which may well include information the housing association thought was confidential. This is not to suggest that housing associations have anything to hide, but it may not be in the mind of a document's author that what he or she is writing today may be disclosed to any person who asks for

it tomorrow. Employees of public authorities on the other hand have had a number of years to get used to that idea.

Mitigating the impact

Housing association information officers will need to be more aware than ever before of the issues. If they know it is an issue then they can at least plan around it. All employees need to be educated that when they are dealing with public authorities any information they share is potentially going to be put into the public domain. Slapping a confidential marker on a document does not in itself make it confidential, but having pro-active discussions with the public authorities which the housing association deals with on regular basis would be a good start. Freedom of information (FOI) should be addressed in all contracts entered into with public authorities: it is of benefit to both parties to have a clearly defined procedure as to how they will behave if the public authority receives a third party request for information.

Housing associations should aim to secure appropriate contractual commitments from public authorities that the housing association will be informed that a request has been received, and that sufficient opportunity will be given to consider whether the housing association wishes to argue that the public authority should exercise an exemption to decline disclosure of the information. Ideally the procedure would incorporate a final step for the housing association to consider



taking legal action to prevent disclosure. These commitments could be in the form of stand-alone contractual protocols, but any significant commercial arrangements between housing associations and public authorities should incorporate such a procedure, and standard confidentiality provisions should be amended accordingly. However, the public authority ultimately has the say in whether or not it will disclose the requested information, so as a rule housing associations should consider the extent to which they share sensitive information in the first place, particularly if there is no satisfactory protocol in place.

The impact of data protection on housing associations

It would be a cliché to say that people are at the heart of our data protection regime, but like most clichés it would be true. DPA 1998 and its associated European Directive exist to make sure that information about individuals is treated with care. People are increasingly

are collecting it, how they are using it and to whom they are disclosing it. Then tell the individuals concerned all of this and, in most cases, obtain consent. If they do that then they are likely to get the rest right. It will be easier to identify whether excessive information is being collected—ie if you know what you have and why you have it then you should be able to identify if there is information that is being collected but not used for the stated purpose. Equally it should be possible to work out if information was, but is no longer, being used and maybe it should no longer be retained.

Making sure that tenants and employees know what is happening with their information, and ideally obtaining consent for that use, means that housing associations are much less likely to receive complaints. If they do, the first question is “but we told you what we were going to do and you consented”, which is often enough to bring the matter to a satisfactory conclusion.

the ICO has previously warned of the dangers of sleepwalking into a surveillance society. Housing associations operating CCTV systems should follow the same logic as for other areas of data protection compliance and tell tenants what systems are in place and why. Covert surveillance carries specific issues, but is rarer in this sector than in others, given that a primary aim is often to make sure that anyone tempted to cause damage to property or harm to others knows that they are being watched. Clear signage, appropriate policies on use and strict procedures for controlled disclosures to the authorities are the order of the day.

A particularly contentious area for housing associations is compliance with the Sixth Principle of DPA 1998, and most particularly the right of subject access. All individuals—including tenants—have the right to access information held about them unless an exemption applies. A tenant, or an employee for that matter, will rarely have any desire to exercise that right when things are going well. So by implication, disgruntled tenants or recently-dismissed employees are more likely to ask to see that dynamite piece of information held by the housing association. If a request comes in from a serial complainant or a troublesome employee the files are likely to be somewhat larger than average. There are arguments to be had about hard copy documents not being held in a relevant filing system, but do you really want to have to resort to a lawyerly argument or would you rather prefer that your staff had been better trained to be careful as what they write down? All of this highlights the importance of having concise and targeted policies, backed up with good internal communication and training.

Data protection compliance should be embedded by design, and freedom of information is not just something on the horizon: it already impacts upon any housing association receiving public money or dealing with public authorities. So at a time housing associations’ financial and human resources are stretched, spare a thought for the individual whose job it is to draw all of these threads together while at the same time answering the IT helpdesk call or dealing with the HR query as part of their “day job”. NLJ

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aware of their rights, partly as a result of a number of high profile data breaches and the associated fines that have been imposed by the ICO.

All organisations, housing associations included, know that it is important to take appropriate measures to safeguard personal information, but it is important not to focus on the Seventh Principle of DPA 1998 to the exclusion of the other Principles. After high profile data losses in the summer of 2011, Wandle Housing Association and Lewisham Homes are no doubt taking security very seriously after the details of thousands of tenants were left on a memory stick in a pub. More recently, Network Housing Group accidentally e-mailed around 300 staff a spreadsheet reported to contain details of employees’ sexuality, ethnicity and disability status. Security is clearly important, but just getting the basics right is critical given the number of individuals about whom housing associations habitually hold personal information.

As an absolute minimum, all housing associations should know what information they are collecting, why they

Examples of achieving compliance—or good common sense

It is worth considering at an early stage which third parties might ask for disclosure of personal information—such as government agencies, financial institutions and the police—and map out a policy on handling requests. Consider if it is possible to obtain consent in advance of a request being made, although it may be appropriate to obtain consent at the time a request is received. Housing associations also share information with contractors such as builders, decorators and maintenance companies as a matter of routine, but are those information flows regulated by appropriate written data processing agreements?

CCTV often gets overlooked as a method of data collection. Images can constitute personal data and if a housing association has installed cameras then there is usually a reason for it, which is likely to be to someone’s benefit and someone’s (eg a vandal’s) detriment. CCTV clearly has benefits for local communities, but

Tom Morrison, partner, Rollits LLP
E-mail: tom.morrison@rollits.com
Website: www.rollits.com