Proposed amendment to data protection legislation

Further Briefing Paper by Police Federation of England and Wales responding to Home Office objections to a draft clause designed to facilitate the transfer of personal data between police forces and the Crown Prosecution Service prior to charging decisions.

1. In May 2023 the Police Federation of England and Wales proposed an amendment to the then Data Protection and Digital Information (No 2) Bill, designed to facilitate the transfer of personal data between police forces and the Crown Prosecution Service (CPS) prior to charging decisions. That Bill fell away as a result of the General Election, but the Federation understands that the new Home Secretary is supportive of the objective of the proposed amendment, and that consideration will be given to including it in an appropriate Bill when an opportunity arises. The purpose of this Briefing Paper is to remind MPs and others with an interest in legislative reform in this area of the problem identified by the Federation and the proposed solution, to summarise the support which its proposal has received to date, and to respond further to objections previously raised by the Home Office to the Federation's proposal.

2. The identified issues within the existing data protection legislation are:

   (i) The **problem** which we identified was an extremely burdensome, and potentially unnecessary, redaction exercise in relation to case-files. In a situation where the police are preparing a case-file for submission to the CPS for a charging decision, the existing data protection legislation requires the police to spend huge amounts of time and resources (a) going through the information which has been gathered by investigating officers in order to identify every single item of personal data contained within that information, (b) deciding whether it is necessary (or in many cases strictly necessary) for the CPS to consider each item of personal data when making its charging decision, and (c) redacting every item of personal data which does not meet this test. The redaction exercise is potentially unnecessary in the case of any given case-file because the CPS only decides to charge in approximately 75% of cases.

   (ii) The simple, practical **solution** we proposed is for the police to carry out the redaction exercise in relation to any given case-file only after the CPS has decided to charge. In the 25% of cases where the CPS decides not to charge the unredacted file could simply be deleted by the CPS or

placed in secure storage. Where the CPS decides to charge, the case-file could be returned to the police to carry out the redaction exercise before there is any risk of the file being disclosed to any person or body other than the CPS. The Federation estimated (very conservatively) that adopting this solution would result in a saving of over £5.6M per anum. But more importantly it would free up the officers currently engaged on the redaction of case-files to spend significantly more time on frontline policing duties and be visible on our streets.

3. Despite all efforts made the previous government quietly refused to support our proposal, even though it acknowledged that there was a very real problem in the operation of the existing data protection legislation as it applies to police forces, and that the redaction exercise the police are required to carry out is extremely burdensome and potentially unnecessary.

4. Developments on this campaign in 2024:

   (i) On 22 March 2024 the Labour Party announced that a commission it had set up to find ways to increase the number of crimes being solved had warned of a "calamitous collapse" in charging, and set out key reforms to ensure delivery for victims, all of which had been accepted. The Labour Party adopted our proposal as part of its "*new five-point "common-sense" plan to solve more crimes*", point 3 of which was: "*Changing data protection laws so police no longer have to redact case files before theyare sent to the CPS, "saving thousands of officer hours every year*". The then Shadow Home Secretary Yvette Cooper said "Labour will implement the commission's common-sense recommendations to ensure the criminal justice system delivers for the people it is there to serve."

   (ii) Our proposed amendment to the then Data Protection and Digital Information (No 2) Bill was moved in the House of Lords by Baroness Morgan on 15 April 2024, where there was general recognition that it raised an important issue, and it attracted significant cross-party support. The amendment was withdrawn after Ministerial assurances were given that the problem was being addressed through consultation with the Information Commissioner about ways to reduce the burden of redaction without the need for legislative change.

(iii) Representatives of the Federation met with Home Office lawyers on 25 April 2024 to gain a fuller understanding of their objections to the proposed amendment.

(iv) As noted above, the Bill fell away with the General Election.

5. The Federation is optimistic that with the support of the new Home Secretary its proposed amendment will now be taken forward. In the new Data (Access and Use) Bill.

6. When we met with Home Office lawyers on 25 April 2024 the first of the legal objections listed in paragraph 9 of our second Briefing Paper[1] was not pressed by them. Instead, the Home Office lawyers appeared to focus on two points:

(i) first, that even if redaction of case-files before submission to the CPS for a charging decision was not required by the data protection legislation, it would be still be required by Article 8 ECHR; and

(ii) second, that it was appropriate for the police to carry out the redaction exercise on case-files before submission to the CPS for a charging decision because this would mean that the case-files would not contain irrelevant personal data which could give rise to potential pitfalls further down the line (for example if the case-file is used to pursue a prosecution and documents from it are disclosed to the accused).

7. The Federation will refer to these two objections as the "Need to redact anyway objection", and the "Further down the line objection". Neither presents a real objection to the Federation's proposed amendment.

<u>The "Need to redact anyway objection"</u>

8. The first point the Federation would make in response to the "Need to redact anyway objection" is that the official publications referred to in the Federation's first Briefing Paper at paragraphs 7 and 8 (the joint NPCC and CPS guidance on the redaction process, and the Attorney General's Office Annual Reviews of Disclosure), which describe the scale and burden of the redaction problem, both identify <u>the data protection legislation</u> as the source of the obligation to redact the case-files. This is consistent with

[1] Namely that two other provisions of the existing data protection legislation, the 6th data protection principle contained in section 40 of the Data Protection Act 2018 (DPA 2018), and the obligation to provide information under section 44 of the DPA 1998, would require the redaction exercise to be undertaken even if our amendment was adopted.

the legal advice that the Federation has received.

9. Whilst it is true that personal data protected by the data protection legislation can sometimes also be protected by Article 8 ECHR, that is by no means always the case.

10. There are two reasons for this. First, not all personal data protected by the data protection legislation is private information – whereas Article 8 ECHR is only engaged where a person has a reasonable expectation of privacy in relation to the information in question. To illustrate this point, take the example of police bodycam footage contained in a case file. This one of the main types of material the police are currently required to redact, by deleting or obscuring the faces of individuals captured in the footage before the case-file is sent to the CPS. Where – as is commonly the case – the bodycam footage was recorded by the police in a public place, the individuals whose faces appear in it will have data protection rights in relation to it, but it is highly unlikely (at least if they are adults) that they will have Article 8 ECHR rights, since in general an adult has no reasonable expectation of privacy when recorded on camera in a public place.[2]

11. The second reason why not all personal data protected by the data protection legislation is also protected by Article 8 ECHR is that there is a threshold of seriousness under Article 8 which does not apply to the data protection legislation. Vehicle registration numbers, dates of birth, work telephone numbers or addresses are all personal data protected by the data protection legislation, but save in exceptional cases such relatively trivial information will not be protected by Article 8. Even where some information contained in a case-file is protected by Article 8, the mere transfer of that information under secure conditions from one law enforcement body (the police) to another (the CPS) is highly unlikely to amount to an interference with Article 8 ECHR rights that crosses the threshold of seriousness.

12. These considerations demonstrate that it is the data protection legislation, rather than Article 8 ECHR, which requires the very burdensome redaction exercise.

13. It must be borne in mind that the Federation's proposal is not that the material in the case-files should never be redacted, but rather that it should only be redacted if and when a decision to charge is made by the CPS. If the CPS decides not to charge, the unredacted file can simply be deleted by the CPS or placed in secure storage. Where a decision is made to charge, the case file will be redacted to remove irrelevant personal data (which will include any private information protected by Article 8 ECHR). Article 8, unlike the data protection legislation, does not require the redaction process to be undertaken before the case-file can be transferred from the police to the CPS.

[2] In *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541 Lord Dyson MR stated at [18]: "*The taking of photographs in a public street must be taken to be one of the ordinary incidents of living in a free community*".

The "Further down the line objection"

14. The short answer to this objection is that under the Federation's proposal if a decision is made by the CPS not to charge, the unredacted file can simply be deleted or placed in secure storage by the CPS. It will not go any further down the line. It will only go further down the line if a decision is made to charge, in which case the file will be redacted in the same way as present.

15. In the Federation's original proposal and in its draft clause it was envisaged that where the CPS decided not to charge the unredacted file would be deleted. The Home Office has pointed out that it may be necessary for the CPS to retain the unredacted file in case the decision not to charge is subsequently challenged. The Federation recognises that this may be the case, but it is easily accommodated into the Federation's proposed amendment by providing for the CPS to place the unredacted file in secure storage if a decision not to charge is made.

Other considerations

16. The Home Office lawyers, like the Minister in the Hansard debate, recognised that there is a problem but suggested that it should be tackled (and was being tackled) not by legislative change but by consultation with the Information Commissioner, revised guidance on redaction, and a pilot scheme involving a small number of police forces.

17. The Federation is concerned about this approach. This is an area where certainty is required and can easily be provided by legislative amendment. Tinkering with the guidance on redaction will not remove the burden on police forces, and cannot address the Federation's core point that in about 25% of cases no redaction exercise should be required at all. To date no meaningful, workable or realistic solution has been found to this issue by the Home Office, the NPCC or the CPS. No pilot schemes have been run, as no agreement can be reached between the NPCC, CPS and the Information Commissioners. It is therefore easy to conclude that in fact the solution to this issue is indeed what the Police Federation have been recommending for over two year. That is Legislative change.

18. On Friday 29th November the PFEW draft clause to the bill was formally tabled in the House of Lords by Baroness Morgan of Cotes and co signed by Lord Thomas of Cwmgiedd. It was debated on 16th December 2024 and it was not supported by the Government and the same disappointing response was provided. The government is working to resolve this and just needs more time! That is not good enough we say and the time for action is now.

19. Under the existing framework, officers face time-consuming requirements to redact case material at the pre-charge stage before it reaches the Crown Prosecution Service. Ultimately, these cases may not even get charged. In what business would it be practical

or economically viable to put in 100% productivity to get 75% return. The current law places a burden on officers time and prevents them from getting out onto the streets and keeping our communities safe. Supporting the draft clause proposed by the PFEW would relive the administrative strain and help achieve a key government manifesto pledge of taking back our streets at no additional cost to policing budgets as well as improving overall policing efficiency.

20. The Data (Access and Use) Bill is now at committee stage in the House of Commons and PFEW urgently need the assistance of MPs across the house to support this amendment and table if formally. So that it can be debated within the Commons and hopefully voted upon for inclusion within the Bill. If this opportunity is missed, then it is difficult to see how this matter will be resolved and Policing and the public will continue to suffer.