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DATA PROTECTION, SAFEGUARDING AND THE PROTECTION OF CHILDREN'S PRIVACY: EXPLORING LOCAL AUTHORITY GUIDANCE ON PARENTAL PHOTOGRAPHY AT SCHOOL EVENTS

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Abstract

Should parents be allowed to take photographs at school events? Media reports suggest that increasingly schools are answering no to this question, either prohibiting or imposing stringent restrictions upon such photography. The legal justifications for such restrictions are, however, unclear. Accordingly, in 2013 freedom of information requests were sent to local education authorities across England, Scotland and Wales, the aim being to determine what advice local education authorities provide to schools in relation to parental photography at school events, and to identify how education authorities' understandings of the law influence the advice they offer. That research reveals that local education authorities' understandings of the law vary significantly and that where authorities do not fully appreciate the extent of the legal obligations arising this may have significant repercussions for the children concerned.

Key words

Data protection; privacy; freedom of information

Introduction

It has been suggested that;

The issue of photographing children has become fraught in schools all over Britain. Ten years ago, nobody thought twice about photographing children on the football field. Now every click of the camera is overhung with a cloud of possible ill intent. Who is photographing that child and why? What will they do with the photo?¹

Whether one agrees with the above comments or not, it is certainly true that over the past ten years parental photography at school events has become an increasingly contentious matter.² Undoubtedly one of the reasons for this development is the growth in use of technology to share vast amounts of personal information, publicly and globally.³ In the past ten years tens of billions of photos have been shared online by users of photo sharing sites such as Flickr,⁴ whilst Facebook's billion or so subscribers⁵ have been alleged to make '100 million photo uploads a day.'⁶

¹ Josie Appleton, 'Why do schools really stop parents taking photographs of their children?' *The Guardian* (London, 23 June 2012) <http://www.theguardian.com/lifeandstyle/2012/jun/23/photos-children-school-ban> accessed 17 July 2014

² Appleton (n1); Ian Shoosmith, 'When can't you take photos of a nativity play?' (*BBC News UK*, 8 December 2010) <http://www.bbc.co.uk/news/uk-11947374> accessed 17 July 2014; Laura Clark 'Parents banned from taking photos of their own children at school sports day' (*The Daily Mail*, 17 June 2009) <http://www.dailymail.co.uk/news/article-1193697/Parents-banned-taking-photos-children-school-sports-day.html> accessed 17 July 2014

³ Commission, 'Communication from the Commission to the European Parliament, the Council, the Economic and social committee and the committee of the regions: A comprehensive approach on personal data protection in the European Union' COM (2010) 609 final, 2 highlighting the challenges that are posed to the protection of personal data and the need for legislative reform

⁴ Unattributed, 'Flickr hits 6 billion total photos, but Facebook does that every 2 months' <http://thenextweb.com/socialmedia/2011/08/05/flickr-hits-6-billion-total-photos-but-facebook-does-that-every-2-months/> accessed 17 July 2014. This 2011 report put Photobucket at 8 billion uploads, Google's Picasa service at 7 billion photos, and Flickr as hosting 5 billion images

⁵ By 2012 there were estimated to be 937,407,180 subscribers to Facebook, with 243.2 million Facebook users in Europe alone; Unattributed, 'Facebook users in the world' <http://www.internetworldstats.com/facebook.htm> accessed 19/5/2014

⁶ Unattributed 'Flickr hits 6 billion total photos, but Facebook does that every 2 months' (n4) This report suggests that Facebook amassed the same number of photo uploads in just two months as Flickr had in the 7 years (2004-2011) since its launch.

Recent surveys suggest that UK citizens are no less keen to use technology to share information online than other nationalities. Indeed, a 2009 survey revealed that 57% of UK internet users use social networking sites compared to 52% of European internet users, whilst 49% of UK internet users use websites to share pictures and videos, compared to 44% Europe-wide.⁷ Since there seems no reason to believe that parents of school age children are less likely to use the internet to share photographs than the rest of the UK population, one might reasonably conclude that some parents will be sharing photographs taken at school events online. If parents do upload photographs which have been taken at school events this potentially raises a host of legal issues.

Whilst most parents who take photographs at school events will do so to maintain a record of their child's life or to share special moments with family members, the reality is that many photographs posted online are not shared solely with the family. Recent research reveals that in 2012 'between 2 and 3 out of 10 of those adults with a social networking profile were sharing photographs with people potentially unknown to them'.⁸ This is not an insignificant statistic given that more than 60% of UK adult internet users have their own social network profile.⁹

The fact that photographs, taken and shared 'innocently' may reach the hands of strangers can be perceived as problematic. The NSPCC,¹⁰ make clear that careful thought needs to be given to any decision to post a photograph of a child online;

The use of photos on websites ... poses direct and indirect risks to children and young people.... Even if the child's personal identity (full name, address) is kept confidential, any other details accompanying the photo, such as an organisation or club they belong to, or a band they like, can make them identifiable and therefore vulnerable to individuals looking to 'groom' children for abuse. There is also a risk that the photo itself is used inappropriately by others. Photos can easily be copied and adapted, perhaps to create images of child abuse, which can then find their way on to other websites.¹¹

Despite these potential risks, some people nonetheless see no problem with parents disseminating their own child's photograph online.¹² Indeed many parents might consider it their right as parents to share photographs of their children with whom, and however they wish.¹³

The problem, however, is that when a parent takes a photograph at a school event such as a sports day or school play, it will often prove difficult for the parent to capture their child's image alone. This is particularly the case if the parent wishes to show the child in context, and to record the child's relationship with its peers and its involvement in the event. Whilst one might certainly accept a parent's right to disseminate their own children's photographs as they wish, the online dissemination of other children's images is a very different matter.

Although one would hope that many parents would be sensitive to the fact that other parents may not wish their children's images to be disseminated online, it cannot be assumed that all parents who take photographs at school events will take this view. Where a parent does disseminate a

⁷ Commission, 'Attitudes on Data Protection and Electronic Identity in the European Union', page 1

⁸ OFCOM, '2013 Adults Media Use and Attitudes Report', 99. The report further reveals that on average 'UK adults with a social networking profile have 237 'friends' on their main social networking site' (page 4), again suggesting that much of the information disclosed on social media is shared outside the family. NB OFCOM is the UK Communications Regulator

⁹ 'In 2013 64% of UK adult internet users had their own social network profile.' OFCOM (n8), 91.

¹⁰ The National Society for the Prevention of Cruelty to Children, a charitable organisation which aims to help end cruelty to children in the United Kingdom

¹¹ NSPCC, 'Using photographs of children for publication: NSPCC factsheet', August 2013

http://www.nspcc.org.uk/Inform/research/briefings/Photographing-children_wda96007.html accessed 20/5/2014

¹² Many parents regularly blog about their families, including photographs of their children in their blogs. Thousands of such parent blogs now exist, see www.tots100.co.uk

¹³ A right emanating either from the Article 8 right to respect for family life or the Article 10 right to freedom of expression

photograph online, without the consent of the children whose images have been captured (or their parents), the potential for conflict between the families is clear.

The parent of the child whose image has been captured might well argue that their child has a right to control or at least to have a say in how their personal information is used, and that accordingly the photographer should not upload the child's photograph without the consent of the child or their parent. Certainly a right to the protection of one's personal data is now clearly recognized at Article 8 of the Charter of Fundamental Rights of the European Union,¹⁴ and at Article 16 of the Treaty on the Functioning of the European Union,¹⁵ whilst within the United Kingdom the Data Protection Act 1998 provides explicit protection to an individual's personal data.

Arguments might alternatively be raised, however, by both the parent photographer and the child's parents, with reference to the rights detailed in the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'). By virtue of the ECHR all individuals within the United Kingdom, including children, are afforded a right to respect for private life.¹⁶ This same convention, however, also provides individuals with a right to freedom of expression.¹⁷ Accordingly, whilst one parent might well argue that their child's photograph should not be posted online, on the basis that such online dissemination breaches their child's Article 8 right to respect for private life, the parent photographer might, by contrast, consider that they are entitled to exercise their right to freedom of expression, and that they are accordingly justified in posting their photograph online.

To add to this complexity, schools themselves are, by virtue of Section 6 of the Human Rights Act 1998, obliged to act in accordance with the rights detailed in the ECHR. If they are aware either that the online dissemination of a child's photograph would place that child at risk of significant harm or that the child has other good reasons for objecting to the online dissemination of their image, and if they then do nothing to prevent such online dissemination then the school may itself be in breach of the ECHR and the Human Rights Act 1998.¹⁸

Whether it is the potential for conflict between parents, the risk to children or a desire to comply with data protection¹⁹ and human rights legislation, it seems clear that something has prompted schools and education authorities to review how they deal with parental photography at school events, with many schools now imposing stringent restrictions upon parents. Interestingly, however, whilst there has been much public debate about whether parents should be allowed to take photographs at school events, few such discussions consider the legal position. It is a matter upon which the academic literature is similarly silent. It was thus that research was undertaken in

¹⁴ Article 8 of the EU Charter of Fundamental Rights states explicitly that '(1) Everyone has the right to the protection of personal data concerning him or her (2) Such data must be processed fairly for specific purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law....'

¹⁵ Also known as the Lisbon Treaty

¹⁶ ECHR Article 8

¹⁷ ECHR Article 10

¹⁸ The right to life is protected at Article 2. Article 3 prohibits inhuman and degrading treatment. If a school is aware that an estranged family member might cause serious harm to or kill a child if they became aware of that child's whereabouts (for example if the child's photograph and name of the school were disclosed on Facebook) then it is arguable that they should take steps to ensure that either no photographs of that child are taken, or that restrictions are placed upon parents to ensure that the child's photograph is not released online. If a school is aware that a child does not want its photograph to be shared online, for religious or other reasons, but does nothing to prevent another child's parent sharing the child's photograph online then again it here be argued that the school has not acted in a way that respects that child's right to private life.

¹⁹ A school is only considered to be a data controller and thus required to comply with the Data Protection Act 1998, if it 'determines the purposes for which and the manner in which any personal data are, or are to be, processed' (Section 1 Data Protection Act 1998). Accordingly, where a school itself determines how a child's photograph is to be used, for example, when posting a child's photograph to the school website they are themselves obliged to comply with the Data Protection Act 1998. A school would, by contrast, however, not be deemed to be a data controller if they played no role in determining when a child's photograph is taken or how it is used. Nonetheless to maintain good parental relations within a school, and to ensure appropriate thought is given to how their pupils' information is used, the school might wish to advise parents of the application of the Data Protection Act 1998, and the obligations which might be imposed upon parents if they were to share photographs of school events online.

2013-4 to explore the policies and advice that local education authorities provide to schools in relation to parental photography at school events, and to identify how education authorities' understandings of the law influence the advice they offer. This article reviews the findings of that research and comments on the process by which such data was obtained.

The research undertaken

It is for each school to determine its own policy on parental photography, taking account of the law, guidance, and practical issues such as the school's size and staff relationships with the community. Whilst it would undoubtedly have been interesting to obtain information from individual schools, it was determined at an early stage that a nationwide survey of schools was impossible given the sheer number of schools that would need to be contacted.²⁰ A decision was therefore taken to instead contact local education authorities, who it was thought might be expected to provide schools in their area with guidance on the issue. In contacting the 206 local authorities in England, Scotland and Wales with responsibility for education, it was hoped to determine the type of advice local authorities were providing, both to urban and rural community schools, across the UK. A further aim was to identify which legal issues were influencing local authorities, and thus schools, to consider restricting parental photography.

The data was collected by means of requests made under the Freedom of Information Act 2000 ('FOIA') and its Scottish cousin, the Freedom of Information (Scotland) Act 2002 ('FOISA'). That UK researchers might use FOIA and FOISA as a data collection technique appears first to have been suggested by Lee in 2005, shortly after the two statutes were implemented. Commenting upon academics' use of freedom of information legislation in other jurisdictions Lee noted positively that material obtained by US researchers had proved vital to their research, and that the use of such legislation had enabled data to be obtained that would simply not have been accessible without it.²¹ Whilst these statutes are still relatively rarely used for social science research,²² increasingly researchers are seeing the benefits of using FOIA/FOISA to obtain information from UK public authorities. Indeed Savage and Hyde have suggested that, 'Freedom of Information requests can provide a fruitful resource for ... academic researchers,'²³ whilst Murray has suggested that freedom of information legislation 'provides social science researchers with the unprecedented opportunity of a *right* to access data for research purposes.'²⁴

In brief, these two statutes provide any member of the public with a right to access information held by public authorities, which definition encompasses local education authorities. When an individual submits a request for information to a public authority that authority must then inform the requestor whether it holds the information requested, and if it does hold such information it must provide it to the requestor,²⁵ unless the request is vexatious in nature²⁶ or the information is exempt from disclosure.²⁷ Any response *should* be made promptly, and in any event, within 20 working days of receipt of the request.²⁸ The most obvious advantage for a researcher, therefore, is that they

²⁰ There were 24,347 schools in England alone in January 2014 according to the Department for Education, 'First Statistical Release Schools, pupils and their characteristics: January 2014', 4

²¹ Raymond M Lee, 'The UK Freedom of Information Act and Social Research' (2005) *Int J Social Research Methodology* 8(1) 1-18

²² Cathy Murray, 'Sport in Care: Using Freedom of Information Requests to Elicit Data about Looked After Children's Involvement in Physical Activity' (2012) *British Journal of Social Work* 1, 1 comments on the use of freedom of information requests describing it as 'an emerging social science research approach'.

²³ Ashley Savage and Richard Hyde, 'Local Authority Handling of Freedom of Information Requests: Lessons from a Research Project', (2013) 19(2) *WebJCLI* <http://webjcli.org/article/view/240/315> accessed 17 July 2014

²⁴ Murray, (n16), 15

²⁵ S1(1) FOIA; Whilst s1 FOISA is worded rather differently to s 1(1) FOIA, stating simply that 'A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority', the effect of the two provisions is essentially the same.

²⁶ S14 FOIA, s14 FOISA

²⁷ Various exemptions are detailed within FOIA and FOISA, including for example where information is confidential, or of a personal nature

²⁸ S10 FOIA, s10 FOISA

should be able to expect a response to their request within 20 working days. Data can thus be 'collated quickly and efficiently', meaning FOIA/FOISA provides 'an effective way of accessing very recent information and data'.²⁹ Whilst information might alternatively be obtained by negotiation with individual authorities, such an approach would take time,³⁰ if indeed it were successful. Perhaps most importantly, Savage and Hyde have suggested that '[f]reedom of information requests can be dispatched to multiple local authorities at the same time, allowing information held by public authorities to be obtained cheaply and in a uniform fashion. This data can then be usefully compared, allowing trends to be discerned.'³¹

The data collection process and the positives and negatives of using FOIA/FOISA

Email requests were initially sent to each of the 206 councils responsible for education in England, Scotland and Wales in December 2013. To elicit comparable information each authority was asked the same questions. Specifically, councils were asked to confirm whether they had produced 'any guidance or policy documents providing general advice to schools about whether or not parents/family members/carers may take photographs of children at school events, for example sports days, school plays and concerts?' If an authority had produced guidance they were asked to produce a copy. If an authority had not produced any guidance they were asked a supplemental question about the advice that they had provided to any school which had made an 'ad hoc request' for advice on the matter.

Since requests were sent immediately prior to Christmas a decision was made to wait until well after the 20 working day period had elapsed before reviewing the responses received. By early February, and despite the legislative requirement to respond promptly to requests, it was clear that many authorities had yet to respond; indeed more than 40 had to be sent follow up requests. A small number who had responded had not specifically addressed the questions asked, indeed several authorities instead of providing information on parental photography at school events provided general guidance relating to photography by the school, local authority or press. Follow up requests were therefore also sent to these authorities to clarify whether they also provided guidance on parental photography.

By mid-April (almost four months after the original request was sent) a decision was finally taken that there should be no further attempt made to chase councils who had failed to comply with their FOIA obligations. At that time 198 of the 206 authorities had responded; a response rate of 96%. Whilst 8 authorities failed to provide any response, and thus failed to comply with their obligations under FOIA, the response rate achieved is undoubtedly higher than would have been the case if a traditional postal survey had been used.³² It reflects Murray's earlier findings that a key advantage of freedom of information requests is the 'exceptionally high response rate'.³³

Interestingly, Murray had, however, also noted limitations to the use of FOIA 'Fewer questions were asked than if interviews or postal questionnaires had been employed ... As with postal questionnaires it was not possible to probe or seek clarification on any of the responses from the councils that were ambiguous.' The experience in this case similarly highlighted both positives and negatives of the use of FOIA/FOISA. In particular, the answers that authorities provided were variable in quality and quantity, with some authorities providing full responses which clearly explained the local authority's reasoning and illustrated that the authorities had made widespread

²⁹ Murray, (n16), 15

³⁰ Savage and Hyde, (n17)

³¹ Savage and Hyde, (n17)

³² Ross and Matthews suggest that a response rate of 25% is typical for a postal questionnaire; Bob Matthews and Liz Ross, *Research Methods: A practical guide for the social sciences* (Pearson Education Limited, 2010) 215

³³ Murray (n16), 15. Interestingly in Murray's case a much lower response rate of 84% was in fact achieved

enquiries, whilst others provided one word; answers 'no' or 'n/a'. Three cases caused particular concern. In the first, the authority provided a link to external guidance. It was only when a query was sent that the authority identified that the guidance was in fact no longer accessible. In the second, the authority initially stated that it did not provide guidance. In fact a literature review had identified that the authority did produce excellent guidance, which the freedom of information officer subsequently confirmed was still in use. In the third case one authority sent two different responses.

As a result of these cases questions must be raised about the accuracy of the information provided across the piece. Unfortunately, as the Government noted prior to the enactment of FOIA any freedom of information legislation is only as good as the quality of the records to which access is provided³⁴ (or as good as the search processes undertaken and the individuals responsible for retrieving the data).

These three problem cases also raise questions about the extent to which authorities were prepared to seek information from other colleagues before answering requests. Of the 198 responses, 56 were received from an individual located within a department responsible for children/families/schools/education, and thus who might be expected to be aware of guidance provided to schools in relation to parental photography. The remainder of the responses were received from individuals located elsewhere in the council, usually with a remit for freedom of information, data protection, information governance, information access, records or records management, central or business support or legal and governance matters. Whether these individuals had made an extensive search of the council's records, whether they had spoken to individuals elsewhere in the council is unknown.

Despite all of these concerns, there is, of course, no reason to believe an alternative data collection technique would have produced more reliable results. Importantly, useable responses were received from 198 authorities. These responses reveal a great deal about local authority understanding of the relevant law, and how such understanding influences the advice they offer.

Analysis of responses

The key point which education authorities were asked to deal with was whether or not they provided any guidance to schools about whether or not parents/family members/carers may take photographs of children at school events. If they did not produce such guidance but had provided more informal, or 'one-off' advice to individual schools they were instead asked to confirm the substance of that advice.

96 authorities confirmed that they did provide some guidance to schools in their area, guidance that had either been drafted by the authority itself or by an organisation with which it was associated; some authorities thus referred to guidance provided by their local Grid for Learning, or to guidance drafted by their local safeguarding children board. 18 of the authorities who produced their own guidance also referred schools to guidance published by the Information Commissioner's Office ('the ICO'). 28 authorities indicated that whilst they did not publish guidance of their own they did refer schools to guidance published by the ICO. 74 authorities did not refer schools in their area to any guidance.

The first point to be noted in relation to this findings is that a large proportion of local authorities (37.6% of those who responded) do not provide schools in their area with any guidance on the issue of parental photography at school. Those who explained why guidance was not provided indicated

³⁴ Cabinet Office, *Your Right to Know: The Government's Proposals for a Freedom of Information Act* (Cm 3818, 1997) para 6.12

that guidance was not provided because ‘schools are their own data controllers, it is up to them to decide,’ ‘schools are self-managing and produce their own guidance’ or ‘this is a matter for individual schools.’

The fact that some authorities believe schools should be setting their own parental photography policies chimes with the Government’s new vision for a more autonomous and self-improving school system³⁵ where improvement in the education system comes from schools themselves.³⁶ It reflects the findings of research into the evolving role of education authorities, undertaken in 2012 by Parish et al, which indicates that education authorities are increasingly delegating powers and responsibilities to schools. The fact that some authorities do nonetheless consider it their role to offer some guidance again echoes the findings of Parish et al’s research, which highlights divergences in local education authorities’ approaches to their roles³⁷ and a continuing debate about when authorities should continue to lead dialogues and when they should leave a matter to individual schools to determine.³⁸

Whilst it is unfortunate that as a result of changes to local education authority roles, some education authorities no longer provide guidance on parental photography as had been anticipated when the research commenced, since the majority of authorities (62.6%) do provide some guidance (whether their own or the ICO guidance), a rich data source is still available from which to develop understanding of local authority policy on parental photography at school events.

It is apparent from the guidance that education authorities adopt a wide variety of approaches to address the practical and legal issues which may arise when parents wish to take photographs at school events. The divergences in approach appear largely to be the result of different understandings as to the relevant legal issues.

Four different legal issues or themes were identified from reading the guidance; data protection, safeguarding, e-safety and privacy/human rights.³⁹ At least one of the four legal issues was mentioned by each authority. 55 authorities perceived the Data Protection Act 1998 (‘the DPA’) to be relevant. 41 identified that safeguarding obligations arose. 18 authorities referred to privacy or human rights in their guidance, whilst an even smaller number (12 authorities) considered parental photography to raise e-safety issues. A relatively small number of authorities recognised that more than one legal issue arose; 29 authorities mentioned both data protection and safeguarding obligations. Very few authorities identified that data protection, safeguarding obligations *and* the human rights of parents and children were all potentially relevant (7 authorities referred to data protection, safeguarding and privacy/human rights, 1 of these also referred explicitly to e-safety).

Parental photography - primarily a data protection issue?

It is apparent that the majority of local authorities consider parental photography raises data protection issues. As noted above, analysis of the guidance reveals a strong disposition towards viewing the the DPA as the primary legal concern (57% of authorities who produced guidance referred to data protection in their guidance). However, even those authorities who state that they do not provide guidance because ‘schools are their own data controllers,’ in making such comments

³⁵ Natalie Parish, Andrew Baxter and Leigh Sandals, ‘Action Research into the Evolving Role of the local authority in education’ (Research Report DFE-RR224, Department for Education, 2012), 4

³⁶ Parish et al (n29), 7

³⁷ Parish et al (n29), 32

³⁸ Parish et al (n29), 25

³⁹ Very few authorities refer explicitly to privacy or private life in their guidance. This theme was therefore expanded to encompass comments which recognise more broadly that children have human rights, and comments which refer to the conflicting human rights of parents and children.

reveal a similar tendency towards treating parental photography as a data protection matter.⁴⁰ A disposition towards perceiving parental photography as a data protection matter is also evidenced by the fact that 48 authorities (24% of respondents) explicitly refer schools to guidance published by the ICO. Since the ICO guidance focuses solely upon the data protection implications of photography at school, one conclusion that might certainly be drawn in relation to the 28 authorities who refer schools only to ICO guidance, is that they view the matter of parental photography at school events solely as a data protection concern (quite logically given that this is what the ICO guidance suggests).

Heavy reliance on ICO documentation and a focus on the DPA as the primary legal issue is perhaps not surprising when one considers the lack of government guidance on the issue; the ICO guidance is effectively the only national guidance on the matter. Another reason for such frequent reference to ICO guidance and/or the DPA might, however, also be possible. As noted above responses were frequently received from an individual or team with responsibility for information access, information compliance, information governance or for data protection and freedom of information matters. Such individuals would be expected to be aware of the potential relevance of the DPA and would, presumably, have a greater familiarity with ICO publications than other council employees. Whilst this explanation would not explain the emphasis on data protection in the guidance, it might explain the relatively high number of authorities which explicitly refer to the ICO guidance.

Irrespective of the reason why education authorities are so disposed towards treating parental photography as a data protection issue, the fact remains that the legal issue which comes up time and again in the guidance is data protection. This has significant implications when it comes to education authority advice relating to parental photography at school events.

Does the DPA prohibit parental photography?

The DPA implements Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data ('the Directive'). The primary objective of the Directive, explicitly stated in its first article is to 'protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect of the processing of personal data.' Since the term personal data⁴¹ can be considered to include photographs, at least those photographs which can be used to identify an individual, one might assume that the DPA/Directive would impose certain restrictions both on taking photographs of other people's children, and dissemination of those photographs.

In fact, however, the ICO suggests that the Data Protection Act 1998 should not be treated as imposing any restriction on parental photography at school events.⁴² It is the ICO's stated position that if 'a parent takes a photograph of their child and some friends taking part in the school Sports Day to be put in the family photo album... [t]hese images are for personal use and the Data

⁴⁰ The term 'data controller' is found at s1(1) Data Protection Act 1998 and means 'a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed'. In commenting that schools are their own data controllers explicit reference is therefore made to data protection legislation

⁴¹ S1(1) DPA. The term 'data' includes electronic data and information which is being processed by means of equipment operating automatically (ie computer processing), 'personal data' is defined as 'data which relates to a living individual who can be identified from those data ...)

⁴² The ICO has reiterated this advice several times since 2005, in various publications, all of which were referred to by at least one authority; ICO 'Data Protection Good Practice: Note Taking Photographs in Schools' (2005, 2007, 2010, 2014), ICO, 'Report on the data protection guidance we gave schools in 2012' (2012); ICO 'Press release: Parents can snap away at this year's sports day' (2010); ICO, 'Press release: Parents can snap away this Christmas' (2010); and ICO, 'Does the Data Protection Act stop me taking photos of my children at school?' (undated)

Protection Act does not apply.⁴³ Indeed two press releases published by the ICO in 2010 suggest that parents who attend school events may ‘snap away’.⁴⁴

The provision upon which the ICO founds its advice is s36 of the DPA. This provision states that ‘personal data processed by an individual only for the purposes of that individual’s personal, family or household affairs (including recreational purposes) are exempt from the data protection principles and the provisions of Parts II and III.’ If, it is the case, as the ICO suggests, that a parent who takes a photograph at a school event can rely upon the s36 exemption, this means that they have no need to tell other parents that they have taken a photograph of their child, they do not need to tell them what they intend to do with that photograph, and they do not need to seek the consent of any child or their parent. Furthermore, the logical conclusion that one can draw from reading the ICO guidance is that schools need impose no restriction upon parents who wish to take photographs at school events. This indeed appears to be the position that is taken both by the authorities which refer schools solely to the ICO guidance and by many of the authorities who provide guidance in reliance on the ICO’s advice. It is a position, however, that requires further consideration.

Firstly, it should be noted that the ICO guidance fails to explicitly address the question of how the DPA applies when a photograph taken at a school event is disseminated online. This may be because the ICO considers that the DPA still applies in such a situation. Indeed ICO guidance in relation to social networking and online forums certainly suggests that the ICO does consider s36 to apply when a parent posts photographs online.⁴⁵ It might be argued, however, that such a stance is unsustainable; that by effectively granting a full exemption from data protection requirements to anyone who uploads materials to the Internet as a private individual the ICO is ‘fundamentally undermin[ing] data protection (and privacy) itself.’⁴⁶ Furthermore, it should be noted that the ICO’s stance in relation to the online application of s36 is at odds with many of his European counterparts,⁴⁷ it contrasts starkly with the jurisprudence of the European Court of Justice,⁴⁸ and with the opinion of the Article 29 Working Party on online social networking.⁴⁹ Across Europe the position is clear; the exemption will certainly not apply if information is shared online with a large number of people. As it stands, and perhaps because of the conflicting messages being conveyed by the national and European institutions responsible for data protection, there seems to be some confusion amongst authorities as to how exactly the DPA does apply when a parent posts a photograph of a school event online. Whilst some consider, in line with the ICO position, that the DPA will never prevent a parent from taking and using a photograph for personal and domestic purposes, other authorities explicitly state that posting photographs online should be prohibited, distinguishing clearly between the situation when parents keep photos to look at themselves and when photos are shared online. Indeed a total of 36 authorities impose a ban on posting photographs online, 6 authorities⁵⁰ stating unequivocally that online sharing may contravene the DPA.

⁴³ ICO, Data Protection Good Practice Note Taking Photographs in Schools (v4.1, 2014); ICO, Taking photos in schools http://ico.org.uk/for_the_public/topic_specific_guides/schools/photos

⁴⁴ ICO, ‘Press release: Parents can snap away at this year’s sports day’ (2010); ICO, ‘Press release: Parents can snap away this Christmas’ (2010)

⁴⁵ ICO, ‘Social networking and online forums – when does the DPA apply?’ (V1.1, 2014)

⁴⁶ Douwe Korff ‘Comparative Study on different approaches to new privacy challenges in particular in the light of technological developments, Working paper no 2 Data Protection Laws in the EU: The difficulties in meeting the challenges posed by global social and technological developments’ (Centre for Public Reform, 2010) 8

⁴⁷ Korff (n40) 9

⁴⁸ Lindqvist ECJ C-101/01 para 47 makes clear that where information is published on the internet with the result that those data are made accessible to an indefinite number of people, the exemption should not apply

⁴⁹ Article 29 Data Protection Working Party, ‘Opinion 5/2009 on online social networking 00189/09/EN WP 163 adopted on 12 June 2009’ This opinion suggests that whilst in some instances the personal/household exemption will apply when an individual uses social media to share information, it is necessary to look at the scale of the dissemination before one can conclude whether the exemption applies.

⁵⁰ 6.25% of authorities who provide guidance or 3% of the authorities who responded

The second point that must be mentioned in relation to the ICO guidance, and which is again a matter of some significance, arises from the fact that the ICO guidance *only* deals with the application of the DPA. In failing to mention any of the other potential legal issues which might need to be considered by schools, the guidance seems to imply that provided the DPA is not breached (and given the ICO's guidance it seems highly unlikely that parents will breach the DPA when taking photographs at school events) there is no reason why parents cannot take photographs at school events. This certainly appears to be the view taken in the media,⁵¹ and indeed by many of the education authorities contacted. Restrictions upon parental photography may, however, irrespective of the DPA position, be necessary to prevent disruption to performances and to avoid distractions for children. There are, also, other legal issues, such as safeguarding obligations and the Article 8 right to respect for privacy, which may justify a school's decision to impose restrictions upon parental photography at school events.

Safeguarding

By virtue of Section 175 and Section 157 of the Education Act 2002 education authorities, governing bodies of maintained schools and proprietors of independent schools must exercise their functions with a view to 'safeguarding and promoting the welfare of children'.⁵² Sections 175 and 157 thus make explicit 'the responsibility of local authorities, governing bodies and proprietors for safeguarding and promoting the welfare of children as part of their common law duty of care towards the children for whom their organisation or establishment is responsible.'⁵³

That the phrase 'safeguarding and promoting the welfare of children' is to be widely interpreted is clear from government guidance. A school's obligation to safeguard children in its care requires a school to consider how best; to protect children from maltreatment and impairment of their health or development; to ensure children grow up in circumstances consistent with the provision of safe and effective care; to enable all children to have the best outcomes.⁵⁴ Authorities are obliged to demonstrate that they have 'considered whether children, including individual children, in their area or school have any specific safeguarding needs' and to 'have policies and procedures in place to meet those needs.'⁵⁵ The Education Act 2002 imposes extensive obligations upon education authorities and schools; 'everyone who works with children – including teachers ... - has a responsibility for keeping them safe.'⁵⁶

Whilst parental photography at school events may not have posed significant risks to children's welfare 20 or even 10 years ago, new problems have undoubtedly been caused by the development of the internet. Photographs innocently disseminated online may all too easily end up in the hands of strangers, and be manipulated, copied or disseminated further and misused. Photographs which reveal a child's identity or which reveal information about a child which makes them identifiable (for example details of their school) may make children vulnerable to individuals seeking to groom children for abuse.⁵⁷ A particular concern, which many authorities recognise, relates to vulnerable children, children who may be in hiding from a violent parent or who are living with local authority

⁵¹ Tom Whitehead, 'Parents should be free to photograph sports days and plays, says watchdog', *The Telegraph* (London, 22 June 2009) <http://www.telegraph.co.uk/news/uknews/5602407/Parents-should-be-free-to-photograph-sports-days-and-plays-says-watchdog.html> accessed 17 July 2014

⁵² Section 175 applies to education authorities and governing bodies of maintained schools, Section 157 Education Act 2002 imposes the same obligations upon independent schools

⁵³ Department for Education and Skills, 'Safeguarding children and safer recruitment in Education' (2007) para 2.9. Note whilst this guidance makes no reference to photography at or by schools several authorities did indicate that, in relation to the issue of parental photography, they referred schools to this guidance

⁵⁴ Department for Education, 'Working Together to Safeguard Children', 2013, 7

⁵⁵ Department for Education and Skills, 'Safeguarding children and safer recruitment in Education' (2007) para 2.7

⁵⁶ Department for Education, Working Together to Safeguard Children (2013), 8

⁵⁷ NSPCC (n10)

foster parents or adoptive parents, and whose welfare may be compromised if members of their birth family become aware of their whereabouts.

Whilst many authorities, having sought advice from the police, suggest that the risks of misuse of photographs are low, the number of authorities who explicitly refer to safeguarding obligations in their guidance makes clear that authorities are both well aware that risks exist and that they believe schools should consider how to prevent harm occurring, before every event.

To fail to act,⁵⁸ when the risks of photography are known might not only be in breach of the Education Act 2002, but if a child or family member were harmed because their whereabouts were revealed by a photograph posted online, an action under the Human Rights Act 1998 might also be foreseeable. Section 6 of the Human Rights Act 1998, of course, imposes an obligation upon public authorities (including schools and education authorities) to act in accordance with the rights detailed in Schedule 1. Amongst these rights are Articles 2 and 3 of the European Convention of the Protection for Human Rights and Fundamental Freedoms, articles which impose positive obligations upon public authorities to act to prevent threats to life (article 2) and to prevent torture, inhuman or degrading treatment (article 3). Where a public authority, such as a school 'knew or ought to have known ... of a real and immediate risk to the life' of an identified individual yet nonetheless failed 'to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk' and a death ensues that school might certainly be considered to have breached Article 2.⁵⁹

What about privacy?

Where a school is aware that a particular child is effectively in hiding, a substantial obligation is imposed upon the school, one which might certainly justify restricting parents' ability to take photographs at school events. In such circumstances the school *must* look beyond the DPA. It is arguable, however, that in all instances schools and local authorities need to be alive not merely to the DPA and to safeguarding obligations, but also to the child's right to respect for its private life.

Interestingly, however, whilst many authorities recognise that it is important to consider data protection and safeguarding issues before a decision is made about parental photography, less than 20% of authorities who provide guidance consider human rights to be a relevant consideration. The reason why so few authorities consider the Human Rights Act 1998 to be relevant is unclear. The fact remains, however, that the taking of photographs, and their subsequent dissemination, engages Article 8, the right to respect for private and family life, home and correspondence.⁶⁰ A child has the same right 'to enjoy a "legitimate expectation" of protection of and respect for their private life'⁶¹ as anyone else. The issue of the child's privacy, therefore, should not be ignored.

The test that has been applied by the UK courts in determining whether a breach of Article 8 has occurred, at least in relation to an adult's image, has been to ask whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.⁶² More specifically, in order to determine whether the taking of a photograph or its dissemination engages Article 8 the courts have suggested that one should ask 'what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.'⁶³

⁵⁸ Actions that a school might consider taking in order to prevent a vulnerable child's whereabouts becoming known might include prohibiting uploading of any photographs or making special arrangements to ensure the vulnerable child's image is not captured

⁵⁹ *Osman v UK* (1990) 1 FLR 193 [116]

⁶⁰ The concept of private life is well recognised as providing protection to a person's right to their image, see *Sciacca v Italy* App no 50774/99 (2005) 43 EHRR 20 [29]; *Schussel v Austria* similarly confirms that the concept of private life extends to a person's picture;

⁶¹ *Von Hannover* (2005) 40 EHRR 1, [69]

⁶² *Campbell v MGN* [2004] UKHL 22 [21]

⁶³ *Campbell* (n56) [99] per Hope LJ

In relation to a child the position is rather more complicated than it is for an adult. As Sir Anthony Clarke MR recognised in *Murray*,⁶⁴ a child may have ‘no obvious sensitivity to any invasion of his privacy which does not involve some direct physical intrusion into his personal space.’ Accordingly, where it is alleged that a child’s privacy has been impinged upon it is necessary to take into account ‘not only the circumstances in which the photograph was taken and its actual impact on the child, but also the position of the child’s parents and the way in which the child’s life as part of that family has been conducted. ... The question whether a child in any particular circumstances has a reasonable expectation for privacy must be determined by ... taking an objective view of the matter including the reasonable expectation of his parents in those same circumstances as to whether their children’s lives in a public place should remain private. Ultimately it will be a matter of judgement for the Court with every case depending upon its own facts. The point that needs to be emphasised is that the assessment of the impact of the taking and the subsequent publication of the photograph on the child cannot be limited by whether the child was physically aware of the photograph being taken or published or personally affected by it. The Court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing.’⁶⁵

A reading of these short quotations reveals clearly that it may not be easy to determine whether or not the taking and dissemination of a child’s photographs breaches a particular child’s privacy. If a school is aware that a child has a particular need to maintain anonymity or to keep its whereabouts secret then it is likely, in those circumstances, that the school will be told that the child/their parent has a reasonable expectation of privacy. In ordinary circumstances, however, schools are unlikely to know whether a parent would be happy for their child’s photograph to be shared on the internet, or, by contrast, whether the parent would have strong, justified, objections to their children’s images being taken and shared online (whether for religious or other reasons⁶⁶). They will be unable to judge, therefore, whether particular parents do consider that their children have a reasonable expectation of privacy even at school events.

A school may be able to establish parents’ views if they specifically ask parents to consent to parental photography (interestingly, however, only 17 of the 96 authorities who provide guidance to schools⁶⁷ suggest that schools even consider parental consent.) The alternative approach which is suggested by the majority of authorities, presumably because it is less heavy handed, is to suggest that schools simply tell parents that parental photography will take place, and that all children’s pictures may potentially be taken. If no parent explicitly objects to such photography taking place the school might then assume that parents did not have a reasonable expectation of privacy, and would not consider that such photography breached their child’s article 8 rights.⁶⁸

What advice do local authorities provide to schools?

⁶⁴ *Murray v Big Pictures* [2008] EWCA Civ 446 [37]

⁶⁵ *Murray v Big Pictures* (n58) para 37, Sir Anthony Clarke MR citing with approval the comments of the trial judge

⁶⁶ Note Cynthia Brougher for the US Congressional Research Service identifies that for religious reasons some individuals may object to their photograph being taken (Cynthia Brougher, ‘Legal Analysis of Religious Exemptions for Photo Identification Requirements’ (CRS Report for Congress 7-5700, 2012)

⁶⁷ Thus only 17.7% of authorities who provide guidance or 8.5% of the authorities who responded even suggest that consent is considered – and it should be noted that in many cases even where schools are advised to consider obtaining parental/child consent to parental photography the guidance simply suggests that obtaining parental consent to photography is one of several alternative options or conditions for photography that parents might consider

⁶⁸ If a parent does object then, obviously, at that stage, the school will need to consider what action it takes in response to such objection. It appears to be the view of all but one of those authorities who consider the issue, that if a parent or child does object to the child’s photograph being taken at a school event, then those wishes should always be respected. This can be achieved by a full ban on photography, but a more proportionate response might be to remove the child from the place where photographs will be taken ie by giving a backstage role at the play, or arrange for photos to be taken at the end of an event when the child is taken elsewhere

As already noted above, the advice that local authorities offer to schools varies significantly.

If a local authority perceives that the only legal issue to be addressed is the DPA, and in reliance on the ICO guidance suggests that parents are, in fact, exempt from the DPA when taking photographs at school events, the authority is likely to suggest that no restriction be imposed upon parental photography. Certainly, eight of the authorities who provide guidance suggest that there is no legal reason to impose a restriction on parental photography (although 2 of these authorities suggest schools may wish to impose conditions for health and safety reasons).

By contrast, where an authority recognises that safeguarding obligations and/or privacy considerations come into play the authority is far more likely to suggest that schools do consider whether to impose some form of restriction or conditions upon parental photography. Eighty-eight authorities suggest in their guidance that some restriction is imposed upon parental photography.

It is clear from the guidance that few authorities believe an outright ban on photography will be appropriate, even if it might be the simplest option. Most authorities recognise that such an outright ban would be unnecessary, an 'over-reaction' or 'heavy-handed.' Whilst parents' rights are rarely discussed in the guidance, authorities are perhaps aware that a total ban on photography might be perceived as a disproportionate interference with the rights of those parents who wish to take photographs. Article 8, of course, protects a parent's right to family life. There is thus a potential argument to be made by a parent that if a school prevents that parent from taking a photograph of its child it is interfering with the child-parent relationship protected by Article 8. It seems more likely, however, that if a ban were imposed on parental photography, any parent affected would complain that their Article 10 right to freedom of expression had been breached; Article 10 entailing, amongst other things, a right to receive and impart information.⁶⁹

Rather than talking of parental 'rights' to take photographs many authorities instead talk of parents' 'wishes'. Accordingly, many authorities explicitly recognise the upset and disappointment that may be caused to parents if they are not allowed to take photographs. Many of the guidance documents refer to the 'pleasure and pride' experienced by parents who attend and take and share photographs of such events, the benefits to children's self-esteem that come from such photographs, and the simple desire of most parents to celebrate their children's achievements. Accordingly, rather than suggesting that schools impose an outright ban on parental photography those authorities who provide guidance suggest a variety of different alternative strategies.

At the more permissive end parental photography is permitted, but restrictions are placed upon uploading of images. Some of the more restrictive authorities suggest that whilst parents will not themselves be permitted to take any photographs, schools could arrange for an individual who has had appropriate CRB checks to take photographs which will then be sold to parents (in this case the school has a greater measure of control over the use of images yet parents are still able to keep a record of the event). In between a range of alternatives are offered; parents are afforded opportunities for photograph only at specified times and places; photography is allowed only if

⁶⁹ The difficulty for a parent who wishes to rely upon Article 10, of course, is that the rights guarantee by this article are not absolute. Indeed the European Court of Human Rights has made clear that 'although freedom of expression ... extends to the publication of photos, this is an area in which the protection of the rights and reputations of others takes on particular importance.'⁶⁹ Much of the debate about the Article 8/Article 10 balance has taken place in the context of media publication of celebrities' photographs and discussions of the need to balance individual privacy against media obligations to disclose information 'in the public interest'. The issue here is clearly very different. The role played by a parent who uploads a photograph is clearly unlike that played by a member of the press, who might be seen as a 'watchdog', who contributes to a democratic society by 'imparting information and ideas on matters of public interest.'⁶⁹ When a parent displays photographs of their children online it may be 'of public interest', but the fact that something is 'of public interest' is far from the same thing as a disclosure 'in the public interest.' It is perhaps for this reason that education authorities spend little time considering parental rights to freedom of expression.

parents stand at the back of the audience; parents are required to register to take photographs (making it easier for schools to identify individuals who should not be taking photographs); photography is permitted only when all parents provide consent; photographs can be taken only of those children whose parents have consented to parental photography (children for whom consent has not been provided may be given a role 'back stage' or as narrator); parents must obtain school permission before taking any photographs.

Some of these strategies are clearly aimed at redressing practical issues, such as parents impeding the view of other parents or distracting the children performing. Others are more clearly designed to afford a balance between the competing positions of parents and children (for example when photographs are only permitted at the end of a performance and after children at risk have been removed). What is, unfortunately, not clear from the guidance, however, is how safeguarding and privacy impact on the strategies that authorities suggest schools adopt. There is no direct correlation, for example, between a reference to safeguarding and any particular strategy for protecting children's welfare. Similarly, no common strategy is adopted by the 18 authorities who refer to human rights obligations in their guidance. Still more interestingly, it is also not entirely clear from the guidance why some of the authorities who cite the DPA as the only legal issue nonetheless suggest that restrictions might be imposed upon photography. That an authority recognises a particular legal issue or issues are relevant certainly does not mean that the authority will recommend that schools in their area should adopt a particular strategy.

Conclusions

In recent years parental photography at school events has become a topic of debate both in the media and on online forums. This sudden interest in parental photography appears to be driven by the increasing number of restrictions upon parental photography that have been imposed by schools. These restrictions themselves appear to have been introduced as a response to increasing use of social media and the risks that online dissemination of photographs are perceived to pose.

A survey of education authorities nonetheless reveals that not all education authorities do in fact advise schools to place restrictions or conditions upon parental photography. Whilst some authorities do suggest that relatively stringent restrictions might be imposed, others suggest that there is no legal reason why parents should not be allowed to undertake photography.

It is clear that local authority understanding of the legal framework does play a role in determining whether or not a local authority recommends that unrestricted parental photography should take place. Certainly many authorities appear to believe that when parents take photographs at school events the sole legal provision which merits consideration is the DPA. Since the ICO guidance unequivocally states that where a parent takes a photograph at a school event for personal or domestic use the DPA does not apply, the advice that these authorities understandably give is accordingly to allow photography, subject only to restrictions needed for practical reasons.⁷⁰

The reality, of course, is that the DPA is not the only legal issue that requires consideration before a school decides whether or not to allow unrestricted parental photography. There is no simple formula for determining what approach a school should take if, for example, a vulnerable child's identity needs to be protected, or if a parent states that they do not wish their child's photograph to be taken, for privacy reasons. What is important, however, is that the full range of legal issues is considered.

⁷⁰ The authorities which fall into this category include those authorities who refer schools solely to the ICO guidance, and those whose own guidance refers only to the DPA and who explicitly state that parents may take photographs at school events because the DPA exemption applies.

The fact that some authorities are focused solely on the DPA, and are thus advising that photographs may be taken and used as parents see fit, must give cause for concern. Statistics suggest that there is a significant possibility that those photographs will be shared online, potentially in breach of a child's privacy, potentially in breach of the Directive/DPA,⁷¹ and more importantly that such widespread dissemination may place vulnerable children at risk of harm.

That risks do exist does not inevitably mean that all photography should be banned. Indeed not one authority stipulates that a ban on photography is necessary. Furthermore it is evident that authorities have spent a great deal of effort devising approaches which will allow parents to record their children's special moments, whilst at the same time respecting children's rights.

The variety of different approaches, and the lack of clear explanation within the guidance as to why, legally, a school might wish to adopt one or other approach may, however, be a contributing factor to the public debates about when parental photography at school events should be allowed. In the absence of a single, coherent, national policy, which details clearly all of the legal issues and how they might be addressed, such debates seem only likely to continue.

⁷¹ Whether one considers that the DPA will be breached will depend upon whether the ICO stance or the European stance is adopted