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Privacy & the media. Traditional and emerging protections in an online world.

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National Report of Denmark

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1. Privacy rights

Under Privacy right, we understand the right not to have information about a person to be disclosed to other persons without consent of the person which the information refers to.

1.1 Are privacy rights statutory rights or are these case-law based?

Denmark is a civil law country and thus based on codified law. Denmark has one law which is above all other laws – The Constitutional Act of Denmark of June 5, 1953. The Constitutional Act contains the fundamental rules of the Danish society including section 72 which concerns the right to privacy.

The Act on Processing of Personal Data (APPD) sets the frames for how public authorities and private companies are to process personal data. The Act implements Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The Danish Data Protection Agency is the supervisory authority and their administrative practice fills and interprets the provisions in the APPD. The Danish Data Protection Agency has published instructions which can be applied when dealing with the APPD and actions concerning personal information.

In addition to the APPD, Denmark is a part of the European Union and therefore has incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 of the Convention protects the right to respect for private and family life.

The Danish Criminal Code section 264 d protects the right to respect for private life and disclosure of private information.

Privacy rights are thus statutory rights codified in the abovementioned laws.

1.2 What type of information (including pictures, sounds, etc.) would be covered by the concept of “privacy rights” in the legal system of your country?

Section 3 of the APPD defines personal information as any information relating to an identified or identifiable natural person.

Personal information includes, inter alia, pictures, the person’s voice, fingerprints, genetic characteristics and digital sound and picture reproduction involving personal data.

Covered by the APPD are both companies’ processing of personal data and the authorities’ processing of personal data. Furthermore the processing of personal data by the prosecutors and the police is not fully covered by the Act¹.

¹ The Instruction on the data subject's rights under the rules of The Act on Processing of Personal Data. Instruction number 126 of July 10, 2000.

1.2.1 Would the information included in that concept, or the extent of the privacy rights, depend upon the celebrity of the person, or upon other elements? Please describe briefly.

The extent of the privacy rights should be assessed individually in each case. However, there is a tendency towards a lesser need for protection regarding individuals involved in politics.

In addition to this there is a *prima facie* presumption in relation to the age of the personal information. It is more likely that older information can be published².

1.2.2 Would privacy rights also apply in relation to legal persons (vs. Physical persons)?

Some sections of the APPD apply to legal persons. The APPD applies to the processing of data concerning companies if the processing is carried out for credit information agencies or the Minister of Justice can decide that the provisions of the APPD shall apply, in full or in part, to the processing of data concerning companies.

1.2.3 Would privacy rights encompass private information made available only to some chosen persons (authorized recipients). So, for instance, can disclosure to third parties, by one of the authorized recipients of the private information, be part of the privacy rights (e.g. disclosure of private correspondence, private phone calls, information shared on social media, etc.)

Section 2, subsection 3 in the APPD decides that the provisions of the APPD shall not apply to the processing of data undertaken by a natural person with a view to the exercise of purely personal activities. Section 2, subsection 5 states that the APPD does not apply to the processing of data which is performed on behalf of the Danish Parliament and its related institutions.

Section 28 of the Act contains a right of the data subject. Where the personal data have been collected from the data subject, the controller or his representative shall provide the data subject with the following information:

1. The identity of the controller and of his representative;
2. The purposes of the processing for which the data are intended;
3. Any further information which is necessary, having regard to the specific circumstances in which the personal data are collected, to enable the data subject to safeguard his interests, such as:
 - a. the categories of recipients;
 - b. whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply;

² Peter Blume, Data protection and freedom of speech, U 2003 B.215.

- c. the rules on the right of access to and the right to rectify the data relating to the data subject.

Section 28 shall not apply if the data subject's interest in obtaining this information is found to be overridden by essential considerations of private or public interests.

Section 28 and section 30 of the Act implements provision of the European Directive on the processing of personal data, 95/46/EC.

1.3 Is there a specific status for “fictional use” of information related to an individual? And are disclaimers sufficient to allow such use?

Occasionally fictional works will include information related to individuals. A decision whether such work is in conflict with the right to privacy and personal information will include a weighing of the individual's right towards the consideration of the freedom of speech and the public interest in the release of the work.

In a case decided march 17, 2011 a person asserted that a fictional work included private information³. The parties to the case invoked individually the European Convention for the Protection of Human Rights and Fundamental Freedoms article 10 (freedom of speech) on one side and article 8 (right to privacy) on the other. The case was decided in favor of the creators of the work and the decisive reason was the consideration of the protection of the artistic freedom of speech and the fact that a part of the information was already publicly available and some of the information was of less sensitive character.

2. Freedom of speech

2.1 Is there a on the one hand a statutory/ treaty based freedom or constitutional recognition of “Freedom of speech” or on the other hand is that freedom based on case-law.

The Constitutional Act of Denmark (please refer to question 1.1) section 77 contains the right to freedom of speech.

Furthermore, article 10 in the European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the right to freedom of speech.

Danish law is based on codified law and the Danish courts are only allowed to interpret the law. The Danish courts do not have the lawmaking role as the courts in common law system do. The freedom of speech is thus not based on case-law.

2.2 If it is a statutory/treaty/ constitution based freedom is it based on domestic or supranational law?

The freedom of speech is based on the provisions in the supranational European Convention and the provisions in the domestic Constitutional Act.

³ The High Court of Eastern Denmark, 1.afd., j.nr. B-1706-09.

2.3 Describe the main characteristics of the “freedom of speech” as recognized in your jurisdiction:

2.3.1 Beneficiaries;

Everyone has the right to freedom of expression. This is the case in both the supranational law and the domestic law (please refer to question 2.2).

2.3.2 Extent of the freedom of speech;

The exercise of the freedom of speech in article 10 in the European Convention may be subject to restrictions prescribed by law and when they are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

When exercising the right of freedom of speech in the Danish Constitutional Act it will be subject to mandatory law as exercised by the courts. The courts are thus in their right to adjudicate statements in contrary to the legislation, including provisions on racism, blasphemy, defamatory statements, confidentiality, privacy and prohibition of the publication of the names of suspects.

2.3.3 Exceptions;

Please refer to question 2.3.2.

2.3.4 Specific status for press (including online press)?

The right to freedom of speech in cases including the press and the online press is weighted heavily in relation to other rights. This is a consequence of the interest of the public to be informed. Denmark cherishes the freedom of the press and an example hereof is the publication of the drawings of the Prophet Muhammad. Especially publication of information and ideas on matters of social interest will be given priority.

When a case is decided there will thus be emphasis on whether or not the case is about exercise of political expression⁴.

3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

3.1 Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other?

⁴ Peter Blume, Data protection and freedom of speech, U 2003 B.215.

The two rights are likely to conflict in every case. Freedom of speech is reasoned in the consideration for democracy whereas the protection of privacy is reasoned in the consideration for the individual. Therefore it is argued that freedom of speech should take precedence over the protection of privacy as the former is a political reasoned right⁵.

Section 2, subsection 2 in the APPD states, that in cases, where procession of personal information is needed in the interest of the right to freedom of speech, the right to freedom of speech should prevail.

3.2 What would be the most significant criteria allowing freedom of speech or privacy rights to prevail over the other (e.g. public interest argument)?

Both rights should be considered and weighted when deciding a case where both rights are in conflict. However, society's interest in protecting freedom of expression will in many cases be given precedence over the protection of the individual's right to privacy.

4. Remedies available in your jurisdiction to protect individuals against disclosure of information belonging to their privacy

The Danish Criminal Code contains in section 152-152f general provisions on duty of confidentiality. A person that works or has been working in public service which unjustified disclose or take advantage of confidential information (including personal information) to which the person in question has got knowledge will be punished with a fine or prison up to six months. According to Danish law confidential information is information described as such in the enacted legislation or information which due to the nature of it – according to the normal perception in the society – should be withheld public knowledge.

The APPD contains the primary rules protecting individuals against disclosure of information concerning private matters. The Danish Health Act and Danish Act on telecommunication also contain special rules in relation to disclosure of information on health and information on content in telecommunication.

4.1. Are there pre-emptive remedies to avoid disclosure of such information before disclosure occurs? Describe briefly the main remedies available.

The Danish Data Protection Agency oversees the compliance with the APPD - please refer to question 1.1. The rules on data security in the APPD and legislation on telecommunication imply that the data controller must implement special security procedures in order to avoid disclosure of personal data, including a duty of notification when personal information is being - or is about to be - processed. Moreover the APPDs provisions regarding liability in damages and criminal liability can act as a deterrent.

⁵ Peter Blume, Data protection and freedom of speech, U 2003 B.215.

4.2. Are “gagging orders” or “super injunctions” as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

Gagging orders may be issued by the courts in relation to restricting the media (and others) from court cases. The secrecy obligation is normally used in cases regarding custody, child abuse and other cases where it is important to have the identity of the parties and/or the main characteristics of a case kept in absolute confidence. Such gagging orders are decided at the sole discretion of the courts on a case-to-case basis.

4.3. Are there other post-disclosure remedies, such as for example damage claims, rectification claims, and right of answer? Describe shortly

According to the APPD the data controller shall at the request of the data subject rectify, erase or block data which turn out to be inaccurate or misleading or in any other way processed in violation of law or regulations. The data controller shall at the request of the data subject notify the third party to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with the above. However, this shall not apply if such notification proves impossible or involves a disproportionate effort.

4.4. In the case of damages, how are they calculated?

In most cases it has been very difficult to calculate the compensation since the person affected is not able to demonstrate any loss. Often the person affected is offered a compensation for the injury in approx. DKK 25.000 (approx. EUR 3,350).

4.5. In case of disclosure of private information, who can be held liable for damages, especially online?

The data controller can be held liable for disclosure of private information in any medium, including online media. A data processor can also be held liable, if the disclosure is caused by insufficient security caused by the data controller. .

4.6. Are there special defenses to a cause of action for information disclosed by the press/ media?

The APPD contains a very wide exemption in relation to the press/media. The APPD does not apply to the processing of data in cases where the information databases are operated by the mass media. The exemption in the APPD can be inconsistent with the personal data directive provisions concerning processing of personal data for journalistic purposes and therefore the exemption is probably too wide even though it is contingent upon notification to the Data Protection Agency.

4.6.1. As part of your answer please explain what is range of news information organisations is covered by the definitions press/ media?

The term “journalistic purposes” is defined very broadly in the APPD compared to the definition in article 9 in the data protection directive.

Journalistic purposes defined:

- All processing of personal data in information databases operated by the mass media.
- Information databases which exclusively include already published periodicals or sound and image programs or part hereof, provided that the data are stored in the database in the original version published.
- Information databases which exclusively include already published texts, images and sound programs or parts hereof, provided that the data are stored in the database in the original version published.
- Manual files of cuttings from published, printed articles which are exclusively processed for journalistic purposes.
- Processing of data which otherwise takes place exclusively for journalistic purposes.

The APPD furthermore contains a provision according to which APPD shall not apply where this will be in violation of the freedom of information and expression, cf. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4.6.2. Is there a specific protection offered to informants/sources?

There is a general right for journalists to protect the identity of their sources and The Danish Administration of Justice Act provides that journalists are allowed to protect the identity of their sources cf. para 172. However, if proceedings concern an offence of a serious nature which is punishable under the law by imprisonment for no less than four years, the court may order the journalists to give evidence as witnesses if it is deemed to be essential to the proper examination of the case.

4.7. Are the principles described in your answers above also applicable to the online world? Is there any specific case-law in your country relating to social media, and if so please summarise this?

The principles are also applicable in the online world. To our knowledge, there is no specific current case-law in relation to social media.

4.8. Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel)? Describe these remedies briefly.

The Criminal Code Section 267 contains specific remedies against disclosure of information that could damage an individual reputation. Section 267 provides for punishment by way of a fine or imprisonment for no more than 4 months.

4.9. Forum and applicable law

4.9.1. Describe shortly what rules exist in your jurisdiction for the determination of the forum and the applicable law.

Danish private international law is primarily founded on the Convention on the Law Applicable to Contractual Obligations (Rome Convention 1980), the Convention On The Law Applicable To International Sale Of Goods (Hague Convention 1955), the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Berne Convention for the Protection of Literary and Artistic Works. In addition hereto, Denmark has also ratified two parallel agreements concluded with the European Union about international civil procedure – Council Regulation (EC) No 44/2001 of 22 December 2000 (Brussels I) and Council Regulation (EC) No 1348/2000 of 29 May 2000.

4.9.2. Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions)?

According to the Danish Data Protection Authority the data controller must remove disclosed personal data from e.g. search engines if there has been a security breach.

4.10. From your experience, what reforms should be made to the legal system of your country to better protect individual privacy, if any?

In Denmark the level of fines for not complying with the APPD is very low (up to DKK 25.000) and the Data Protection Agency has limited resources available. The individual privacy would be better protected if the Data Protection Agency was given more resources and the level of fines was at the same level as in other European countries.

5. Interplay between data protection rules and privacy rights

5.1. Summarise how does data protection law in your jurisdiction protects privacy or other personal data being used in online media?

The APPD is applicable likewise to processing of personal data in the online media. There is therefore no difference between the previous answers regarding privacy and personal data and the processing of personal data in the online media.

5.2. Is there an effective right of opposition to collection of data?

As a general rule the data controller is not allowed to register and disclose personal data without the consent of the data subject.

However, personal data can be processed if the data controller fulfills the requirements in the APPD, e.g. notification to the data subject and security requirements.

Regardless of the right to process data in the APPD the data subject can resist data being processed if the data contains sensitive personal information. The right for the data subject to resist is founded in section 7 of the APPD where sensitive personal data is exhaustively

listed as being information concerning racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or data concerning health or sex life.

6. Right to be forgotten

6.1. Is there a statutory or case-law based “right to be forgotten” in your jurisdiction (whether under domestic or supranational law)? Describe it briefly.

On the 13 of May 2014 the Court of Justice of the European Union decided that a Spanish national had a "right to be forgotten". Denmark is a part of the European Union and is therefore obliged to interpret consistent with EU law and EU case law. "The right to be forgotten" does therefore exist in Denmark as a result of the above mentioned ruling.

6.2. Is there relevant case law in your jurisdiction regarding the right to be forgotten and/or are there other guidelines (whether under domestic or supranational legal procedure) for a successful claim under the “right to be forgotten”.

Please refer to question 6.1.

6.3. Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction?

The judgment rapidly changed the view on the right to be forgotten in Danish Law, please refer to question 1.1. There is not yet any case law in Denmark arising from the decision.

7. Are there other aspects to take into consideration in your jurisdiction in relation to freedom of speech, the privacy right and the right to be forgotten?

The Danish Public Administration Act contains a duty of confidentiality for everyone employed in the public administration, and similar duties is repeated in a number of other Danish acts and regulations – e.g. The Danish Health Act and the Code of Conduct for the Danish Bar and Law Society, which respectively contains rules of patient confidentiality and client confidentiality.

Furthermore, commercial censorship is occasionally used to protect the movie-, literature-, art- and music industry from infringement of copyrights. Accesses to the webpages alofmp3.com and piratebay.com have e.g. been blocked from a few of the Danish internet service providers.