Video Games:
Some Pitfalls of Video Evidence

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Abstract  CCTV evidence is regularly employed in criminal cases, yet there has been relatively little consideration of the manner in which such evidence is collected and subsequently handled. The use of CCTV evidence raises issues of disclosure, data protection and human rights, all of which have a far-reaching impact not only on the accused but also on others who find themselves recorded by surveillance systems. In addition, much of the video evidence collected during criminal investigations comes from third parties, such as shops and commercial premises, which are outside the direct control of the police. This only serves to compound the difficulty of managing such material within the investigative and trial processes.

Although the courts are increasingly faced with sophisticated forms of evidence, from computer data to DNA, it is the everyday videotape which continues to present some of the greatest difficulties for investigators, prosecutors and defendants. Criminal trials regularly involve consideration of video evidence, partly due to the growing popularity of urban surveillance systems¹ and also the proliferation of CCTV within private businesses, such as shops and petrol stations. Video evidence is undeniably persuasive, making it a valuable weapon in court, but its use raises issues of collection, retention, disclosure and storage, which can have a critical influence on the conduct of cases.² The situation is further complicated by legislation, not least the Criminal Procedure and Investigations Act 1996 (CPIA), which regulates the disclosure of ‘unused material’ (including videotape) to the defence, the Data Protection Act 1998 and, of course, the Human Rights Act 1998.

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¹ Under the government’s Crime Reduction Programme CCTV Initiative alone, around £170 million has been spent on 684 CCTV schemes across England and Wales. House of Commons, Written Answer 16 Septmber 2003, col. 675W.
In recent years there has been considerable discussion of issues surrounding video identification evidence. The aim of this article is to examine some additional aspects of video evidence which have proved especially problematic, first in relation to the disclosure of unused video material under CPIA and then in the context of human rights and data protection principles. It will be suggested that although the legislation does, in theory, provide safeguards for those adversely affected by the use of video evidence, in practice these may well be of limited use.

**Police station video**

At many police stations CCTV is routinely employed to record dealings at the front inquiry desk and, more importantly, within the station custody area to record the processing of suspects. Such tapes may be used to counter any allegations of police misconduct and, therefore, can be seen as providing protection for officers and suspects alike, notwithstanding that, in the vast majority of cases, they record little or nothing of interest to either side. For this reason, together with issues of storage and cost, it is usual for tapes to be recycled on a rolling basis after a period of time has elapsed; however this is a policy which leaves the police vulnerable to later requests from the defence for disclosure of the tapes as unused material. If the initial circumstances of the inquiry have not indicated that the custody video might be significant it is quite possible that a defence request for copies might arrive after the tape concerned had been re-recorded, thereby erasing any evidence which it contained. It therefore falls to the individual officer in the case to assess not only whether the custody tape might contain potentially contentious material but also whether there is any reason to suspect that the accused may make a false allegation. In both cases the tape must be retrieved and secured before it is reused.

It is important to realise that the implications of a failure to safeguard the tape adequately in such circumstances extend beyond the potential loss of evidence as it is not unknown for officers to include the custody video on the MG6C schedule of non-sensitive unused material which is submitted to the defence and which forms the basis for subsequent defence requests for additional prosecution disclosure. Including a custody video in the schedule when the tape itself is no longer in existence could have serious consequences should the defence later request sight of the tape, as such an omission will, inevitably, raise doubts over the accuracy of the disclosure schedules as a whole.

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3 This area has raised a number of issues, not least following the introduction of the Video Identification Parade Electronic Recording (VIPER), discussed in S. Nicholls, ‘Police Station Practice: Video Identification’ (2003) 7(3) Magistrates’ Courts Practice 1–2. For further aspects of video identification, see Attorney-General’s Reference (No. 2 of 2002) [2002] EWCA Crim 2373, The Times (17 October 2002), (2003) 67 JCL 91.

Third-party video

If the procedures for handling police videos places undue emphasis on the foresight of the individual officer then the position in relation to third party material is even more hazardous. With the increasing use of urban CCTV systems it is inevitable that many street crimes, public order offences and commercial thefts may entail consideration of video evidence which is rarely, if ever, under the direct control of the police. The potential destruction of material by third parties raises additional difficulties in that, whereas the third party may be summoned to present the evidence in court, there exists no general prosecution duty to preserve the evidence beyond a requirement to make the third party aware of the existence of the investigation and to make the prosecutor aware of the existence of the third-party material. This creates problems for the investigator in the conduct of the initial investigation which are both chronological and geographical in nature, as illustrated by the following (fictional) examples.

Case 1
A charge under s. 18 of the Offences Against the Person Act 1861 is supported by pub CCTV showing the defendant striking the alleged victim in the face with a beer glass. The defence of self-defence is based on the allegation that there had been an altercation between the two men in the same pub the previous week which led the defendant to believe that he was in imminent danger of attack by the alleged victim. Whereas the tape from the evening of the assault had been seized, the tapes from the previous week had not and they have subsequently been lost.

Case 2
A charge of theft from a shop is supported by a poor-quality CCTV tape from the store in question, raising the question of the identity of the accused. The defendant claims that, at the time of the alleged theft, he was in a shop some distance away but which also has CCTV facilities. As there was nothing initially to suggest that the other shop was involved in the investigation, their CCTV tapes had not been seized. In each case it is possible to conclude that the missing tapes should have been secured by the police as part of the investigation and CPIA and the associated Codes of Practice state that the police are under a duty to:


5 *Re Barlow Clowes Gift Managers Ltd* [1992] Ch 208.
6 Codes of Practice, para. 3.5.
7 Grievous bodily harm with intent.
pursue all reasonable lines of enquiry, whether these point towards or away from the suspect.⁸

Yet, equally, it is clear that in both cases the significance of the missing tape has only become apparent once the proposed defence has become known, which presents the defence with a tactical advantage. Under CPIA the defence is required, after primary disclosure has been made by the prosecution, to reveal the scope of the proposed defence by means of the defence statement,⁹ submitted with the objective of:

(a) setting out in general terms the nature of the accused's defence,
(b) indicating the matters on which he takes issue with the prosecution, and
(c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.¹⁰

Receipt of a defence statement compels the prosecution to revisit their initial assessment of the unused material in the case by means of ‘secondary’ disclosure.¹¹ The aim is to provide additional protection for the accused, without reverting to the pre-CPIA regime, which often required the police to undertake the time-consuming exercise of copying all the material in their possession for the defence. However, in the majority of cases the defence statement contains nothing more than a simple denial of the charge¹² and so provides little justification for the police to secure additional material such as that featured in the above cases. Even where the defence statement is more expansive, research¹³ has indicated that there is frequently a significant delay in the submission of the defence statement, making it probable that the third party will have disposed of tapes which were not initially identified as potentially relevant to the investigation in the period before the defence statement is received.¹⁴ The result is a situation where the defence are able to ascertain what video evidence is in the possession of the police before seeking to draw attention to an otherwise unrelated video in order to undermine the prosecution case and where the prosecution, and in particular the investigating officer in the case, is largely powerless to preserve the video evidence held by the third party unless this has been identified as potentially significant at an early stage in the investigation.¹⁵ The critical point is that, even though the tape in question

⁸ Codes of Practice, para. 3.4.
¹¹ CPIA s. 7.
¹² For an overview of the area, see Taylor, above n. 9.
¹³ See Crown Prosecution Service Inspectorate, above n. 4; Plotnikoff and Woolfson, above n. 4.
¹⁴ For an illustration of the operational difficulties this presents, see R v Dobson [2001] EWCA Crim 1606.
¹⁵ In the case of R v Sadleiv [2002] EWCA Crim 1064, the defence waited a full year after the alleged offence before raising the question of CCTV at the scene.
may have little or no evidential value, the very fact that the police are unable to produce a copy for the defence may, itself, be sufficient to generate doubt in the minds of the jury.

Paradoxically, the situation is little better when there is too much, rather than too little, video evidence to be considered and the police will frequently find themselves in the possession of a quantity of videotape far in excess of that required for evidential purposes. Such a situation may arise following continuous video surveillance of a given area by a single camera over a period of hours or even days. Alternatively, many commercial premises and city centre CCTV systems operate ‘multiplex’ systems on which the tape displays the images from a number of cameras simultaneously. The common factor in each case is that the investigator is left with a wealth of tape of which only a small proportion is likely to be of relevance to the case, and this raises important questions over how the remaining portions of the video are handled. Clearly the primary evidential issue is identification of the pertinent segments of the tape and their assembly for use in court, however, of equal importance is what happens to the remainder of the tape, by virtue of its status as unused material in the case. The significance of this is to be found in the 1996 Act which requires the prosecution to:

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).16

In this way it falls to individual officers, in their capacity as ‘disclosure officer’ in the case, to assess the extent to which the remaining tape might conceivably undermine the prosecution case and to ensure disclosure to the defence accordingly.

**Videotape and abuse of process**

The court may halt a prosecution inter alia where:

The prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality … the ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution.17

There have been a number of attempts to employ this principle in relation to lost or destroyed evidence,18 based on defence assertions that the absence of the item in question renders the trial unfair, and there is clearly a potential application of this principle where there have been errors in the handling of video evidence. As has been shown, the

16 CPIA s. 3(1).
identification of the relevant sections of any video evidence lies solely in the hands of the investigator and the danger for the prosecution is that a police failure to retain and disclose unused video material will later be judged sufficient to justify a stay of proceedings on the grounds of abuse of process. This has led to instances, both under CPIA and the previous Attorney-General’s Guidelines,\(^\text{19}\) where the defence have sought to argue abuse of process in order to capitalise on the mishandling of videotape by the police or prosecution. Consideration of a number of recent decisions illustrates some of the factors influencing the court in such cases.

Perhaps the most straightforward grounds for an application arise where there has been a total failure by the police to disclose video evidence to the defence, as in \textit{R v Birmingham and Others}.\(^\text{20}\) Here the videotape in question recorded events immediately preceding and during a fracas outside a nightclub, as a result of which seven defendants faced charges of violent disorder and assaulting police officers. At the start of the trial it emerged that although the tapes had been viewed by the police in the immediate aftermath of the incident, they had not been retained and their existence had not been revealed by the police to the CPS or the defence, even after there had been a number of requests for access to any remaining unused material including specific requests for copies of any videotapes. Against this background, and having visited the scene, the judge concluded that the tape would have been valuable in relation to the alibis asserted by some of the defendants and, consequently, that to allow the trial to continue would constitute an abuse of process.

In reaching this conclusion, the court in \textit{Birmingham} was influenced not only by the actions taken by the police (in concealing the existence of the tapes from both the defence and the CPS) but also by the fact that the officer in the case justified his actions on the basis that he had viewed the tapes and was ‘satisfied that they were of no evidential value to our case’. This clearly ignored the potential value of the tapes to the defence, but served to illustrate the tendency of investigating officers to seek to minimise the significance of material which does not support the prosecution case. This can be contrasted with the later case of \textit{R v Swingler}\(^\text{21}\) where the police had acted on the erroneous assurance that a video surveillance system was not operational at the relevant time and had, consequently, not seized the tape before it became lost. In dismissing an application for a stay on grounds of abuse of process in this case, Rougier J noted:

Before there can be any successful allegation of an abuse of process based on the disappearance of evidence there has to be either an element of bad faith or at the very least some serious fault on the part of the police or


\(^{21}\) Unreported, 10 July 1998.
prosecution authorities before an application can possibly succeed. That was the situation in the case of *Birmingham* …, if it were otherwise every time a significant piece of evidence by accident were not available, a defendant facing a serious charge, which might be supported by other cogent evidence, would effectively be able to avoid it on this somewhat technical ground.\textsuperscript{22}

Such cases established the enduring principle that *mala fides* or egregious fault on the part of the investigator was the essential prerequisite for a successful stay and, whereas, this may be relatively simple to ascertain in cases of total non-disclosure, such as *Birmingham* and *Swingler*, the position is considerably less clear in those cases involving the selective compilation of tapes. Here the question of what material has been omitted by the police may be central to the defence and the consequences of this process may be illustrated by the decision in *R v Stalbard*,\textsuperscript{23} where the Court of Appeal considered the impact of such a compilation tape made from an in-store multiplex system operating at the time of the theft of a customer’s purse. Following the incident the police viewed the entire tape and arranged for the portions they judged to be relevant to be assembled for evidential purposes although it was clear from the outset that this final compilation showed only a limited portion of the events surrounding the theft.\textsuperscript{24} The routine destruction of the original tapes before the case came to trial meant that there was no opportunity for the defence to examine the segments discarded by the police but, rather than immediately applying for a stay, the defence waited until the victim had stated in her evidence that she could not confirm that no one but the accused had been in the vicinity of the theft, thereby raising the question of whether the missing tapes might show another person to have been responsible.

This left the question of whether to continue the trial in the absence of the missing portions of the tape was sufficient to constitute an abuse of process and here the prosecution sought to justify the police actions by reference to para. 4.2 of the Codes of Practice under CPIA which states:

> where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, its contents should be transferred to a durable and more easily stored form before that happens.

The court declined to explore this interpretation of the Codes of Practice, although it is debatable whether this provision was ever really aimed at the selective copying of video evidence, which does not entail transfer to a more ‘durable’ medium but simply replicates portions of one videotape on to another. In dismissing the appeal the central issue for the court appeared not to be whether the police had faithfully transferred all of the relevant material contained in the original tape to the compilation

\textsuperscript{22} Unreported, 10 July 1998 at 6F.
\textsuperscript{23} Unreported, 13 April 2000, Transcript No. 199904391/X3, 199905674/X3.
\textsuperscript{24} See also *R v Stephen* [2001] EWCA Crim 2561.
provided to the defence, but rather the question of good faith as highlighted in *Swingler*. Notwithstanding some criticism of the police actions in relation to the tape, the court saw no evidence of bad faith, a conclusion based largely on the evidence of the officer in the case that the missing portions of the store tape did not show anyone else in the vicinity of the theft. Clarke LJ saw no reason to doubt this, stating that it ‘would have been quite clear [to the officer]’ if another potential suspect had been identified on the tape.\(^{25}\) Similarly, in *R v Medway*,\(^ {26}\) although CCTV tape from the scene had been seized and examined by the police, it was not retained as the investigator concluded it contained nothing of interest and, as a consequence, the tape was later destroyed. The Court of Appeal concluded that this was insufficient to render trial unfair. Again the issue of whether the police had acted in good faith in discarding the tape was seen as central to any possible stay on grounds of abuse of process. Although the purpose of such an order, if granted, was to prevent an unfair trial, not to punish the investigator, it was held that the presence or absence of malice on the part of the police was of direct relevance.

This generous acceptance of the investigator’s assessment of the evidence is in keeping with the earlier decision in *R v Beckford*\(^ {27}\) and appears to reflect the settled view of the court in all but the most extreme cases where evidence is lost or destroyed before trial, yet this approach must be contrasted with the view of the court in the earlier case of *DPP v Chipping*, where it was concluded that:

> it was not good enough in this case, any more than it was good enough in the *Birmingham* case, for the Crown to rely upon the simple assertion of a police officer that the video did not reveal anything of relevance or assistance.\(^ {28}\)

This raises the question of whether a police officer’s assertion that only the unimportant sections of a tape have been discarded, as in *Stallard*,\(^ {29}\) in any way differs from an assurance that a tape *in its entirety* contains nothing of relevance, as in *Birmingham*, and the result is a degree of uncertainty over the extent to which any tape can safely be edited without the risk of a later challenge from the defence. Clearly one solution would be to copy for the defence all videotape in the possession of the prosecution as a matter of procedure, however the logistical implications of such a policy would be daunting, particularly as this would, inevitably, require the defence to be provided with tapes in a format which they could view. In the case of a tape from a ‘multiplex’ system this could entail the production of a separate tape for each of

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\(^{25}\) A similar approach was taken in the pre-CPIA case *R v Reid (Hainsley)*, unreported, 10 March 1997, Transcript No. 9605572/Y3.


\(^{27}\) [1996] 1 Cr App R 94, concerning the destruction of the defendant’s car by the police before it could be examined by a defence expert.

\(^{28}\) Unreported, 11 January 1999.

\(^{29}\) See also *Omar v Chief Constable of Bedfordshire* [2002] EWHC 3060.
the four or more cameras recorded on each tape. Multiply this by the number of defendants, if they are represented separately, and the scale of the problem soon becomes apparent.\(^ {30}\)

In many cases the only solution has been a system of informal disclosure between the police and solicitors, whereby the defence are not provided with copies of the unused tapes (on the basis that nothing else of relevance is present) but, instead, are invited to visit the police station to examine the unedited tapes if they so wish. For the police this undoubtedly saves the time and expense of arranging for additional copies to be made, however what is less clear is whether it addresses the spirit of CPIA in relation to disclosure. The aim of the Act was to confine prosecution disclosure to circumstances where the prosecution had, either of its own volition or as a result of representations from the defence, identified material as capable of undermining the prosecution case or assisting the defence. However, the widespread use of such informal disclosure replaces this with a system based on expediency and an acceptance that a strict application of the disclosure provisions is simply not worth the effort. The potential danger in such an approach is either that potentially valuable evidence will be missed as it is clear that where such informal disclosure operates, the offer to inspect video material is seldom taken up by the defence, thereby leaving the prosecution compilation as the definitive version of events.

Inevitably, it falls to the courts to assess the degree to which the defendant’s due process rights have been infringed by defective prosecution treatment of video evidence and it has been suggested that, in considering alleged abuse of process, the courts should move away from their hitherto, somewhat technical, approach and instead consider cases by reference to more general equitable principles.\(^ {31}\) However, in the recent decisions of \(R\ v\ Feltham\ Magistrates\ Court,\ ex\ p.\ Ebrahim; Mouat\ v\ DPP\)\(^ {32}\) the Divisional Court reiterated that the basis for any claim lay in the prosecution duty to retain the video evidence in question and concluded:

\[
\text{If in all the circumstances there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention then there could be no question of the subsequent trial being unfair on that ground.}
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Similarly, where the prosecution had breached their duty to retain the video evidence then the test remains one of bad faith or serious fault. The problem with this approach is that it risks penalising the defence for the operational and logistical difficulties of dealing with the large quantities of videotape as outlined above due to the amorphous nature of the prosecution duty under CPIA.

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\(^{30}\) Such difficulties were illustrated in \(R\ v\ Calderdale\ Magistrates’\ Court,\ ex\ p.\ Donahue and Cutler,\) unreported, 18 October 2000, Transcript No. CO/1508/2000.


Videotapes and the right to a private and family life

Although it is clearly possible to challenge the misuse of CCTV as part of the broader issue of non-disclosure under Article 6, this is not the only Convention right potentially engaged by the use of videotape evidence. Article 8 provides for, inter alia, the right to a private life in that ‘Everyone has the right to respect for his private and family life, his home and his correspondence’. This is not an absolute right but cannot be subject to ‘interference by a public authority’ unless that interference is not only ‘in accordance with the law’ but also falls into one of the listed categories, the relevant one for the purposes of this discussion being for the ‘prevention of disorder or crime’.

Covert surveillance has in the past been found to violate Article 8 in the absence of legal authority. However, while the use of CCTV developed in the virtual absence of any legal regulation, its installation and replacement is permitted under the Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No. 418) and its use encouraged by s. 163 of the Criminal Justice and Public Order Act 1994. A statutory basis for legal control of surveillance over public areas was established in March 2000 when the Data Protection Act 1998 came into force. The applicability of the data protection principles in relation to videotaped material will be discussed in more detail later.

Any interference with an individual’s private life would also have to be seen as being necessary for the prevention of crime. Difficulties arise at the outset as to the definition of the privacy sought to be protected and these are well rehearsed. While the concept of privacy could be argued to exist under domestic law, at least in the context of breach of confidence, the problems with its applicability to CCTV footage relate to the fact that videotaped footage is bound to have been recorded in public, whereas Article 8 privacy rights are only invoked in this situation when private acts are performed in public.

While it has been argued that Article 8, as given greater effect by the Human Rights Act 1998, could extend current thinking and shape it more to suit a modern society, it is submitted that, even if this were to be the case, Article 8 would be of little use for anyone wishing to challenge the admissibility of or non-disclosure of video evidence although perhaps the effect of Article 8 could be argued to be to instil more ethical treatment of CCTV evidence by CCTV operators rather than a direct

33 Following the principle in Jespers v Belgium (1981) 27 DR 61, that the accused should have ‘at his disposal ... all relevant elements that have been or could be collected’.
35 Taylor, above n. 2.
38 See Peck v United Kingdom (App. No. 00044647/98); Herbecq v Belgium (App. No. 32200/96) and von Hanover v Germany (App. No. 59320/00, 24 June 2004).
39 Taylor, above n. 2.
impact upon the trial. The actual taking of video footage will always be justifiable under the derogations contained within Article 8(2) relating to the prevention of crime so long as the action taken is not disproportionate to the harm sought to be prevented. The failure to disclose the footage is, within the human rights context, more obviously an Article 6 issue as discussed above. Even if an Article 8 action were to be taken and a violation to be found, it is unlikely to affect the outcome of a criminal trial or appeal.40

Video evidence—the data protection principles

The Data Protection Act 1998 came into force on 1 March 2000 as a result of the UK’s obligations under Community law in enacting Directive 95/46/EC (the Data Protection Directive). Accompanying the Act is a CCTV Code of Practice,41 issued by the Data Protection Officer under s. 51(3)(b) of the 1998 Act and is intended to provide ‘guidance as to good practice’ for users of surveillance equipment such as CCTV. Contained within the 1998 Act are the data protection principles42 which state that data must be fairly and lawfully processed for limited purposes.43 Data must be accurate, adequate, relevant and proportionate to the aim for which the information is obtained.44 The data must not be kept for longer than necessary,45 processed in accordance with individuals’ rights,46 kept securely47 and should not be transferred to countries where adequate protection measures do not exist.48

While, if adhered to, these principles could be said to provide for a basic minimum standard of care to be taken with data and thus help in dealing with at least some of the pitfalls of video evidence, it would appear that they have little to offer an individual who wishes to contest the retention or lack of disclosure of videotaped material to him. Presumably, CCTV footage used by the police, for example, would be processed fairly and lawfully for a specific lawful purpose, i.e. the detection and prevention of crime. Indeed, most security cameras set up by companies would be covered although the status of private security cameras handed over for the purposes of criminal investigation could be a little more problematic. There is little else covered by the principles to help an individual aggrieved by the fact that some of his activities may have been captured on videotape. Accuracy is obviously of paramount importance so any inaccurate time or date details could be challenged as

40 See, e.g. D. Ormerod, ‘ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches’ [2003] Crim LR 61 at 67 where it is suggested that the lack of coherent guidance for trial judges in such issues leads to the courts routinely admitting covert surveillance evidence ‘despite acknowledged breaches of Article 8’. See also, B. Fitzpatrick and N. Taylor, ‘Human Rights and the Discretionary Exclusion of Evidence’ (2001) 65 JCL 349.
42 The data protection principles are contained within Sched. 1, Part 1 to the 1998 Act.
43 Data protection principles, para. 2.
44 Ibid, paras 3 and 4.
45 Ibid. para. 5.
46 Ibid. para. 6.
47 Ibid. para. 7.
48 Ibid. para. 8.
could the inaccuracy of any automatic facial recognition systems used. Various issues could be contested provided that, first, the defendant is aware that the footage exists in the first place (see above regarding the difficulties in ensuring full disclosure is given) and, secondly, that the defendant is aware of his data protection rights.

There is more awareness of the principles enshrined in the 1998 Act than those of its predecessor, the Data Protection Act 1984.49 Those who work in professions involving data collection and retention will, with adequate training, hopefully be aware of the issues pertaining to their particular areas as will those who have to deal with s. 7 subject access rights on a regular basis. If CCTV operators are unaware of their DPA obligations, it is of little surprise that the DPA is not as influential as it could be. A recent Home Office study found that levels of knowledge and instruction varied and were more often a result of ‘shared wisdom’ amongst operators rather than formal training.50 Indeed, of the 13 control rooms dealt with as part of the study, only one provided its operators with specific data protection guidance in the form of a booklet. The study concludes that guidance should be given as part of the Codes of Practice, accompanied by advice on interpretation as it was felt that interpretation of the principles varies from operator to operator. Clearly, CCTV operators need to be aware of not only ‘best practice’ when dealing with the capturing and retention of images but need also to be aware of the ethical considerations which undoubtedly should be taken into account. The influence of the data protection regime is a regulatory one and therefore its potential influence on culture and existing practice should not be underestimated. Only through proper training could the regime eventually contribute to the reduction of the hazards associated with video evidence. Those responsible for the operation of CCTV equipment can, in an ideal world at least, be expected to have at least some knowledge of the data protection principles governing the operation of the equipment. But as far as those on the receiving end of the CCTV operation are concerned, what awareness does the type of individual have who happens to get captured performing some kind of dubious activity by a CCTV camera? And even if he is aware of the data protection principles, is there even any use that he could make of them? Following breaches of the data protection principles and the Codes of Practice, the Data Protection Commissioner can issue an Enforcement Notice under s. 40. However, breaches of the principles in themselves surely will not make the obtaining, processing and sharing of the evidence unlawful and therefore inadmissible in a court of law.

49 In any event, the 1984 Act was more limited in its scope in that it only applied to data stored on computers.

Conclusion

As has been shown, the treatment of CCTV evidence (most notably by the police) will continue to cause concern, given the ease with which it can be lost and distorted by means of selective compilation. A more positive application of the courts’ powers regarding abuse of process may, ultimately, lead to a more equitable stance towards cases of missing video evidence but, unless or until this occurs, the courts will continue to risk confusion and unfairness in the treatment of this particularly compelling form of evidence. The difficulty is that the third party who initially produces the video in question is largely beyond the scope of the law of disclosure for, as with other forms of evidential material, it falls to the Office of the Information Commissioner to retain any CCTV material which might, ultimately, prove relevant to the investigation. For this reason it is suggested that a more rigorous application of the doctrine of abuse of process represents the most practical and expedient mechanism by which investigators can be compelled to adopt a more rigorous approach to the treatment of CCTV material in order to prevent the loss/destruction of potentially valuable material.

Similarly, although an individual may, in theory, be able to contest the collection and retention of material against him under the human rights or data protection principles, it would seem that avenues of redress are, in practice, limited and, notwithstanding that the collection of video material relating to an individual might, prima facie, appear to be a breach of Article 8 privacy rights, this will almost always be justified under the Article 8(2) derogations in order to prevent or detect crime. The use of data protection principles raises similar issues because, although redress may be available (if the individual concerned is even aware of the principles) this will be of little practical use. It is evident that CCTV will continue to play a vital role in a growing number of cases, however the danger is that the desire to utilise this compelling form of evidence will, ultimately, have deleterious consequences for the due process rights of the accused.
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