Personal data in social media

Public authorities and private companies are increasingly turning to social media for their communication with customers and citizens. It is a trend that raises many complex legal questions. During spring 2010, the Data Inspection Board announced two decisions, which provide guidance in using social media in respect of the Personal Data Act.

I am a frequent speaker on the legal aspects of social media and cover everything from the liability of the service provider; market law issues; and the use by public authorities of social media through to the contractual terms and conditions of service. In many cases there are no relevant judgments to guide us in practice, but in at least one respect guidance has arrived. During spring 2010, the Data Inspection Board announced some decisions which illustrate the issues regarding responsibility for personal data in social media, i.e. who is responsible under the Personal Data Act for the processing of data. The decisions concerned in part the racing site Reco.se (case no. 1288-2009), and in part use by the municipality of Katrineholm of Facebook, Twitter and a blog (case no. 685-2010). The decision answers several questions in respect of the Data Inspection Board's application of the Personal Data Act in social media.

Responsibility for personal data

A person who alone or together with others determines why and how personal data is to be processed is called the controller of personal data under section 3 of the Personal Data Act (1998:204, PuL). Reco.se is an independently developed website where the service provider had decided the focus, form and structure of the service and where it was actually possible for the service provider to remove, edit and block information. This constituted a responsibility for personal data both for the information included in the service by the provider and for information which was collected by the user entering the personal data to the service. In the Katrineholm decision, the municipality was deemed to be responsible for personal data published by itself or others on the blog and Facebook. As regards Twitter, the responsibility for personal data only extended to such information as the municipality had posted itself. According to the Data Inspection Board, the reason for this was that the municipality had neither the legal nor actual ability to influence the comments of others with reference to the municipality's Twitter account.

The decisions are split on how responsibility for personal data is to be applied.

Processing of personal data – Reco.se

The Data Inspection Board opened by concluding that the service represented structured processing and thus the abuse rule in the Personal Data Act (section 5a) was not applicable. On applying the rules in the Personal Data Act on processing,

the Data Inspection Board concluded that the necessary processing associated with the service – i.e. consumer guidance – was in principle, permitted under section 10, subsection (f) of the Personal Data Act (balance of interests). It was, however, incumbent upon the service provider to ensure that the processing of personal data did not contravene the Personal Data Act. The interesting aspect of the decision is that the Data Inspection Board felt that several of the obligations imposed on a controller of personal data under the Personal Data Act could be met by introducing provisions to the terms and conditions of use or by providing information on the website. These are:

- the processing of Personal Data is to comply with the fundamental requirements in section 9 of the Personal Data Act;
- sensitive personal data and data on violations of the law are not to be entered by the users; and
- persons registered must be informed of the processing (section 24).

In addition, the service provider, when it became aware of it, was compelled had to ensure the removal of personal data processed in contravention of the Act. In addition to this, the general obligations under the Personal Data Act apply. These include the rectification, blocking or deletion, as soon as possible, at the request of the person registered, of personal data which has not been processed in accordance with the Personal Data Act (section 28).

Personal data processing – municipality of Katrineholm

According to the abuse rule, the management rules in the Personal Data Act are not applicable to unstructured processing, i.e. processing of personal data which is not included in, or intended to be included, in a collection of personal data which is structured in order manifestly to facilitate searches or compilations of personal data. Behind this rather inaccessible wording, is concealed a desire on the part of the legislator that daily personal data processing, which is typically of less significance for the protection of integrity should be exempted from the normal rules. Examples of this are text in a word processing program or e mail correspondence. Despite the fact that Facebook's structure is intended to facilitate searches, the municipality had no legal or actual ability to decide over this structure because this was de facto determined by Facebook. The municipality can remove but not change the content in the structure and form of Facebook. In the light of this, the municipality's processing of personal data appears to be less risky from an integrity perspective. Use of Facebook is both common and widespread and this combination has led the Data Inspection Board to the judgment that the municipality's processing of personal data via Facebook represents a customary use of generally used functions which falls under section 5 of the Personal Data Act. The Data Inspection Board did not feel that any other assessment should apply to the blog or twitter account.

Concluding comments

Both decisions provide good guidance for the use of social media in respect of the Personal Data Act. The Reco.se decision shows that social services where the service provider has created, and has control over, the structure may well fall under the normal processing rules in the Personal Data Act, but that the service provider can meet several of the obligations that are incumbent upon the controller of personal data by imposing demands on the users by way of terms and conditions of use. Furthermore, it would seem to be clear that in some cases, having information available on a website will suffice to meet the duty to inform the registered person. In the Katrineholm decision the Data Inspection Board shows how it reasons in respect of determining whether the technical abuse rule is applicable. The reasoning put forward by the Data Inspection Board is especially interesting for publically accessibly social media like Facebook and Twitter.

In recent years, the number of services with social functions has exploded. On a general level, these can be divided into two different categories – in part web services, the main aim of which is for users to be able to spread and share thoughts, ideas, information, links, images and other content and in part the almost classic applications and web platforms which are provided with links to these (Spotify is a good example but even hardware platforms such as Boxee Box have connections to Facebook and Twitter). Today it is possible with a Facebook or Twitter account to connect together in principle all types of services and share information with a large number of channels at the same time. Public authorities and private companies are increasingly turning to social media for their communication with customers and citizens. Communication takes places at very high speeds, which represents challenges for users in meeting legal requirements.

The legal aspects relating to the use of social media comprise many complex questions and demarcation issues, and as usual when it comes to solving legal problems associated with new phenomena, it is largely about applying old rules to new circumstances – circumstances which in many cases were not known or even thought of when the rules or principles were developed.

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