

Information technology and law

Wolfgang Kilian*

Professor Kilian visited Wellington in Spring 1980. While here he discussed the results of his research¹ on the computerised personnel information systems used by the 220 biggest German enterprises and also delivered a paper in the Law Faculty on the present state of the law relating to information technology in West Germany and Europe generally. An edited version of that paper is printed here for readers' information.

I. INTRODUCTION

To me as a German Civil Lawyer visiting New Zealand two facts are most remarkable:

The strong taste for social security in New Zealand. The New Zealand Accident Compensation Act 1972 gave incentives to worldwide progression from tort liability to social insurance systems.

The modern information management in New Zealand. The Wanganui Computer Centre Act 1976 established not only a computer-based information system to aid the departments of Police, Justice and Transport but also safeguarded the privacy of individuals against unwarranted intrusion by computer systems two years earlier than was the case in Germany.

Social security on one hand, privacy protection on the other hand are the main concerns in the computerisation debate and the efforts to establish industrial democracy in the Federal Republic of Germany and in Europe. Therefore, I am happy to give a short report on legal problems associated with information technology from a German point of view.

Statutes and regulations that might be called "law of personnel data record keeping" do not provide consistent principles in Europe. The legal systems are too different. But law tends to reflect a coherent approach to balancing the interests of society, public administration, commercial enterprises, organisations, and individuals. Individuals in their role as worker, school child, house wife, student, patient, tax payer, car driver, bank customer, credit applicant, airline

* Professor of Law, University of Hanover, Federal Republic of Germany.

1 A monograph on the topic is soon to appear in Germany.

user are all subjects of automated records in most of the European countries. The collection, storage, use, dissemination of information and the access to data-banks became the connecting links between information technology and legal rules.

Three years ago the following news appeared in German newspapers:

Two insurance representatives found that after terminating their work contracts with a private insurance company they were unable to find new appointments despite applications to numerous other companies. By chance they discovered that the rejections were due to incorrect information issued by a mutual information centre of the insurance companies and building societies. From this centre information regarding representatives in the field is stored centrally and handed out to the members upon request. Each insurance company makes a report when a representative leaves, containing data concerning the reason for giving notice, the police good conduct certificate, civil law offences, agency business complaints, turnover and cancellations. All data is confidential and must be withheld from the person concerned. The function of such a system is clear: The common information centre pools, at a federal level, personnel information about employees leaving employment. Each insurance and building society can obtain information of an applicant's professional career prior to appointment without the applicant's knowledge. This may indeed help to prevent wrong decisions and to save expense but on the other hand the person concerned is defencelessly at the mercy of the information ring, because clerical or transmission errors, faulty reports, mistaken identities cannot be checked or corrected.

If chance had not led to the discovery of the information network, corrections would have been impossible and further damage would have arisen. The persons concerned knew neither the content of the data stored nor were they involved in the setting up of the information network; they did not know anything of its existence. It is to be questioned whether the particular industrial law is sufficient to guarantee the exercising of existing rights or whether an additional "activity protection" is not necessary for automated systems as condition for an effective "integrity protection".

II. PRESENT USE AND FUNCTIONS OF PERSONNEL INFORMATION SYSTEMS

Computer-based personnel information systems have been set up since the beginning of the 1970's in many large businesses and authorities. The federal government, states, local authorities, private and public insurances, hospitals, credit bureaux and industrial concerns use such automated systems, containing data on persons. This technological development is due to several reasons:

(1) In business and administration there is pressure to rationalise in order to save expenses and, in business, to obtain or safeguard competitive advantages. Above all by means of automation costly workforces are freed from routine work.

(2) There is a desire to have more comprehensive information available more quickly in order to improve internal administration and planning. As a result all phases preceding a decision as well as the organisation of the decision-making proceedings gain in significance. Therefore, the systematic effort to reduce informational uncertainties becomes an important driving factor for the establishment of automated systems.

(3) The growing interdependence between private and state authorities increases the information network and demands a quick and accurate communication. In a highly sophisticated industrial society large enterprises could scarcely be in a position to accomplish their duties without the aid of a computer because the external requirements are growing in leaps and bounds. It is estimated that more than 100 statutes and regulations at the German federal level require the passing on of data regarding persons from business enterprises to other places. Among the addressees are tax administrations, national insurance institutions, courts, labour authorities, churches, employers' associations, unions and many others. Already in the Federal Republic of Germany at least 50 individual pieces of data on each employee must be compiled and kept up to date. To this are added proficiency data for personnel planning. All individual data represent combinable variables which are available for many purposes and can portray each employee in qualities which constitute his personality. For example, computer-controlled statements about capabilities, achievements, personal development, reliability and creditability are possible.

Even though for the reasons named practically all businesses having more than 5000 employees use computers for the personnel sphere, every computer-based personnel data file cannot be classified as a "Personnel information system". There is still uncertainty regarding the definition of a personnel information system. Some authors call an automated payroll accounting system a "Personnel information system", although payroll accounting is not, in the management sense, within the responsibility of personnel planning but that of financial accounting. On the other hand an automated payroll accounting system effectively forms the basis for planning methods. This may be the reason why different development stages of a personnel information system are differentiated, extending from accounting systems, statistical decision aids to planning methods with conversational mode.²

The staff personnel manager has the task of providing the necessary manpower for the fulfilment of the business purposes and in so doing so has to consider the interests of the individual employee. Personnel information systems facilitate the production of transaction data, support the auditing sector and promote the planning and decision processes. To put it simply one could say: Personnel information systems fulfil administrative and planning functions.

Administrative personnel information systems serve to cope with the legal and business requirements such as payroll accounting, appointments, transfers, promotions and dismissals. Most of the existing systems seem to be at this stage of development e.g. the Volkswagenwerk system.

Planning information systems installed in other enterprises, like IBM or Mercedes-Benz, contain more than 300 individual data items on each employee and include personnel planning schemes. They make it possible to calculate and organise the employee requirement, their procurement, placement, release, training and further education as well as to develop wage and salary codes or promotional

² My preference is to describe a personnel information system by its functions rather than to give a definition.

and training programmes. In any case the exchanges between administrative and planning methods are easy. For the most part the personnel information system does not consist simply of one single data bank but of several self-contained but interlinked sub-data banks. Thus it is possible to link up data from the personnel data bank e.g. data on education, advanced training, development, capabilities, achievements, performance ratings and medical fitness of an employee with the assistance of a method data bank not only with an accounting data bank but also with an employment data bank. The latter contains mainly data about work vacancies, job functions, job organization and security requirements.

The structures and functions of these personnel information systems make it clear that there are numerous opportunities but also risks for those concerned, upon installation. As far as industrial management is concerned personnel information systems facilitate new and speedy data linkages for many purposes, even for the purpose of a just work organization. Sociologically the new technical possibilities might lead to an increase in the power of those who can use or supervise them. The programming of the communications presumably favours a centralizing of the decision responsibilities at the top of the organizational hierarchy because previous planning duties of the middle decision authorities are automated and thereby probably the organizational significance, the co-decision and co-management possibilities of the middle and lower authorities are diminished.

From the industrial law point of view up to now there have therefore been almost no empirical investigations because an automated personnel information system is merely regarded as a more modernized personnel file administration. In reality, however, it represents a qualitatively new means of organization which produces not only influences of rationalization but also can change accession processes, supervisory processes, decision processes and co-management processes in business.

III. LEGAL PROBLEMS AND SOLUTIONS

In Europe the legal problems concerned with the computerized society are sought to be solved on three levels — the individual level, the collective level, and the organizational level.

The individual level is covered by data protection Acts, as they came into existence in Sweden in 1973 and since 1977 in the Federal Republic of Germany, Austria, Norway, Denmark and France. Draft legislation now exists in Belgium, Luxembourg, the Netherlands, Great Britain, Italy, Switzerland and Spain. The collective level is not yet regulated in Europe except in Norway and Sweden; this aspect seems to constitute the most important topic for the future. The organizational level sometimes forms a component of data privacy legislation and has recently become the subject of international drafts in the European Community.

A. The legal situation at the individual level.

As far as individuals are concerned by databanks, several Data Privacy Acts in Europe enforce individual rights and freedom. In Germany the Federal Data Protection Act which came into effect in 1978, is intended to protect personnel

data from misuse when stored, processed, transmitted, changed and erased. The Act changed the problem awareness of computerized data banks. It applies also to private businesses which store personal data in data files for their own or others' purposes or which pass on such data. Every person has the right to

- information regarding the data stored about himself;
- correction of the data should they be incorrect;
- blocking of the data if neither correctness nor incorrectness is determined;
- erasure of the data if the storage was inadmissible.

Under section 3 of the Federal Data Protection Act "personal data" means "individual data about personal and material circumstances of a named or ascertainable natural person". As is seen from the information and the legal system the data collected, e.g. by the employer regarding the personal, professional or material circumstances of an employee also come under this heading. The law avoids the determination of disputed legal terms "personal sphere", "confidential sphere", "intimate sphere" or "public sphere" and instead protects basically all personal data independently of the social and economic roles which the persons concerned occupy.

The Federal Data Protection Act does not govern the phase of procurement of personal data because it only protects the phases of storage, processing and transmission. The principles therefore apply which have been developed for non-automated ascertainment of data. This means above all the obligation to formal equality of personal treatment. There is basically a formal equality of treatment with regard to automated systems only if as regards the dimensioning of the data basis an equal data framework is used for comparable groups of persons (e.g. employees in a special employment position), and the data collected must be valid as well as reliable. The validity demands evidence for the process of gaining the initial data (interview, questionnaires, psychological tests) as well as evidence for the stage of aggregation (initial data; data based on the evaluation of initial data). The reliability of the data collected depends on its being kept up to date; this is particularly necessary in the case of industrial medicine data regarding a person. Finally the questions up to now considered inadmissible are not therefore admissible because the answers go into a personnel information system, for the possibility of a comprehensive machine storage and processing of answers does not create any legitimate grounds for an extension of the question list.

The consent of a person to process data according to section 3 of the German Federal Data Protection Act represents a particular problem. Storage, transmission, amendment or erasure of personal data is only admissible if this is allowed by a legislative provision or if the person concerned has given his consent. Large businesses at present are starting to demand this formal declaration of consent in the written work contract. Section 3 of the German Federal Data Protection Act offers the possibility for this if the employer makes special reference to the consent.

The consent or agreement of the employee has, above all, considerable significance in the case of corporate enterprises. About 80% of large businesses process

all, employee data of the inland affiliate groups of a corporation centrally at the parent company. As the affiliate companies as corporate bodies do not store the data themselves they are "Third Parties" in the sense of the Federal Data Protection Act. A transmission of employee data to "Third Parties" is allowed according to the Federal Data Protection Act only under certain conditions. These are: for the purposes of the work contract or for the safeguarding of the legitimate interests of the storage body or of the Third Party as long as the legitimate interests of the employee are not thereby adversely affected. Because these requirements are not always fulfilled it is only the consent of the employee that removes the obstacles for the group data processing.

Whether a general permission to process data can be seen in every consent is a matter of doubt. As in many parallel situations this depends on the individual circumstances and above all on the respective market situation. In times of high unemployment the consent of employees in connection with the work contract does not represent a sure indication of the voluntary nature of the permission to process data.

Under the German Federal Privacy Act every person has the right to be informed about data stored on him in any databank except those of the Police and Secret Services. Public registers at the federal and local level provide knowledge of the existence and content of databanks. Checking the register is free of cost; the inquiry of a defined databank costs up to DM20 (approx. NZ\$10). It is interesting to remark that outside of automated databanks the German law — contrary to the legislation in Sweden and the United States of America — provides no right of a person to access public files. German employees have been entitled since 1972 to check their personnel data in business files. The extension of free access to databanks causes many problems, especially for medical databanks (guarantee of physician's secret) and databanks for planning purposes. There exist also clear practical limits as well as textual limits to the exercising of the right to access. Difficulties occur due to the specific representation of the data in the computer, for data is not directly accessible but must first of all be retrieved with the help of special techniques.³

The German Federal Data Protection Act provides two additional precautions for protecting individual freedom: At plant, local, and federal level, control institutions called *Datenschutzbeauftragte* (commissioners for data privacy) are established. Everybody is allowed to ask for their support free of cost. Public *Datenschutzbeauftragte* are entitled to investigate databanks and to report to their competent authorities. Many reports have now been published and they prove the importance of control measures for automated data processing.

Another more technical precaution is the list of data security measures appended to the Federal Data Protection Act. Data security comprises two different things: firstly checking procedures to minimize risks with respect to correctness, reliability, and validity, and secondly technical provisions against deliberate misuse by

³ There has been very little research into the methodological, organisational and psychological problems connected with this.

unauthorized people, e.g. checking access to computer centre, checking access to remote interfaces, checking user identity, checking on rights of access to databank, checking on rights of use of communication lines.

Every person in Germany is therefore entitled to exercise against the owner of a databank in personnel the following rights:

- to ask for support of a *Datenschutzbeauftragter*;
- to forbid data processing with personnel data until law gives express permission or he himself agrees;
- to require information about his personnel data stored;
- to intervene with the following stipulations:
 - if personnel data are incorrect they must be amended;
 - data, of which correctness or incorrectness cannot be established must be blocked;
 - data, which are no longer required for the purpose for which they were stored, must be erased;
 - medical data of which correctness can be disputed and cannot be checked by the databank owner, are to be erased.

A general comparison with the other European Data Protection Acts on the rights of data subjects leads to the following results. Only in France, Germany and Sweden has the individual a right to be informed of the obligation or freedom to disseminate information. The right to ascertain or to be informed of personal data storage is a constituent part of all European Data Acts except that of Luxembourg. All Data Acts acknowledge the right of a person to access his own data set; exceptions are made in France with respect to medical records (where the transmission by a physician is required) and Denmark (where only partial or conditional access is permitted). The demand for corrections or erasure of wrong individual data is approved by all Data Act countries; differences in the existing European laws affect the procedure (direct intervention in Germany, interposition of a commission in Austria and Sweden, control by a judicial tribunal in France).

One may summarize that every person in most European countries is legally entitled to exercise control on automated data related to his person. But it is doubtful whether these rights will lead to an effective countervailing power in future. Most people pay no attention to technological possibilities and are unable or unwilling to perceive or observe repercussions on their status. As the consumer protection debate in Europe shows a framework of additional precautions is necessary to establish an informational equilibrium in an information society.

B. The legal situation at the collective level

In Europe as far as organizations and group interests are concerned by information technology devices there is less legislation but an increasing number of general agreements and court decisions. The most important developments took place in Norway and Sweden.

The first national data agreement between an Employers' Confederation and a Trade Union was signed 1975 in Norway for the iron and metal workers. In 1976 there followed a framework agreement concerning computer systems between the organizations of all employers and all trade unions. The framework-agreement introduced data shop stewards in enterprises and focussed upon the processes of design, introduction, and use of computer-based systems. The utilization of personnel data was left to shop agreements. In addition, the Act Relating to Worker Protection and Working Environment of 1977, which institutionalized industrial democracy in Norway, contains in section 12 rules for automated system properties and specific points for participation. The result in Norway is a strong participation of workers' representatives in system designing and application.

In Sweden the Codetermination Act of 1976 contains a paragraph that requires employers to inform trade unions about technical developments and the principles of personnel policy. As the legislative history makes clear the paragraph is to serve as the basic rule in the computerization process. Since the employer has the last word the function of trade unions so far is more of an advisory nature.

To understand worker participation at the workshop level in Germany it is necessary to take the basic structure into account. The most important Act is the Works Council Act of 1972 (the *Betriebsverfassungsgesetz*). Its principles are bound to the idea of cooperation between management and works council.⁴

The German cooperation model structure leads to a series of important rules: the employer and the works council shall work together in accordance with the valid collective labor agreements, in a spirit of mutual trust, and in cooperation with the trade unions represented in the works and the employers' organizations, to promote the interests of the employees and the works (section 2); If necessary, a conciliation board shall settle differences of opinion (section 76); Employer and works council shall discuss disputed matters with a sincere desire to reach agreement and shall make proposals for settling differences of opinion (section 74); Members of the works council are obliged not to reveal or utilize operational or business secrets which have become known to them by virtue of their membership (section 79); Neither the employer nor the works council shall use labor dispute measures against each other (section 74); And the most important principles are laid down in section 75 of the German Works Council Act:

(1) The employer and the works council shall observe that all persons working in the plants are treated in accordance with the principles of law and justice and particularly that they are not subjected to discrimination based on origin, religion, nationality, descent, political or union activities or views, or sex. They shall ensure that employees are not discriminated against because of their age.

(2) The employer and the works council shall protect and further the free development of the personalities of the employees in the plants.

Various differentiated rights to information of the works council originate in these cooperation principles. In sharp contrast to the U.S.-conflict model German

⁴ This is to be compared with the National Labour Relations Act in the U.S.A. which emphasises confrontation rather than cooperation.

employers have to keep the economic committee of the works council "timely and thoroughly" informed concerning economic matters of the plant. Those matters include: The economic and financial situation of the enterprise; the production; investment programs; new methods of work and protection and planned organizational changes. Sections 87 and 90 of the Works Council Act require the employer to inform and ask for consent for new technical equipment or changes in working procedures. With respect to personnel planning the works council is entitled to agree or disagree on the personnel questionnaire, evaluation principles, and guidelines regarding personnel selection in cases of employment, transfer, reclassification and dismissal. These rights of the works council together form a flow of information which at present has to be applied to automated information systems. Most of Germany's biggest multinational and national enterprises have introduced information systems in personnel for accounting and personnel planning procedures. The German Works Council Act 1972, due to the technological situation eight years ago, does not mention automated information systems in personnel expressly. So the question arose if and how participation rights of the works council are to be directed towards design, introduction, and application of automated systems. If so — and several court decisions confirmed this opinion of mine published in 1975 — the German Works Council Act serves as a specialized data protection act in the labor field.

The consequences are the following. Besides the individual rights of an employee according to the Federal Data Protection Act there exist collective rights of the works council according to the Works Council Act. This is of importance regarding the effectiveness of interventions. For example, an employee himself is not entitled nor in the position to control the introduction of an information system in personnel. If the introduction is subject to section 90 of the Works Council Act — and there is a high probability that those systems are to be classified as "technical equipment" — the introduction of computer systems is subject to the consent of the works council. As the introduction of computer systems is a matter of high investment with considerable consequences the works council must participate at a stage of the decision-making process in which there are still genuine alternative actions. To take a further example: Due to the competence to agree to guidelines in personnel management (section 90) the works council may determine the programme viewpoints for the work with personnel data. It would concern the determining of the programming viewpoints if the criteria are fixed according to which the computer is supposed to select 100 employees for dismissal. The concrete applications of the selection programme for ad-hoc questions are on the other hand not subject to the approval of the works council because the works council had already intervened at a previous stage and a participation in each processing operation would in the final analysis make the data processing incapable of functioning. And as a last example: The pattern for communication between business management and works council differs clearly from the pattern for automated systems. The works council can do little with verbal communications about findings which the employee gains from the personnel information system if he is not immediately informed of the question dimensions and decision variables. A "comprehensive notification" according to sections 80 and 92 of the Works Council Act requires the indication of the processing programme. Otherwise

the existing rights of the works council would be diminished and decision-making competence would be passed on to the management.

As far as is known no other more general laws or agreements on workers' participation in information technology development or application exist in Europe, but several commissions have made suggestions favouring collective bargaining. The report of the Committee on Privacy in Great Britain of 1972⁵ recommended a standing commission on the problems of information technology. A significant proposal was the demand for a responsible person in every enterprise for the control of computer systems. As yet however there is no legislation.

Altogether the situation tends to favour collective bargaining procedures in different modes. To me collective bargaining seems to be more effective than grants of individual rights, which are not put into practice. For an average person information technology is too complex to comprehend.

C. The organizational level and international drafts in the European Community

It is well known that information technology transcends national borders. The transborder dataflow increases within multinational corporations. The Ford Company of Germany for example transmits corporate data via satellite to Detroit, U.S.A. And in the most recent example a parent company in the chemical industry located in the U.S.A. demanded medical data of all employees from affiliate companies in Germany.

Several information systems like the bank electronic fund transfer system facilitated by the SWIFT corporation at Brussels, Belgium, or the airline reservation system operate worldwide. National legislation ends at the border. Some data protection Acts such as the Austrian Data Protection Act provide regulations concerning data export. All European data protection Acts except the German Act established data control boards for registration, licensing, and/or policy making with respect to data export. Though multinational companies and time sharing service firms oppose efforts to reach international agreement, because they fear restrictions, international agreements are needed. They will have to develop principles to protect personnel data crossing international borders and to protect personnel data crossing international borders and to harmonize each country's rules to avoid needless disruptions of international communication.

The European Community plays an active role in this debate. In May 1979 a Council of Europe Subcommittee drafted a "Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data" which if adopted by the member states will provide minimum legal standards for uniform data protection in the public and private sector in Europe.

The purpose of this Convention is "to secure in the territory of each Contracting Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him". The basic

5 (Younger Committee) H.M.S.O., London, 1972, Cmnd. 5012.

topics (safeguards, sensitive data, sanctions, remedies, transborder flows) take the national legislation into account.

A similar Convention called "Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data" was proposed in 1979 by the OECD.

In addition to legal provisions the nine member states of the European Community are considering far reaching policy for the information society in the 1980's, and in 1979 the Commission of the European Community, adopted a report entitled "European Society Faced with the Challenge of New Information Technologies". Several actions were urged by the Commission:

First action: develop a social policy to prepare the climate for innovation, and in particular:

- pool studies on the impact on employment and other social consequences;
- explore with the social partners measures such as collective agreements, designed to ensure that innovation is introduced in an acceptable way;
- establish a programme in the key fields of education, training, and dissemination of knowledge, designed to reinforce the efforts of Member States in particular in schools and in industry itself;

Second action: use the normative powers of the Community to create a homogeneous European public market for a tele-communication equipment and services through Council decisions which:

- commit the telecommunications administrations to introduce common harmonized services on the new digital networks from 1983, and to purchase for them only harmonized equipment from 1985;
- establish the principle of an open Community market for terminals, in which private industry can compete.

Third action: promote a European information industry by:

- facilitating investment by the private sector in data bases and related services;
- stimulating worldwide exports of European information industry products.

Fourth action: enhance the value of national and European programmes in the fields of satellite communications and detecting earth resources by:

- bringing together users to establish markets;
- establishing standard interfaces for earth terminals;
- establishing legal and policy frameworks which permit the most effective Community-wide use of new facilities such as television satellites, as well as in third world countries.

This ambitious program, if accepted by the member states Belgium, Denmark, France, Germany, Great Britain, Ireland, Italy, Luxembourg and the Netherlands, will influence the development of information technology throughout the world. It also will influence the minimum standards in law we need to safeguard individual, group and state interests,

YOUR LEGACY TO HUMANITY THROUGH CORSO

CORSO is a wholly New Zealand aid and development agency, founded by New Zealanders over 30 years ago. Since then, it has assisted hundreds of thousands of people to build a better and more human life. It is a non-denominational, non-sectarian organisation and will provide assistance irrespective of a person's creed, colour or race.

CORSO is concerned with helping people to help themselves. It gives New Zealanders the opportunity to assist people overseas who are suffering and lacking the basic essentials of life — health care, education, decent housing. CORSO attacks the causes of poverty so as to remove the barriers which hinder and prevent development.

If you require further information, please write to:

CORSO, BOX 9716, WELLINGTON