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Thorntons Logo and their email address:
Innovate@Thorntons WS

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**Disability Discrimination Act Part IV
Scottish Disability Team
30 October 2003**

Lesley Paterson and Hester Middleton

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Brief Legal Overview
by
Lesley Paterson

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The Special Educational Needs and Disability Act 2001

- ▶ **Further and higher education no longer excluded from the DDA**
- ▶ **Enforceable civil rights for disabled people in education**
- ▶ **Duties introduced in 3 stages**

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Timescale for Implementation

- ▶ **1st September 2002**
- ▶ **1st September 2003**
- ▶ **1st September 2005**

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What Constitutes Discrimination?

- ▶ **Less favourable treatment that cannot be justified [s28S(1)]**
- ▶ **Failure to make reasonable adjustments where there is a substantial disadvantage [s28S(2)]**

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Less Favourable Treatment

- ▶ **Arrangements for determining admissions [s28R(1)(a)]**
- ▶ **Terms of enrolment [s28R(1)(b)]**
- ▶ **Refusal of applications [s28R(1)(c)]**
- ▶ **Student services [s28R(2) and (11)].**

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Justifying Less Favourable Treatment [s28S(6) - (9)]

- ▶ **Maintain academic standards**
- ▶ **Maintain prescribed standards**
- ▶ **Material and substantial reasons**
- ▶ **Onus on institution**

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The Duty To Make Reasonable Adjustments [s28T(1)]

- ▶ **Substantial disadvantage**
- ▶ **Date of implementation**
- ▶ **Anticipatory requirements**
- ▶ **Knowledge and anticipated knowledge**

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Determining What is Reasonable [s28T(2)]

- ▶ **Type of service**
- ▶ **Nature of institution, its size and resource**
- ▶ **Effect of disability on disabled person**

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- ▶ **UK Cases in the pipeline?**
- ▶ **Focus on practices, policies and procedures**

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**Data Protection Act
1998
by
Hester Middleton**

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Data Collection

Examples:

- ▶ **application/
enrolment forms**
- ▶ **accommodation services**
- ▶ **examination scripts**
- ▶ **tutors' notes**
- ▶ **student counsellors' notes**

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Data Protection - What does it relate to?

- How is the handling of information regulated?
- What rights do individuals have?
- What restrictions apply?

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What does it relate to?

There is a diagram with:

Processing (then there is an arrow going to); Personal Data (data subject); (then there is an arrow going to) Data Controller

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Data Controller

“a person who (either alone or jointly with others) determines the purposes for which, and the manner in which, personal data are, or are to be, processed”

An arrow points to - the University itself

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Processing

There is a diagram with the word "Processing" based in the centre and the following words go around it anti clockwise:

Recording; Combination; Obtaining; Organisation; Adaptation;
Disclosure; Destruction; Alteration; Erasure; Blocking; Retrieval;
Consultation; Holding; Alignment

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Data Subject

**“any living individual”
(student, employee, sub-contractor)**

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Personal Data

▶ **Factual information**

▶ **Expressions of opinion**

▶ **Expressions of intention**

▶ **Documents provided by the individual**

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Personal Data

1984 Act
computerised data

1998 Act
computerised data and manual records

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Manual Records

Paper Form

There is a picture here of a file and Index Book

Relevant filing system

“Any set of information relating to individuals which is structured by reference to the individuals or by reference to criteria relating to individuals in such a way that information on an individual is readily accessible”

▶ Recorded information only

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Data Processor

“Any person who processes data on behalf of the data controller”

▶Sub-contracted services, e.g.. caterers, CCTV

▶Requirement for contractual provisions

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How is information regulated?

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Notification

- ▶ **Office of the Information Commissioner**
 - ▶ **Purposes for which data are processed**
 - ▶ **1 year renewal (£35)**

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What restrictions apply?

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The Eight Data Protection Principles

- ▶ **Fair**
- ▶ **Specific**
- ▶ **Adequate**
- ▶ **Accurate**
- ▶ **Retention**
- ▶ **Rights**
- ▶ **Security**
- ▶ **Transfers abroad**

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First Principle

- ▶ **Personal data shall be processed FAIRLY and LAWFULLY and in particular shall not be processed unless:-**
 - ▶ **at least one of the conditions in Schedule 2 is met, and**
 - ▶ **in the case of sensitive personal data at least one of the conditions in Schedule 3 is met**

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First Principle

► Schedule 2

- Data subject has consented
- Necessary for performance of a contract of the data subject
- To comply with legal obligation
- For administration of justice
- For vital interests of data subject
- For legitimate interests of data controller unless prejudicial to rights and freedoms of data subject

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First Principle

▶ Sensitive Personal Data

- ▶ Physical or mental health**
- ▶ Racial or ethnic origin**
- ▶ Political opinions**
- ▶ Religious beliefs or beliefs of similar nature**
- ▶ Commission or alleged commission of offence**
- ▶ Proceedings for offence or alleged offence**
- ▶ Trade union membership**
- ▶ Sexual life**

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First Principle

► Schedule 3

- **Necessary for legal proceedings (including prospective legal proceedings), obtaining legal advice, establishing, exercising or defending legal rights**
- **Explicit consent (signed)**
- **To comply with employment law obligations**
- **For vital interests of data subject and data subject cannot consent**
- **Done by non-profit body with appropriate safeguards**
- **Administration of justice**
- **Already made public by data subject**
- **For medical purposes**
- **Necessary for racial or ethnic monitoring**

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Second Principle

- ▶ **Personal data shall be obtained only for one or more SPECIFIED and LAWFUL PURPOSES, and shall be further processed in any manner incompatible with that purpose or those purposes**
 - ▶ **Check notifications**
 - ▶ **Importance of clear consent –**
 - ▶ **Obvious/non-obvious purposes**

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Third Principle

- ▶ **Personal data shall be ADEQUATE, RELEVANT and NOT EXCESSIVE in relation to the purpose or purposes for which they are processed**
 - ▶ **Need to be able to show reason for retention of data**
 - ▶ **Data audits**

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Fourth Principle

- ▶ **Personal data shall be accurate and, where necessary, kept up to date**
 - ▶ **Have procedures in place to update**
 - ▶ **Carry out regular reviews**

Fifth Principle

- ▶ **Personal data processed for any purpose or purposes shall be KEPT FOR NO LONGER THAN IS NECESSARY for that purpose or those purposes**
 - ▶ **Document storage/retention policy**
 - ▶ **Statutory time limits**
 - ▶ **Evidential purposes**

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Sixth Principle

- ▶ **Personal data shall be processed in accordance with the RIGHTS OF DATA SUBJECTS under this Act**

Seventh Principle

- ▶ **Appropriate TECHNICAL and ORGANISATIONAL MEASURES shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data**
 - ▶ Nature of data
 - ▶ State of technological development
 - ▶ Data processors - contractual provisions
 - ▶ Passwords, firewalls, policies
 - ▶ Extra security for sensitive personal data
 - ▶ Guarantees from IT service providers?

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Eighth Principle

- ▶ **Personal data shall not be transferred to a country or territory outside the European Economic Area, unless that country or territory ensures an ADEQUATE LEVEL OF PROTECTION for the rights and freedoms of data subjects in relation to the processing of personal data, unless:-**
 - ▶ consent of data subject
 - ▶ adequate safeguards put in place
 - ▶ contract with recipient at data subject's request
 - ▶ contract of data subject
 - ▶ (e.g. placements overseas, sending references abroad)

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What rights do individuals have?

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Subject Access

- ▶ **Request from individual**
- ▶ **Identification of individual**
- ▶ **£10 fee**
- ▶ **40 days**

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Subject Access

- ▶ **Copy of information held**
- ▶ **Disclosure of information**
- ▶ **Uses of information**
- ▶ **Sources of information**

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Copies of Records

- ▶ **Exemptions include:-**
- ▶ **“Disproportionate effort”?**
- ▶ **Repeat requests**
- ▶ **Management forecasting/negotiations**

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Subject Access

►File - Joe Malone

File entry of meeting on 22/01/03

“Discussion at meeting with Joe Malone regarding panic attacks being suffered by this student related to drugs that he is taking for a long-term condition, and his concerns regarding exams. JM does not wish this information to be used or disclosed - see attached form. Advised JM that assistance with exams should be considered.”

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Individuals' Rights

Compensation or damage or distress – inaccurate personal data or unauthorised use, destruction, access or disclosure

Prevent processing likely to cause damage or distress

Rectification and erasure of inaccurate data

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Statements in Key Documentation

- ▶ **How does institution ask about discrimination?**
- ▶ **What will the data be used for?**
- ▶ **Who will data be passed to?**
- ▶ **Options**
- ▶ **Signature for consent**

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**Confidentiality
by
Hester Middleton**

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**Relationship with the Data
Protection Act?**

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Why is confidentiality important?

- ▶ **Managing Relationships**
- ▶ **Breach of Confidence actions!**

What Information is capable of being protected?

- ▶ **Includes personal information (“matters that one would regard as personal”)**
- ▶ **Can include information obtained through observation!**
- ▶ **Making information freely and entirely public at any time effectively gets rid of any duty of confidentiality (unless publicised by the confidant or other person in breach of confidence)**

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What does the Pursuer have to prove in a Breach of Confidence action?

- ▶ **The information has the “necessary quality of confidence”**
- ▶ **The information is received in circumstances which impose a duty of confidence**
- ▶ **The information has been, or is likely to be, used or disclosed without the authority of the confider**
- ▶ **The information that is claimed to be confidential requires to be specific**

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The necessary “quality of confidence”

- ▶ **Knowledge of confidential nature of information**
- ▶ **Express undertaking to keep information confidential - never agree to keep information confidential!**
- ▶ **Traditional relationships e.g. doctor/patient, lawyer/client, priest/penitent, counsellor/student?**
- ▶ **Illegal means used to obtain the information (also struck at by DPA)**
- ▶ **General circumstances of receipt, objectively assessed**

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Examples

- ▶ **A v B plc and another, 2001**
- ▶ **“Information of a personal nature”**

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Wrongful Acts

- ▶ **Disclosure or use which contravenes the limited purpose for which the information was revealed**

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- ▶ **What is "disclosure"?**
- ▶ **Does it matter to whom?**
- ▶ **What is "use"?**
- ▶ **Does "use" include "writing it down"?**
- ▶ **What is the "limited purpose"?**

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Remedies

- ▶ **STOP! Interdict (injunction)**
- ▶ **Damages!**
- ▶ **Account of profits (commercial situations only)**
- ▶ **Delivery up and destruction**

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Defences

- ▶ **Consent to disclosure/use by confider**
- ▶ **Information is not confidential**
- ▶ **No duty of confidence arises**
- ▶ **Public knowledge**
- ▶ **Public interest (often freedom of speech, health and safety, duty of care)**
- ▶ **No unfairness (information anonymised)**

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- ▶ **R v Department of Health ex parte Source Informatics Ltd**
- ▶ **Anonymised data could be used without authorisation even though confidential**

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Public Interest/Duty of Care Defence

- ▶ **Controversial and elusive**
- ▶ **Most common example is "harm to the public or a specified class of person"**

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Public Interest Disclosure Act 1998 (Whistleblower's Act)

- ▶ **Main aim to protect good faith “whistleblowers” from vengeful employers**
 - ▶ **“Qualifying Disclosures” include:**
 - ▶ **Information about a criminal offence**
 - ▶ **Failure to comply with a legal obligation**
 - ▶ **Miscarriage of justice**
 - ▶ **Health & Safety endangerment!**
 - ▶ **Environment has been damaged**
 - ▶ **Information tending to show any matter above as being deliberately concealed**

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Is detriment required to the Pursuer?

- ▶ **No!**
- ▶ **Federal Bank of the Middle East v. Hadkinson, 2000)**
- ▶ **Sufficient that the Pursuer's "sensibilities will be disturbed" (distress or embarrassment test)**

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Human Rights Act

- ▶ **Article 8 guarantees respect for an individual's private and family life, home and correspondence**
- ▶ **Narrow right of privacy?**
- ▶ **Right to assistance in leading a full life!**
- ▶ **Right still to be scoped out by the law.**

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Conclusions

- ▶ **Disability information always of a sensitive nature**
- ▶ **Must not be used/disclosed except for limited purpose for which it is given**
- ▶ **Ascertain/negotiate that purpose**
- ▶ **Always write it down**
- ▶ **Disclosure where danger**
- ▶ **Get clear consent**
- ▶ **More problematic than the DPA???**

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**How do the DPA and
Confidentiality affect the
DDA?**

**by
Lesley Paterson**

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Disclosure - the Act

- ▶ **Most obligations only apply once a disclosure is made**
- ▶ **Did not know**
- ▶ **Could not reasonably have known**
- ▶ **Failure to take step due to lack of knowledge**

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Disclosure cntd

- ▶ **Onus on the Institution**
- ▶ **Knowledge of employee is knowledge of institution**
- ▶ **Knowledge not relevant in every case**

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Types of Disclosure

- ▶ **Application/UCAS Forms**
- ▶ **Matriculation**
- ▶ **Members of Staff**

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Confidentiality and Data Protection

- ▶ **Confidentiality - Common Law**
- ▶ **Data Protection – Legislation**
- ▶ **Govern and may prevent disclosure and use of information**

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Straightforward Disclosure

- ▶ **Happy for information to be passed throughout University**
- ▶ **Confirmed in writing then DPA complied with**
- ▶ **Data Protection Act complied with**

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What does the DDA say about confidentiality?

- ▶ **Unhelpful/confusing reference**
- ▶ **Will be taken into account**
- ▶ **Not a defence**
- ▶ **Does not always have to be adhered to**
- ▶ **Code of Practice adds further confusion**

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Confidentiality and the DDA cont/d

- ▶ **Take notes of disclosure**
- ▶ **Institution to prove confidentiality request**
- ▶ **Never guarantee confidentiality**
- ▶ **Explain implications of confidentiality to student**
- ▶ **Get student to sign and date in acknowledgement**

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Breach of Confidentiality – Defences

- ▶ **Consent**
- ▶ **Public knowledge**
- ▶ **No unfairness**
- ▶ **Public policy/health and safety**
- ▶ **Communication with student**

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Action Points

- ▶ **Encourage written disclosures**
- ▶ **Obtain necessary consents**
- ▶ **Disability, confidentiality and data protection policies**
- ▶ **Practices and procedures**
- ▶ **Staff training**
- ▶ **Rely on defences as last resort**

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Guidance for Verbal Disclosures

- ▶ **Practical implications**
- ▶ **Use on a need to know basis**
- ▶ **Procedure of confidentiality requested**
- ▶ **Distinguish between fact and opinion**
- ▶ **Destruction of information**

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Guidance for Verbal Disclosures

cont/ d Other DPA considerations

▶ Key contacts

▶ Cross reference with other policies

▶ Consider having a standard disclosure form

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Action Points

- ▶ Encourage written disclosures
- ▶ Obtain necessary consents
- ▶ Policy consistency
- ▶ Practices and procedures
- ▶ Staff training
- ▶ Rely on defences as last resort

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**Disability Discrimination Act Part IV
Scottish Disabilities Team
26 November 2003**

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