

Cameras in Care Situations

Patricia Rickard-Clarke

Chair: Sage Advocacy. Former Law Reform Commissioner.

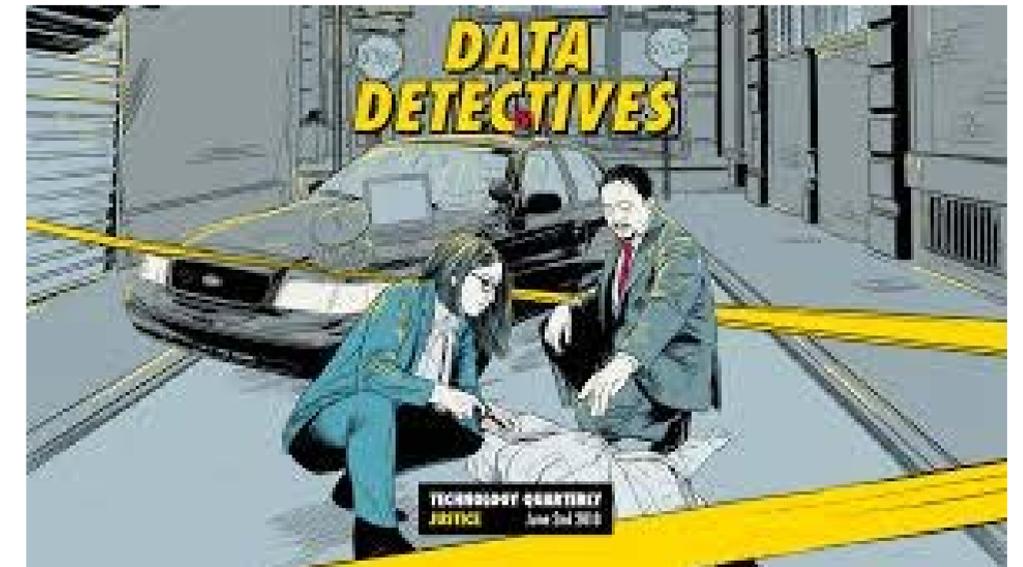
Nothing about you / without you

sageadvocacy.ie

Surveillance technology is ubiquitous –
In your face in China – in your pocket in Europe



It permeates all aspects of life, society and economy



Cameras in National Children's Hospital - Irish Independent Jan 12th 2020



“The new National Children's Hospital will have Chinese CCTV technology which can capture, store and analyse up to a million pictures of people's faces. Documents obtained by the Sunday Independent reveal the hardware and software systems to be used for security surveillance in the €1.7bn hospital. The technology includes cameras and software which can count the number of people who enter a room, provide panoramic views of a room, generate heat maps to analyse the visit and dwell time of those in the hospital, as well as capture and optimise images of people's faces.

RTÉ Investigates: Patrick Fitzgerald with his wife, Anne, at Cherry Orchard Hospital, Dublin. October 2018. Issues about perspective.



HSE application over family using CCTV to monitor care of mother 'unjustified'



High court judge said application was 'improperly brought' and he would award costs to the family at the highest level Irish Times. Mon, Dec 17, 2018.

Assistive technologies for a person with disabilities have raised concerns among care staff about privacy and surveillance.



At a time when police officers wear body cameras and average citizens check video feeds of their children and pets at daycare, the long-term care industry is being forced into a game of catch-up.

Some points

- Information technology and cameras are now ubiquitous in society, economy and increasingly in care situations.
- Gardaí appeal for Dash Camera footage to assist them in investigations.
- Cyclists use them to capture the behaviour of motorists
- Motorists use them to capture the behaviour of cyclists
- Families use them in hospitals to record interactions with staff – threatening behaviour
- Entry and exit from the state involves surveillance – safeguarding the nation?
- Complex care situations e.g. hospitals, increasingly using cameras
- RTE investigations in Leas Cross, Aras Attracta, Cherry Orchard have used hidden cameras but use of hidden cameras does not always tell the full story

Current legal situation

info@sageadvocacy.ie

sage advocacy

Privacy: Constitutional Right and a Right under International Conventions

- Constitution of Ireland

- Art 40.1 All citizens shall, as human persons, be equal before the law
- Art 40.3 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen

Right to privacy an unenumerated right

- European Convention on Human Rights

- Art 2 Right to respect for private and family life
- European Convention on Human Rights Act 2003 – gave effect to Convention – Sec.3

- UN Convention on the Rights of Persons with Disabilities (ratified 2018)

- Art 12 Equal recognition before the law
- Art 14 Liberty and security of the person (under constant supervision and control)
- Art 17 Protection the integrity of the person
- Art 22 Respect for privacy

Privacy is inextricably linked to the notion of consent

Legislation

- Garda Siochana Act 2005
- Freedom of Information Act 2014
 - To gain access ... to information in the possession of public bodies, consistent with the public interest and right to privacy
- Assisted Decision-Making (Capacity) Act 2015
 - Relevant Person
 - Personal Welfare Decisions (includes healthcare and other matters relating to person's well-being)
 - Section 8 General Principles
- Mental Health (Amendment) Act 2018 (incorporated GP in 2015 Act) (not yet commenced)
- Data Protection Act 2018 (1988-2003); GDPR
 - Images captured by CCTV are personal data and subject to data protection legislation
- Data Sharing and Governance Act 2019 (regulation of sharing information between public bodies)

Article 5 GDPR – Principles

Sec.71 2018 Act

- Lawfulness, fairness, and transparency
- Purpose limitation
- Data minimisation
- Accuracy
- Storage limitation
- Integrity and confidentiality and
- Accountability

Reference: Quick Guide to the Principles of Data Protection (Data Protection Commission 2019)

Principles relating to the processing of personal data – Article 5

- Personal data shall be:
- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency'); **Must be a clear legal basis (Art 6 and 7)**
- (b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; ('purpose limitation');
- (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation'); **Must be proportionate and necessary**
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

Principles – Art 5 continued

- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed;(‘storage limitation’);
- (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (‘integrity and confidentiality’)
- (g) accountability – must be able to demonstrate compliance with other principles of data protection. Must have appropriate processes and records in place to demonstrate compliance

Lawfulness of Processing – Article 6

- Processing shall be lawful only if and to the extent that at least **one** of the following applies:
 - (a) Person has given consent for one or more specific purposes
 - (b) Processing necessary for the performance of a contract
 - *(c) Processing necessary for compliance with a legal obligation to which controller is subject**
 - (d) Processing is necessary in order to protect the vital interest of the person or another person
 - *(e) Processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller**
 - (f) Processing is necessary **for the purposes of the legitimate interests pursued by the controller** or third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the person which require protection of personal data
- *National Law may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing

Conditions for Consent – Article 7

- Where processing is based on consent, the controller shall be able to demonstrate that person has consented to processing of personal data
- If the person's consent is given in the context of a written declaration which also contains other matters, the request for consent shall be presented in a manner which is clearly distinguishable from other matters, in an accessible format
- The person shall have the right to withdraw consent at any time...Person shall be informed of right to withdraw consent.
- When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract

Special Categories of personal data - Article 9/Sec.2 and 46-54 2018 Act

Article 9(1)

- Processing of personal data revealing –
 - Racial or ethnic origin
 - Political opinions, religious or philosophical beliefs,
 - Trade union membership
 - Genetic data
 - Biometric data for the purpose of uniquely identifying a natural person
 - Data concerning health
 - Data concerning a natural person's sex life or sexual orientation

Shall be prohibited unless one of the following applies:.....

Processing of special categories of personal data include...

- Person has given explicit consent **except where law provides that the prohibition may not be lifted by data subject**
- For the purpose of -
 - Legal advice and legal proceedings
 - Administration of justice and performance of functions...
- Where necessary for reasons of substantial public interest, **on the basis of law which shall be proportionate to the aim pursued**, respect the essence of the right to data protection and provide for suitable and specific measures to be taken to safeguard the fundamental rights and freedoms of the data subject
- Preventive or occupational medicine, for medical diagnosis, for the provision of medical care, treatment or social care, for the management of health and social care systems and services on the basis of law... and subject to conditions and safeguards
- Public interest in the area of public health

Art 9.2(c) Processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent

Data Protection Act 1988

Disclosure of personal data in certain cases:

Section 8 Any restrictions in this Act on the processing of personal data do not apply if the processing is—

.....

(d) required urgently to prevent injury or other damage to the health of a person or serious loss of or damage to property,

(e) required by or under any enactment or by a rule of law or order of a court,

Policies and Standards and Guidance

- HSE National Consent Policy
 - Section 6 Is it always necessary to seek service user consent?
 - Section 7 – Specific issues relating to consent – does not include reference to surveillance
 - Para 7.6 Confidentiality and data protection - Staff are expected to comply with the provisions of the Data Protection Acts

Policy currently being revised and updated to include taking account of GDPR

- Data Protection Commissioner
 - Guidance on the Use of CCTV – For Individuals
 - CCTV Guidance for Data Controllers
 - Guidance to the Principles of Data Protection
 - Data Sharing in the Public Sector
- Department of Justice and Equality/An Garda Síochána
 - Code of Practice for Community Based CCTV Systems

HIQA National Standards

- NS for Residential Services for Children and Adults (2013)
 - 1.2 The privacy and dignity of each person are respected
 - 1.2.1 Each person has an area of personal space that comprises their own person, possessions, thoughts and feelings that no other person enters, uses or intrudes upon without their expressed permission
 - 1.3.4 People have opportunities to be alone, with due regard to their safety. Privacy and dignity are respected at all times....
 - 2.2 The residential service is homely and accessible and promotes the privacy, dignity and welfare of each person
 - 2.2.12 Where closed circuit television (CCTV) systems are used, they do not intrude on privacy and **there is a policy on the use of CCTV** which is informed by relevant legislation.
- NS for Residential Care Settings for Older People in Ireland (2016)
 - 1.2 The privacy and dignity of each resident are respected
 - 2.6.8 **Where closed circuit television (CCTV) systems are used to protect the safety and security of residents, they do not intrude on privacy and there is a policy on the use of CCV which is informed by relevant legislation.**

Issues for Consideration – Cameras in Care Settings

- Accountability principle in GDPR
 - Must have processes and records in place to demonstrate compliance with GDPR principles
 - Obligations on data controllers to ensure data is collected for ‘specified, explicit and legitimate purposes’
 - Lawful basis for processing both personal and special category data – impact on privacy and dignity of the resident
- Consent
 - May often be impracticable to obtain consent (lack of decision-making capacity) and therefore will be necessary to identify at least one appropriate ground under Art 6 or Art 9(2)
- CCTV in bedrooms/bathrooms
 - Only lawful if resident has given explicit consent to the processing of that data or
 - One of the exemptions in Art 9(2) applies
 - CCTV in bedrooms will usually give rise to ‘continuous supervision’, if the purpose is to prevent the resident from leaving the premises and the resident lacks capacity to consent to the arrangement, it may amount to ‘deprivation of liberty’.

Data Protection Policy for Care Setting

- Care Settings – must have clear policy to include use of CCTV (HIQA requirement)
- Policy should include:
 - Rights of privacy and dignity of resident
 - Purpose for which data processed –
 - Identify specific legal basis for surveillance
 - Identifying data controller
 - Where more than one organisation involved both have responsibilities and obligations
 - Third parties to whom data may be supplied
 - How to make an access request, (resident may request access to personal data which includes recordings)
 - Retention period
 - Should be informed by purpose for which collected and long it is needed to achieve this purpose
 - Security arrangements
 - Integrity of information must be maintained
 - Who has access to the CCTV and for what reasons. Who are authorised persons to have access.
 - Details of Staff Training

Call to Data Protection Commission for Guidance

In the context of Safeguarding vulnerable adults:

- Where a safeguarding issue arises, clear guidance on the processing of personal data and the processing of special categories of personal data in respect of a person who has capacity and in respect of those who lack capacity to give consent
- Specific Guidance on the use of cameras in care settings (given that a care setting is the home of residents) to include communal areas and private space/spaces for intimate care. Guidance to include of cameras – overt, discreet and covert.
- The disclosure of data by/to another body that is not covered by the *Data Sharing and Governance Act 2019* (not ‘public body’ to another ‘public body’) but clear guidance as to the circumstances where Section 8 of the Data Protection Act 1988 may apply

Assisted Decision-Making (Capacity) Act 2015

Section 2

- Clarification on 'personal welfare' decision – *'healthcare'* and *'other matters relating to the relevant person's well-being'*
- Regulations for Decision-Making Assistant and Co-Decision-Maker
- An Attorney under an Enduring Power Attorney
- A Decision-Making Representative – court may give authority but must be within the spirit of the data protection legislation

House of Lords Debate/Department of Health response (2018)

- The Government recognises that cases of abuse + neglect have been exposed as a result of hidden cameras
- CCTV should not be regarded as a substitute for proper recruitment procedures, training, management and support of care staff; or to ensure that numbers on duty are sufficient to meet needs of users of services
- It is a legal requirement that care providers must ensure the safety, welfare, privacy and dignity of service users at all times. The use of CCTV in care homes would raise important concerns about privacy.
- The use of CCTV and other forms of covert surveillance should not be routine, but should be considered on a case by case basis. The Government does not object to use in individual care homes or by families of residents provided it is done in consultation with permission of residents and their families
- Care provision is often personal, intimate in nature. Filming or recording the more than 400,000 people who live in care and nursing homes whilst they are receiving personal care – being bathed, helped to dress and eat, etc – would represent a major intrusion into their privacy. For the great majority, whose care is good, such an intrusion could not be justified.
- Care providers... including care users are free to decide whether or not to deploy CCTV or cover monitoring. However they should be aware of the requirements, including legal protections around ensuring the privacy and dignity of those who are being filmed/observed.

References

- Garda Guidance on CCTV (An Garda Siochana)
- Briefing Paper on CCTV in residential settings (NDA 2015)
- Data Privacy and Community CCTV Schemes (Oireachtas Library & Research Service 2019)
- Guidance on the Use of CCTV – For Individuals (Data Protection Commission 2019)
- CCTV: Guidance for Data Controllers (Data Protection Commission 2019)
- Quick Guide to the Principles of Data Protection (Data Protection Commission 2019)
- Data Sharing in the Public Sector

- Electronic surveillance in health and social care settings: a brief review (SCIE 2014)
- In the picture: A data protection code of practice for surveillance cameras and personal information. (Information Commissioner's Office 20170609)
- Code of Practice: A guide to the 12 principles (Surveillance Camera Commissioner)
- CCTV for communal areas of care homes(House of Lords Library
<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CDP-2018-0189>)

Nothing about you / without you

sageadvocacy.ie

Click to add text

29/01/20

sage advocacy