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Databases, Registers and Fraud: The Emergence of a New Private Justice?

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Mark Button on the private intelligence databases and confirmed fraudster registers containing lists of persons who have been confirmed by members of the scheme according to their rules to have engaged in a fraud related behaviour

Imagine a shopper – a largely law abiding citizen with no criminal record – in a busy supermarket in a rush who sees large queues and cannot work the self-checkout, who wrongly decides as they only have a loaf of bread to just walk off without paying – an act of theft, but they are stopped by the security guard, caught, the bread confiscated and their personal details taken. They fear a letter summoning them to court to face criminal charges of theft, perhaps a knock on the door from the police. There is no letter or knock on the door, but the next time they go to that supermarket they find they are banned from it. They go

to another branch, the same again; they go to a different supermarket chain and again they find they are banned too. They ask the supermarkets why they are banned and they are told to make a subject access request under the Data Protection Act. They do so and they find they are listed as a shoplifter and will continue to be listed for another six years. They cannot appeal because they did engage in an act of theft. The only place they can now buy food is a local chain which is much more expensive. The police have not been involved or the criminal justice system, they have been dealt with by a completely private system of justice for a criminal act and face an indirect penalty as a consequence of it.

This scenario for shop-theft does not exist as described – although there are persons who are banned and databases of known shoplifters. If the shopper was replaced with a serial shoplifter we might have no concerns at all with the outcome. However, the reason to use this example is that if we replace shops with banks and attempted theft with fraud, this is exactly the system of private justice that has emerged to deal with the problem and this has expanded to other sectors and is likely to continue to do so. It is important to stress from this very early part of this paper that this is not going to be a paper that questions the very basis of such systems, because to be clear from the start, they play a very important part in preventing fraud, which has become a huge problem, with only limited state interest. This article, however, and the more extensive research it is built upon (a piece of research commissioned by the Nuffield Foundation) is aimed to illustrate what is happening, stimulate further debate and research and offer some early recommendations to improve such systems.

The research identified at least 25 databases (beyond the national police database), but there are likely to be more as not all are publicly advertised. These systems can be classified between intelligence databases and confirmed fraudster registers. Due to time and resource constraints, the research focused on the fraudster registers (although there are many more intelligence databases and they raise more significant issues which clearly need more research). These registers contain lists of persons who have been confirmed by members of the scheme according to their rules to have engaged in a fraud related behaviour. Access to these systems is by membership subscription and allows users to view the existing records and use that data for investigations and to aid decision-making on the provision of services (such as whether to issue a credit card) and offers of employment. Users add new records to the databases by entering the identities of persons who they have been “confirmed” as fraudsters according to their own rules and applicable regulations.

Confirmed Fraudster Databases

The following confirmed fraudster databases were identified:

- Cabinet Office Public Sector Staff Fraud Database (a new database of civil servants who have been sacked for fraud related behaviours which at the time of writing was not yet live);
- Cifas: Internal Fraud Database (a database of members of staff from member organisations who have been sacked for fraud related behaviours);

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- Cifas: National Fraud Database (a database member organisations' customers who have made fraudulent applications for products, largely in financial services (loan, credit card applications etc), telecommunications, retail, insurance and public sector);
- Insurance Fraud Register (a database of member organisations' customers who have made fraudulent insurance claims and/or applications);
- National Hunter (a network of linked databases of members' customers who have made fraudulent applications largely in the financial services sector); and
- Telecommunications UK Fraud Forum (a database of member organisations' staff in the telecommunications sector who have been sacked for fraud).

Statistics

The researchers could only secure statistics from Cifas and National Hunter and as there is some overlap, only the Cifas statistics were used. These showed at least 130,000 persons added in 2014 on such databases – illustrating the scale of such justice (by contrast the criminal justice systems dealt with just over 15,000 fraudsters and if we add TV Licence evasion (which has often been combined with fraud) this would add another 163,000 – it illustrates Cifas alone is not that far off dealing with the total volume of offenders that the criminal justice deals with and significantly more if TV Licence evasion is excluded. These databases play an important role in fraud prevention too. Cifas claims in 2015, members reported £1.1b of prevented fraud through the Cifas system. Its primary focus is identity theft, with identity fraud cases making up 53% of the database. Cifas also records the fraudulent use of identities and the victims of this fraud in order to prevent the identities being used elsewhere.

They have, however, become the basis for a private form of justice and punishment as a consequence of their fraud prevention role. The research identified the following as the normal means in which most of these work when a fraudster is placed on them. A fraud occurs and a person is identified by the victim organisation's investigators as the offender. The victim organisation's investigators then decide by reference to its own criteria and the rules of the database to enter the offender's name on the database. Their name is entered and that entry lasts for six years in most cases. Not all databases inform the person they have been placed on the database. A successful criminal prosecution is not an evidential requirement, however, a key guiding criterion is that the case could be prosecuted if the member wished to. The personal information is then shared between members of the database.

There is no direct penalty for inclusion on the database (although some might regard being designated as a fraudster as a penalty), but inclusion on these registers has consequences for accessing certain services, for example: insurance cover might be declined or premiums higher; loans, credit cards, credit etc might be also be more difficult to attain or at a higher cost; and securing employment in some sectors might be very difficult if not impossible.

The legal basis for the databases is founded in a number of important pieces of legislation and regulation. The 1998 Data Protection Act in s.7A of sch.3 specifically states the processing of sensitive personal data is lawful where "necessary for the purposes of preventing fraud" when conducted as "a member of an anti-fraud organisation". Further, the guiding European regulation which is due to be implemented (passed in 2016) through the General Data Protection Regulation under Recital 47 specifically states that "The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned", demonstrating that European legislators clearly view the sharing of personal data for fraud prevention purposes as a legitimate exercise. Additionally many of the databases above also utilise contractual and/or employment contracts. When a person applies for a job, credit card or insurance there is a clause that they are agreeing data can be shared. These clauses are known as the "fair processing notices".

The determination of guilt for those working in these schemes is undertaken by the members' investigators and no external independent review of decisions is mandated. Many individuals are not formally notified that they have been placed on databases or it has been done so in a way that is not always entirely clear. Consequently some individuals only find out by accident when, for example, they are declined credit and undertake a subject access request. There is also evidence of a small number disputing their placement on the register and complaining to the database, the media or the appeals body, the Financial Ombudsman.

The fraudster registers are not subject to any special regulation other than general data protection laws. There is a clear case for some form of specific regulation or code of practice to enhance fraud prevention whilst ensuring confidence in high quality data processing and just decision-making for both users and members of the public. These standards could be built on the best in class practices of the leading body in this field, Cifas, which continues to seek improvements in its methods and governance. The fraudster databases raise a number of issues and areas for further research and to summarise these include:

- Lack of independent third party review of decisions to place persons on fraudster registers;
- Evidence some fraudsters are not told they are placed on databases;
- The fair processing notices which warn persons false information could lead to their data being shared to prevent fraud do not always clearly set out the potential consequences of what could happen (which also misses a potential deterrence opportunity as customers are not effectively warned of the potential consequences should they be caught and that very large numbers are caught – which are key components of successful deterrence);
- Uniform sanctions of six years on database no matter how serious the case; and
- Some evidence – albeit very small – of mistakes;
- The need for an industry code of practice which builds upon the best practice of bodies such as Cifas; and
- The need to secure more information on all the databases that gather information on fraudsters, not just the confirmed databases.

The full report and the database of regulatory bodies can be found at <http://www.port.ac.uk/centre-for-counter-fraud-studies/publications/under> 2016.

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