Subject Access Requests: fishing for information?

Gateley Plc

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We are seeing an increasing trend in disgruntled, compensation-driven, litigation-savvy customers seeking to obtain information before commencing a court claim.

Usually, during the course of court proceedings, parties will be required by the court to disclose documents. There are strict court rules governing the documents which are required to be disclosed and this process does not usually take place until after a claim has been issued and a defence has been served.

Some customers are now seeking to gain a litigation advantage by making a request for information under the Data Protection Act 1998 (DPA), which is referred to as a Subject Access Request (SAR). In doing so, potential Claimants are able to 'fish' for information months prior to the time when the court would order the disclosure of documents in the course of proceedings.

These requests also place a significant burden on companies as they have only 40 calendar days in which to respond to a SAR and provide the information requested. Any failure to comply may result in the Information Commissioner's Office (ICO) investigating, possibly imposing a fine, and also obtaining a court order against the company requiring it to comply with the request.

The purpose of the Data Protection Act 1998

The Act was passed by Parliament to try to control the way information held about individuals is stored and processed, and also to provide individuals with a legal right to find out how such information is held.

This came about with the rise of computer usage for data storage, and concerns that data could be copied, shared and accessed more readily between organisations. How often have you received a call from an unknown company and wondered how they have obtained your number? The Act was designed to allow you to find out where such details about you are held.

The right to a SAR was not intended to provide a means of pre-action disclosure, but it is now frequently used for those purposes.

At the time the Act was devised and brought into force, it had not contemplated the sheer amount of searchable electronic data that now exists. This has resulted in SAR's placing a considerable administrative burden on companies having to sift through the information from electronic searches.

Personal data

A SAR enables individuals to request their 'personal data'. It could be received from a customer, employee or anyone else whom you hold information on.

The ICO has published a 30 page document which attempts to assist in ascertaining if information is considered to be 'data'. A further 30 page document considers if this data is 'personal'.

In summary of the 60 pages of ICO guidance 'Personal data' is data which relates to 'a living individual who can be identified'.

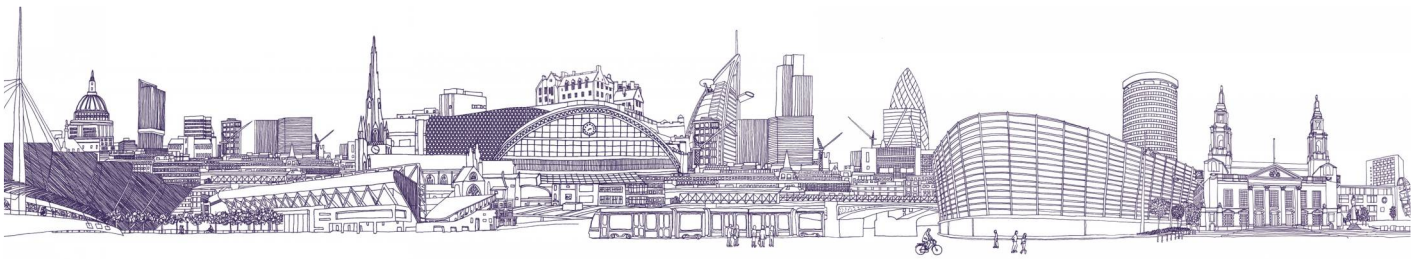
What should I do if I receive a SAR?

Requests must be responded to within 40 days of receipt. Before carrying out searches, it is possible to request the following:

1. A £10 fee, if it was not paid with the request; and
2. Evidence to confirm the identity of the individual if there are doubts as to their identity.

Where it is appropriate to request these, the 40 day period will not start until they have been received.

A request can also be made to obtain any information necessary to locate the information sought, i.e. to try to clarify what personal data they are looking for. This may sometimes help narrow the search, but often the response will be that they are looking for all personal data. This is



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especially the case where the SAR is made by a potential claimant. It can also be useful to ask why the SAR is being made as this may then give grounds to refuse to comply with the SAR, depending on the motives.

The next step is deciding which documents to disclose.

If you follow the ICO guidance on what must be disclosed, you will be required to take a very wide view of what constitutes 'personal data' and disclose everything that is linked to the individual.

The court's historic view on disclosure in *Durant -v- Financial Services Authority*

The courts used to take a narrow view of what constitutes 'personal data', stressing that the information must include an expression of opinion about the individual.

The case of *Durant -v- Financial Services Authority* [2003] EWCA Civ 1746 sets out the court's view that the purpose of entitling an individual to have access to information in the form of his 'personal data' under the Data Protection Act was to enable him to check whether the data controller's processing of it unlawfully infringed his privacy and, if so, to take such steps as the Act provided to protect it.

Europe's reaction

Following the UK courts' narrow interpretation of personal data, the European Commission issued an opinion (the Commission's Opinion) on the concept of personal data, which adopts a wider position, making it clear that information may relate to an individual, even if it does not focus on him.

The Commission's Opinion was, in turn, reconciled with the view of the courts by a Technical Guidance Note (TGN) issued by the ICO.

The Technical Guidance Note

The TGN raises 8 questions to be answered when considering whether data is 'personal data'. These are as follows:

1. Can a living individual be identified from the data, or from the data and other information in the possession of, or likely to come into the possession of, the data controller?
2. Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?
3. Is the data obviously about a particular individual?
4. Is the data 'linked to' an individual so that it provides particular information about that individual?
5. Is the data used, or is it to be used, to inform or influence actions or decisions affecting an identifiable individual?
6. Does the data have any biographical significance in relation to the individual?
7. Does the data focus or concentrate on the individual as its central theme rather than on some other person, or some object, transaction or event?
8. Does the data impact, or have the potential to impact, on an individual, whether in a personal, family, business or professional capacity?

The current position

The courts have since confirmed that the correct approach is to consider the tests contained within the Commission's Opinion and the TGN, and only rely on the guidelines in Durant where the opinion and TGN do not catch the data.

It is, however, clear that the UK courts will take into account the real purpose of the Act, and may take steps to prevent it being abused by would-be litigants by preventing them from using it to obtain pre-action disclosure of documents to assist them in litigation or complaints against third parties. However, in practice it can be difficult to obtain evidence that this is the motive for the SAR, and without clear evidence to that effect the individual is entitled to have their SAR complied with.

So what does this mean in practice?

The ICO have tried to prevent the courts from letting companies off too lightly when complying with a SAR. However, it is clear from the court guidance that where there is a dispute, the court will consider the reason for the request and the administrative burden placed upon the company, but will only rule against compliance with the SAR where it is a clear abuse of process. Just because there is an actual or potential dispute does not mean that compliance with a SAR can be avoided. Upon receipt of a SAR, you should carry out an extensive search of all information you hold electronically on your systems and in archives, as well as searching any paper files which may exist and clearly relate to the individual making the request. At the same time as carrying out these searches, it is worth bearing in mind the requestor's aim and information sought, and try to clarify that.

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Once searches have been carried out, the following considerations should be taken into account when going through the bundle of documents you have in front of you:

1. Does the document contain information on any other identifiable individual. If so, you should not disclose that information without the other individual's consent (unless it is reasonable in all the circumstances to do so - this is discretionary but note the risk of a complaint by that other individual if their information is revealed), so normally this information would be redacted.
2. If the document contains management information which is likely to prejudice the business if disclosed, you may withhold it.
3. If the document contains any record of your intentions in negotiations with the individual it may be withheld; for example an internal e-mail recording a settlement proposal.
4. Is the document legally privileged? i.e. is it correspondence/documentation passing between you and your professional legal advisors? This extends to correspondence and documents passing between you, your professional legal advisers and third parties where litigation is contemplated, or in progress. If it is legally privileged, do not disclose it.

Where you believe the information is being sought with a view to gathering information before bringing a claim, it is sensible to seek legal advice on what must be disclosed, whether there are grounds to refuse to comply with the SAR and to understand the risks between the wider interpretation of the ICO and the slightly narrower views of the courts.

If you would like to discuss any of the issues raised in this update, please contact:

Andrew Evans
Partner
Commercial
dt: +44 (0) 121 234 0036
m: +44 (0) 7718 559 661
Andrew.Evans@gateleyplc.com