

# Handling SARs now and after May (a UK perspective)

**Ann Bevitt, Partner, and Nihara McCormack, Associate, Cooley LLP, discuss recent changes to handling SARs in the UK following two instrumental cases, and how things will change under the GDPR**

**U**nder section 7 of the current UK Data Protection Act 1998 (the 'DPA'), upon the submission of a valid subject access request ('SAR') to a data controller, an individual has the right to obtain a description of the personal data being held on them, the purposes for which the data are held, and the recipients of the data. For the request to be valid, it must be in writing, and include the relevant fee (if charged by the controller).

This subject access right is open-ended and extensive; there are only a limited number of exemptions. One such exemption is the 'disproportionate effort' exemption, set out in section 8(2)(a) of the DPA. That exemption provides that the supply of a copy of the information constituting any personal data requested is not required if it is not possible or would involve disproportionate effort.

Until recently, the Information Commissioner's Office ('ICO') had interpreted the section 8(2)(a) DPA exemption as applying only to the supply of information, not placing limits on the duty to search for and retrieve personal data or allowing data controllers to exclude personal data from a response simply because it was difficult to access the data.

This meant the exemption was of limited use to data controllers, as the main issue faced by data controllers is the considerable cost and inconvenience incurred in finding, collating, reviewing and redacting information, which uses significant management, administrative, legal and IT staff time.

However, the landscape shifted significantly in 2017 following two Court of Appeal judgments. This article explains what changed and speculates on the further changes following the introduction of the General Data Protection Regulation ('GDPR').

## Recent decisions on the exemptions

The Court of Appeal judgments on SARs — *Dawson-Damer & Ors v Taylor Wessing LLP* [2017] EWCA Civ 74 and *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd & Ors and Deer v University of Oxford* [2017] EWCA Civ 121 — both dealt with the 'disproportionate effort' exemption. Each challenged the posi-

tion taken by the ICO by holding that the exemption is not limited to the supply of information, and that data controllers can take account of the difficulties of complying with a request, including searching for, collecting and reviewing the information when responding. However, the outcome of the cases was that the burden of proof remained with the data controller, who must be able to show it has taken all reasonable steps to comply with the SAR, and that it would be disproportionate in all the circumstances of the case for it to take further steps. Whether taking further steps will be found to be disproportionate or not will depend on the facts of each particular case.

In *Dawson-Damer*, the Court of Appeal was asked to determine a number of issues arising out of a dispute between a Bahamian trust company and its solicitors. The beneficiaries of the trust company had made SARs to the solicitors, and the solicitors argued they were not obliged to supply the claimants with permanent copies of the information sought because it would involve disproportionate effort. The claimants were not satisfied with the response, and the Court of Appeal was asked to resolve the issue of the extent to which the 'disproportionate effort' exemption can be relied upon. The Court held that the onus was on the data controller to show the supply of information would involve disproportionate effort, and that the difficulties to be taken into account were not limited to those arising in the process of supplying the information, but included those which occurred at any stage in the process of complying with the SAR.

In *Ittihadieh*, the Court of Appeal considered whether the duty to comply with a SAR was limited to a duty to carry out a reasonable and proportionate search. The Court followed the conclusion of *Dawson-Damer* and stated that "while the principle of proportionality cannot justify a blanket refusal to comply with a SAR, it does limit the scope of the efforts that a data controller must take in response".

Following the Court of Appeal judgments, the ICO revised its Subject Access Code of Practice and provided new guidance on the disproportionate effort exemption. For a discussion of the guidance, see 'Changes to Subject Access Requests in the UK' in Volume 17, Issue 8 of *Privacy & Data Protec-*

tion, pages 14-16.

## How the disproportionate effort exemption will change under the GDPR

The GDPR will be implemented in the UK on 25th May 2018. At this point, the DPA will no longer apply and subject access will operate in accordance with Article 15 of the GDPR. The process for making a SAR under the GDPR is similar to the process under the DPA, but with a number of key changes.

**Rights:** Article 15 of GDPR gives an individual the right to obtain confirmation that their data are being processed, access to their personal data, and other supplementary information. The supplementary information includes all information a data subject is entitled to under the DPA, and expands this to include information on any automated decision-making or profiling, the existence of the rights to rectify or delete the personal data or to restrict or object to the processing of personal data, the right to lodge a complaint with the ICO and the envisaged retention period for the data.

**Fees:** Under the DPA, a data controller can charge up to £10 for a SAR. Under the GDPR, a data controller cannot charge for a single SAR unless the request is 'manifestly unfounded or excessive'. A 'reasonable fee' can be charged for multiple requests.

**Response time:** The DPA requires that a controller must respond to a SAR within 40 days of receipt of the written request. Under the GDPR, requests must be complied with 'without undue delay', and in any event within one month, unless there are a number of requests or the request is complex, in which case the deadline can be extended by a further two months. If the controller intends to extend the response time within the initial one-month period, the data controller must inform the individual making the request and explain why the extension is necessary.

**Format:** If the individual makes a SAR electronically, after verifying the identity of the individual, the controller

must provide the information in a commonly-used electronic format unless otherwise requested by the individual.

With regard to exemptions, the GDPR does not include an equivalent 'disproportionate effort' exemption. Instead, the GDPR contains an exception for 'manifestly unfounded or excessive' requests — an arguably higher burden of proof for data controllers to satisfy.

Article 12(5) states that where a request from a data subject is 'manifestly unfounded or excessive, in particular because of [its] repetitive character, the controller may either charge a reasonable fee taking into account the administrative costs of providing the information or communication or taking the action requested or refuse to act on the request.' However, it is important to note that the controller must be able to demonstrate the 'manifestly unfounded or excessive' character of the request, and there is no guidance yet as to what will be considered 'manifestly unfounded or excessive'. As such, given the increased penalties for infringement of the GDPR, controllers may be reluctant to rely on this subsection until its application is clearer.

Although the 'disproportionate effort' exemption will no longer apply, the GDPR still uses the concept of 'disproportionate effort' in the context of the transparency obligations in Article 14 (see Article 14(5)(b) and also Recital 62), the obligation to notify a data recipient to whom personal data have been disclosed of the rectification or erasure of personal data or restriction of processing (Article 19) and also the obligation to tell affected data subjects about personal data breaches (Article 34).

Given that the 'disproportionate effort' concept is used elsewhere in the GDPR, the fact that it has been replaced in the context of SARs by this new 'manifestly unfounded or excessive' test also suggests that there is a difference in standard between 'disproportionate effort' and 'manifestly unfounded or excessive'. However, as mentioned above, what precisely this difference is, is currently unclear.

Recital 63 of the GDPR allows controllers to request that individuals making requests specify the information or processing activities to which the request relates where the controller processes a large quantity of information concerning the individual. Whilst the controller cannot narrow the scope of a request, this may allow them to manage the request efficiently and provide information only to the extent required. It is possible, therefore, that this may also help mitigate the removal of the 'disproportionate effort' exemption.

## Summary

Recent cases have clarified that the 'disproportionate effort' exemption in the UK DPA covers both the process of finding and collating information, as well as that of providing the personal data. When the GDPR comes into force in May 2018, however, this exemption will cease to apply. The GDPR contains a different 'manifestly unfounded or excessive' exemption, which may be of some help to controllers — but how exactly this will be interpreted by courts and regulators is yet to be determined.

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