

Section 5 of the Data Protection Act 2002 (DPA) entitles an individual to request from a data controller a copy of the information constituting personal data about him. The exercise of this right of access to personal data is usually referred to as making a *subject access request* and is one of the cornerstones of Data Protection legislation.

Whilst the right of access is subject to a number of exemptions set out in Part IV and schedule 7 to the DPA, there is nothing in section 5, nor Directive 95/46/EC, that limits the purposes for which a subject access request may be made. There is also no provision requiring the data subject to state the reason for making the request, or to identify the purposes for which they intend to use information supplied in response to the subject access request.

Individuals who are in dispute with the data controller often exercise their right of access to personal data. In many cases, they may intend to begin, or have already begun legal proceedings against the data controller and see section 5 as a way of obtaining additional information to assist in those proceedings.

There is no specific exemption from the right of access where civil legal proceedings are contemplated or are ongoing. If a data controller were able to avoid complying with a subject access request in circumstances where the data subject was contemplating or had begun legal proceedings it would seriously undermine the fundamental right of access to personal data.

In respect of criminal proceedings, Mr Justice Green, Queen's Bench Division of the High Court of Justice, stated in *Zaw Lin and Wai Pho v Commissioner of Police for the Metropolis* ([2015] EWHC 2484 (QB)), *"In my view the Claimants have a perfectly proper right to seek access to the personal data for the purpose of using it subsequently in their defence in criminal proceedings. The DPA is about fundamental rights. The right to a fair trial and the right to life are fundamental rights. The right of access is a fundamental right and it does not lose that character simply because the data, once obtained, is then used to protect a further fundamental right."*

The failure to comply with a subject access request in such circumstances will amount to a breach of the Sixth Data Protection Principle, unless a relevant exemption from the right of access applies.

In circumstances where an exemption is relied on by the data controller, in particular the crime and taxation exemption set out in section 25, the reasoning must be clear and evidence based. As stated by Munby, J, *"[i]t is for those who seek to assert the exemption ... to bring themselves within it, and, moreover, to do so convincingly, not by mere assertion but by evidence that establishes the necessity contemplated by the Directive [95/46/EC]"* (R (Lord) v Secretary of State of the Home Department [2003] EWHC 2073 (Admin)) and by Green, J, in ([2015] EWHC 2484 (QB)) *"The burden of proof is thus upon [the data controller] to show its entitlement to refuse access and it must do this with significant and weighty grounds and evidence."*

If a data controller refuses to comply with a subject access request, the applicant may complain to the Information Commissioner ("Commissioner") and / or apply to the Court for an order under section 5(9).

If the applicant complains to the Commissioner (this is referred to as making a 'request for assessment'), the Commissioner has discretion to serve an enforcement notice requiring a data controller to comply with section 5.

A recent UK Court of Appeal decision (*Durham County Council v Dunn* [2012] EWCA Civ 1654) considered how courts should apply disclosure obligations under the Civil Procedure Rules so as to comply with privacy rights, including the right of access under the DPA.

Lord Justice Maurice Kay made the following observation:

*"I do not doubt that a person in the position of the claimant is entitled – before, during or without regard to legal proceedings – to make an access request pursuant to section [5]. I also understand that such a request prior to the commencement of proceedings may be attractive to prospective claimants and their solicitors. It is significantly less expensive than an application to the Court for disclosure before the commencement of proceedings pursuant to [UK] CPR31.16. Such an access may result in sufficient disclosure to satisfy the prospective claimant's immediate needs. However, it has its limitations. For one thing, the duty of the data controller under section [5] is not expressed in terms of disclosure of documents but refers to communication of "information" in "an intelligible form". Although this may be achieved by disclosure of copies of original documents, possibly redacted pursuant to section [5](5), it seems to me that it may also be achievable without going that far."*

The court noted that the right of access, in terms of the DPA, is limited to the communication of the *information* (personal data) to the individual, not the provision of copies of documents.

This supports the Commissioner's existing interpretation that the supply of information constituting personal data that has been extracted from documents or emails, together with some contextual information alongside, will fulfil the obligations under section 5 of the DPA. This extraction method may also prove a useful alternative to the redaction of considerable amounts of information that is not the personal data of, and should not, therefore, be disclosed to, the data subject.

Further guidance on the DPA, including complying with a subject access request, is available on the website.