

Article 15 of the Applied GDPR gives individuals the right to access their personal data. The exercise of this right is usually referred to as making a *subject access request* and is one of the cornerstones of Data Protection legislation.

Whilst the right is subject to a number of exceptions set out in Schedule 9 of the GDPR and LED Implementing Regulations 2018 (Regulations), there is nothing in the legislation 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 the personal data provided by the controller in response to the request.

Individuals who are in dispute with controllers, including, for example, employees or ex-employees, often exercise their right of access. In many cases, they may intend to begin, or have already begun legal proceedings against the controller and see the right of access as a way of obtaining additional information to assist in those proceedings.

Whilst there is a specific exception to the right of access, to the extent necessary, for personal data being processed in connection with criminal matters (Schedule 9, para 1 of the Regulations) no such exception exists where civil legal proceedings (such as Tribunal matters) are contemplated or are ongoing. If a controller were able to avoid complying with a subject access request in circumstances where the data subject was contemplating or had begun criminal or civil legal proceedings it would seriously undermine the fundamental right of access to personal data.

In respect of criminal proceedings (and in the context of the predecessor legislation in the UK), 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 an infringement of Article 15, and possibly Article 12, unless, and to the extent that, a relevant exception or exemption in Part 4 of Schedule 9 applies.

Where the controller relies on an exception or exemption set out Schedule 9, the reasoning must be clear, evidence based and capable of justification to the Commissioner or court.

Munby, J, stated: *"[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 controller] to show its entitlement to refuse access and it must do this with significant and weighty grounds and evidence."*

If a controller refuses to comply with a request, the applicant has the right to lodge a complaint with the Commissioner in accordance with Article 77 and/or apply to the Court for a compliance order under Regulation 122 of the Regulations, and/or seek compensation pursuant to Article 82 and Regulation 125.

A 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.

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 [Article 15]. 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 ... 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 [Article 15], it seems to me that it may also be achievable without going that far."*

As the court stated, the right of access is limited to the provision of personal data to the individual, not the provision of copies of documents under disclosure.

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 Article 15. 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 need not, therefore, be disclosed to, the data subject.

Whilst the law has changed, the right remains unchanged but has been strengthened. If the applicant complains to the Commissioner, the Commissioner has various investigative and corrective powers that may be exercised, either alone, or in combination. This includes the power to enforce compliance and imposition of a penalty.

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