

Employment

Subject access requests under General Data Protection Regulations (GDPR)

Current law under the Data Protection Act 1998

Under the current law (the Data Protection Act 1998), employees or former employees can ask their employers for access to information that the employer holds about them or their personal data. Personal data is defined as data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of the employer. This includes any expression of opinion about the individual and any indication of the intentions of the employer or any other person in respect of the individual.

This can include a personnel file, performance-related documents, disciplinary and/or grievance records, to name a few. Further, any emails that include information that help to identify the individual in question would also have to be made available to the employee. The remit is quite wide and can be a cumbersome and time consuming process for the employer to comply with.

When such requests are received, the employer must respond to the request promptly and at least within 40 days of receiving such a request. Before the employer can respond to this, it must have received a £10 fee from the employee as well as evidence to confirm the identity of the employee and any information that would help to locate the data sought.

Can they be used for litigation purposes?

It is quite common for employees or former employees who have been dismissed to make a subject access request in an effort establish what kind of evidence their former employer may have if there were to be employment tribunal proceedings between the parties. Until recently, it has not been clear whether such requests can be made for the purposes of litigation, and often employers disputed that subject access requests ought to be used for litigation purposes.

The Court of Appeal ruled in in *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74 that subject access requests can be used for the purposes of litigation (even if information emanating from complying with such requests are later ruled not to be disclosable in any court proceedings). There is at least a clarity as to the legitimacy of the use of SARS for litigation purposes.

New rules under GDPR

The new General Data Protection Regulations (GDPR) will come into force on 25 May 2018. This is a Europe-wide regulation which will apply directly to all Member States including the UK. The new rules will make changes to how employers are to deal with subject access requests. Employers will have less time to comply with requests (1 month compared to 40 days), will have to provide more detailed information to employees than currently and no fee will be chargeable for complying with the request.

It's not all bad news though. If the employer receives a complex request, then the time for compliance may be extended up to 3 months (additional 2 months to comply). If the request is "manifestly unfounded or excessive", then the employer can either charge a reasonable fee or refuse to comply with the request. If the latter is chosen, the employer must write to the employee within 1 month of the request to inform them of this and that they may make a complaint to the Information Commissioners Office or seek remedy from the courts.



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