

Annual employment law update

Data subject access requests

2nd February 2021

What amounts to a data subject access request? (DSAR)



- By any means
- To any person
- In any format



When can we refuse to respond to a DSAR?



If a request is manifestly unfounded or excessive, the employer may either:

- Charge a reasonable fee (taking into account the administrative costs of providing the information)
- Refuse to act on the request

When can we refuse to respond to a DSAR? (2)



When is a request manifestly unfounded?

Potential scenarios:

- Malicious intent
- Used solely to harass and cause disruption
- Manifestly – is it obviously and clearly unfounded?



When can we refuse to respond to a DSAR? (3)



Example from the Information Commissioner Office (ICO)

'An individual believes that information held about them is inaccurate. They repeatedly request its correction but you have previously investigated and told them you regard it as accurate.'

'The individual continues to make requests along with unsubstantiated claims against you as the controller.'

'You refuse the most recent request because it is manifestly unfounded and you notify the individual of this.'



When can we refuse to respond to a DSAR? (4)



A request may be manifestly excessive if it:

- repeats the substance of previous requests and a reasonable interval has not elapsed; or
- overlaps with other requests
- It is not necessarily excessive just because it is burdensome – make a reasonable search

When can we refuse to respond to a DSAR? (5)



If you refuse to comply with a request, you must inform the individual about:

- the reasons why you have not complied with their request
- their right to make a complaint to the ICO or another supervisory authority
- their ability to seek to enforce this right through the courts

How extensive does our search for documents have to be?



- Employers are expected to make reasonable efforts to find and retrieve the requested information even if it is:
 - held electronically or as hard copy
 - in archived or backed up electronic files
 - in e-mail deleted folders
 - stored in different locations
- Searches are not expected to be unreasonable or disproportionate



Extent of search – an example from the ICO



- An employee makes a SAR for all the information you hold about them. During your search for their personal data, you find 2000 e-mails that the employee is copied into as a recipient. Other than their name and e-mail address, the content of the e-mails does not relate to the employee or contain the employee's personal data.
- You do not have to provide the employee with a copy of each e-mail (with the personal information of third parties redacted). Since the only personal data that relates to them is their name and e-mail address, it is sufficient to advise them that you identified their name and e-mail address on 2000 e-mails and disclose to them the name contained on those e-mails, for example, John Smith, and the e-mail address contained on those e-mails, for example, JohnSmith@org.co.uk. You should also clearly explain to the individual why this is the only information they are entitled to under the UK GDPR, but remember to provide them with supplementary information concerning the processing, for example, retention periods for the e-mails.

Should we disclose information that refers to other people?



- No, except where:
 - the other individual has consented to the disclosure; **or**
 - it is reasonable to comply with the request without that individual's consent.
- You may sometimes be able to disclose information relating to a third party. You need to decide whether it is appropriate to do so in each case
- If the other person consents to you disclosing the information about them, it is unreasonable not to do so. However, if there is no such consent, you must decide whether to disclose the information anyway

Yes

No

Maybe

Should we disclose information that refers to other people? (2)



- It is good practice, where possible, to ask relevant third parties for their consent to the disclosure of their personal data in response to a SAR
- But you are not obliged to ask for consent. Indeed, in some circumstances, it may not be appropriate to do so, for instance where:
 - you do not have contact details for the third party;
 - it would potentially disclose personal data of the requester to the third party that they were not already aware of; or
 - it would be inappropriate for the third party to know that the requester has made a SAR

Should we disclose information that refers to other people? (3)



- You must always consider whether it is reasonable to disclose the information about the other individual anyway, without their consent.
- The DPA 2018 says that you must take into account all the relevant circumstances, including:
 - the type of information that you would disclose;
 - any duty of confidentiality owed to the third party;
 - any steps taken by you to try to get the third party's consent;
 - whether the third-party individual is capable of giving consent; and
 - any stated refusal of consent by the third-party individual
- This is an non-exhaustive list, and ultimately it is for you to make this decision, taking these factors into account, along with the context of the information.

What data are exempt and so do not need to be disclosed?

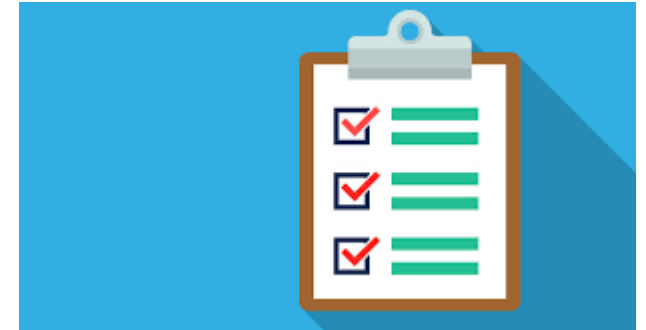


- Legal professional privilege
- Purely personal or household activities
- References given for employment, training or educational purposes
- Data processed for management forecasting or planning if disclosure would be prejudicial to the business or activity
- Records of intentions in negotiations between the employer and employee if disclosure would prejudice the negotiations
- Other exceptions relating to regulatory functions, judicial appointments and proceedings, the honours system, criminal investigations, tax collections and various corporate finance services

What information needs to be given in a DSAR?



- Provide a copy of the data and:
 - purpose of processing
 - categories of data
 - recipients or categories of recipients
 - source of the data
 - retention periods
 - whether automated decision making (including profiling) was used and details of the logic involved and significance for the employee
 - their right to rectify, erase, restrict and object
 - where data are transferred to a third country or international organisation, information about any safeguards
 - right to complain to the ICO



What is the remedy for a failure to respond and/or supply relevant information following a DSAR?



- The data subject can complain to the ICO
- The ICO can issue a:
 - warning;
 - reprimand;
 - enforcement notice; or
 - penalty notice



What is the remedy for a failure to respond and/or supply relevant information following a DSAR? (2)



- The data subject can also apply to the court to require you to comply with the DSAR
- A court can award compensation to the data subject if they have suffered damage or distress because you have infringed their data protection rights. You will not be liable to pay compensation if you can prove that you are not responsible in any way for the event giving rise to the damage

What is the remedy for a failure to respond and/or supply relevant information following a DSAR? (3)



- It is a criminal offence to alter, deface, block, erase, destroy or conceal information with the intention of preventing disclosure of all or part of the information a person making a SAR would have been entitled to receive
- You can defend this offence if you prove that:
 - the alteration, defacing, blocking, erasure, destruction or concealment of the information would have happened regardless of whether the individual made a SAR; or
 - you acted in the reasonable belief that the person making the SAR was not entitled to receive the information requested.

Mark Clayton
mclayton@watershedhr.com

Jo Hale
jhale@watershedhr.com



Ryecroft Aviary Road Worsley Manchester M28 2WF United Kingdom

Telephone +44 161 703 5611 **Web** www.watershedhr.com