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Subject access requests: the U.K. ICO orders disclosure of third party information

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One of the trickiest issues surrounding replying to subject access requests (in the U.K., pursuant to Section 7 of the Data Protection Act 1998 (the “Act”), which implements Article 12 of Directive 95/46) is where the provision of the information to which the data subject is otherwise entitled will disclose information about a third party. Section 7(4)(b) of the Act provides that where this occurs, the data controller should not disclose information relating to another identifiable individual unless (in the absence of consent of that third party) “it is reasonable in all the circumstances to comply with the request without the consent of the other individual”.

The U.K. Information Commissioner’s Office (the “ICO”) recently had occasion to consider this in the context of enforcement action against a public sector data controller.

The Department for Communities and Local Government (the “Department”) was, on September 24, 2008, issued with an Enforcement Notice under Section 40(1) of the Act. The ICO determined that the Department had contravened Section 7 of the Act (and thus had failed to comply with the Sixth Data Protection Principle i.e. the requirement to process data in accordance with data subjects’ rights), as it had failed to process personal data in accordance with the request of the data subject.

The unnamed individual had put in a data subject access request to the Department. However, the Depart-

ment did not fully comply. It did not disclose the identities of the third parties who had give some opinions about the subject relying on Section 7(4) of the Act. It claimed that it was not reasonable in the circumstances to comply with the request without the consent of the third party authors of the data. It was this assessment of reasonableness that, the ICO ruled, the Department got wrong.

According to the ICO, the data withheld by the Department contained “personal data” (within the meaning of the Act) about the data subject; the opinions recorded and the identity of the persons who gave those opinions. Clearly this identified the third party concerned and so there was no obligation to provide the data if (in the absence of consent of the third party) “it was reasonable in the circumstances to comply with the request without the consent of the other individual” (Section 7(4)(b)).

There had been some correspondence and discussions and in order to comply, the Department had provided a summary of the sought information in a manner where a third party would not be disclosed. This was not sufficient, the ICO ruled.

The ICO took the view that withholding the data would be likely to cause damage or distress to the data subject as he would be denied the opportunity to correct personal data about him, which may be incorrect.

But the ICO reasoned that the third party authors of the data were acting in a professional, rather than private capacity. As such it was perfectly reasonable to disclose information which might disclose their identity.

In the absence of full facts (which have not been made public) it is hard to comment on this case. However, the distinction between acting in a private and acting in a personal capacity is one which may impact (if a sound one of principle) upon the ability of data controllers to resist subject access requests. Data controllers are of course always acting in a non-personal capacity, as are their employees. Does this mean that any opinion given (for example, on an assessment/evaluation process) by a member of staff will fall into a category of “professional capacity” and so fair game for disclosure on a sub-

ject access request? Given that Section 7(6) sets out factors which the controller should take into account in making the reasonableness assessment (such as the existence of a duty of confidentiality to the third party, which will often be present), and these factors were not discussed, it is probably an unusual set of facts. The writer ventures to suggest that this is probably something which is not of an ongoing precedential value. An assessment of reasonableness on particular facts will continue to be needed.