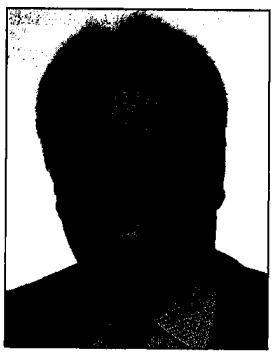
Avoiding fishing expeditions

A recent decision may provide some encouragement to employers seeking to resist compliance with subject access requests that they believe have been made for the purposes of actual or contemplated litigation, writes Charles Wynn-Evans



Charles Wynn-Evans is a partner at Dechert LLP and a fee-paid employment judge assigned to the Birmingham region

'The person making a SAR is not obliged to (nor can the recipient of the request require them to) state why they are making it or how they propose to use the material disclosed.'

Many employers, and especially managers charged with dealing with such requests, must dread the receipt of a subject access request (SAR). In particular, the process of identifying the electronic material, which refers to the individual requesting the information and then analysing that material to assess whether it should be disclosed as personal data for the purposes of the Data Protection Act 1998 (DPA), can be remarkably time consuming. Moreover, an employer that receives such a request from a current or former employee, or from an unsuccessful job applicant, may be concerned that it is little more than a 'fishing expedition' intended to bolster an actual or intended claim or to seek out material that will be damaging to the employer, whether or not directly connected with any legal claim.

There is nothing in the DPA that explicitly limits the purposes for which an individual may serve a SAR or requires that a SAR be made in good faith. Indeed, the person making a SAR is not obliged to (nor can the recipient of the request require them to) state why they are making it or how they propose to use the material disclosed.

The existence of legal proceedings between the maker and the recipient of a SAR is similarly not mentioned as limiting the individual's right under s7 DPA to make such a request. Therefore, an employer which is concerned that a SAR is being made as a fishing expedition would seem, on the face of it, to have little choice but to comply with the request or face the risk of enforcement action. Such action could be taken by way of a complaint to the information commissioner or specific civil proceedings seeking an order that the SAR recipient comply with its obligations under the DPA.

Durant v Financial Services Authority [2003]

In *Durant v Financial Services Authority* [2003], it was suggested that data controllers might be entitled to refuse to comply with a SAR where the individual making the request had commenced or was considering legal proceedings. In his technical guidance on this point issued in April 2005, the information commissioner made it clear that he did not accept this proposition. His analysis was that:

> Failing to comply with a subject access request in such circumstances will, unless an exemption under the Act applies, amount to a breach of the Sixth Data Protection Principle. The right of subject access is one of the cornerstones of Data Protection legislation. 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 this fundamental right.

Nonetheless, the information commissioner noted in his guidance that the courts do have discretion over whether to grant an order of compliance with a SAR under s7(9) DPA:

> [The court] may be reluctant to exercise [its] discretion where it is

clear that the purpose of the request is to fuel separate legal proceedings and, importantly, where the discovery rules under the Civil Procedure Rules would provide a more appropriate route to obtaining the information sought. The Commissioner is also likely to take such matters into account when considering whether to exercise his enforcement powers under section 40.

Elliott v Lloyds TSB Bank plc [2012]

The apparent conflict between the information commissioner's guidance and the case law has left the position unclear, unsatisfactory and ripe for heated disputes. The issue has recently been the subject of further litigation in *Elliott v Lloyds TSB Bank plc* [2012], a decision of Judge Behrens in the Leeds County Court. The decision reviewed the relevant authorities and may provide further encouragement for those seeking to resist SARs that they consider to have been made on inappropriate grounds or for improper motives. It may also bolster arguments that the obligation to search for personal data is not absolute but limited to what is proportionate in the circumstances.

Elliott arose from SARs made to Lloyds TSB and Lloyds Development Capital Ltd. By the time of the hearing, the dispute was principally limited to whether the bank was required to search for Mr Elliott's personal data (if any) within the records of six senior bank managers. The court was asked to decide whether, if there was a breach of s7 of the DPA, Mr Elliott would be entitled to any relief (by way, for example, of an order to comply with the SAR). The bank argued that he would not because his SAR, as a whole, was an abuse of DPA procedure on the basis that it was pursued for a collateral purpose.

The two key issues to be determined in this case were:

- whether Lloyds could resist compliance with Mr Elliott's SARs on grounds of his 'mixed motives' in serving them; and
- whether the search to be conducted was only required to be proportionate.

Lloyds argued that Mr Elliott's real or dominant purpose in pursuing the application was as a fishing expedition to further certain claims against the bank. As such, his application for an order for compliance was an abuse of the process of the court and any relief should be refused. Mr Elliott argued that he had become suspicious that the bank had used some of his personal data improperly and given it to people who had no right to it. He had therefore commenced the proceedings to ensure that his personal data had not been misused.

Lloyds had carried out extensive searches and disclosed substantial personal data to Mr Elliott and contended that it would be disproportionate for the court to order it to conduct searches of the six managers' records. Mr Elliott argued that such searches should be ordered because either the question of proportionality was irrelevant to the obligation imposed by s7 DPA or it would not be disproportionate to order the searches.

There is nothing in the DPA that explicitly limits the purposes for which an individual may serve a SAR or requires that a SAR be made in good faith.

Personal data must have biographical focus

The court referred to the prior authorities on SARs, namely *Durant, Smith v Lloyds TSB Bank plc* [2005]

and *Ezsias v Welsh Ministers* [2007]. These decisions establish and reinforce the well-known point that the issue of what information to disclose in response to a SAR depends on the proper identification of personal data. In *Durant*, it was held that access to the material sought could not possibly be necessary for or even relevant to Mr Durant's protection of his privacy and therefore he could not use proceedings under the DPA to extract it. In *Smith*, it was held that the documents held by Lloyds, and the information in them that Mr Smith sought to have disclosed, were not personal to him in the relevant sense. In other words, they were not biographical about Mr Smith to a significant extent. This issue can, to a greater or lesser degree, determine what data falls to be disclosed in response to a SAR.

The apparent conflict between the information commissioner's guidance and the case law has left the position unclear, unsatisfactory and ripe for heated disputes.

Mixed motives and a 'but for' test

In *Elliott*, the judge accepted that, if the real purpose of the SAR was to obtain documents or information that might assist Mr Elliott in a claim against a third party, this would be an improper purpose. Consequently, there would be no obligation to comply with the SAR and the court would refuse to make an order under s7(9) DPA. However, the question of whether Mr Elliott had 'mixed motives' was more difficult. Could an action to enforce a SAR properly be brought if it was also pursued for a collateral or ulterior purpose?

The judge adopted the guidance on the issue of mixed motives and collateral purposes, albeit not in the context of SARs, given by Lewison J in *Iesini v Westrip Holdings* [2011], where he put forward two propositions. First:

> If it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, *but for* his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. [Emphasis added].

Secondly, Lewison J raised the example of where:

> ... a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation.

In this case, Lewison J 'very much' doubted that such an ulterior motive could preclude the individual from enforcing their rights.

In Elliott, the judge held that, if Mr Elliott were found to have mixed motives in bringing the application, it would not be an abuse of process unless it could be shown that, but for the collateral purpose, he would not have brought the application at all.

Proportionality

By reference to *Ezsias*, it has been argued that the data controller's obligation is only to make a 'proportionate' search in response to a SAR rather than it being an absolute obligation to locate all personal data irrespective of the effort involved. Again, the information commissioner disapproved of these attempts in his subsequent guidance on the case. His view was that the qualification of disproportionate effort applies only to the supply of the relevant information as distinct from the search for it.

In *Elliott*, the judge held that, when read as a whole, the information commissioner's guidance did not suggest that a data controller is required to carry out a disproportionate search upon receipt of a SAR. He agreed that, in accordance with *Ezsias*, the obligation is only to supply such personal data as is found after a reasonable and proportionate search.

When it came to assessing whether Lloyds should conduct a search of the six senior individuals' records, the judge held that a proportionate search had already been conducted. Lloyds had argued that any information that the individuals might hold would be likely to relate to the relevant companies, rather than Mr Elliott, and that any information held would be likely to duplicate that found from searching less senior staff. Judge Behrens accepted this argument as logical, rational and fully consistent with the considerations of proportionality identified in *Ezsias*.

Impact of the decision

The correct response to a SAR depends on a number of factors, including:

- the terms of the SAR itself;
- the nature of the employer's record keeping;
- whether the person lodging the SAR has co-operated in any attempt to narrow and focus the request;
- the likely extent and location of personal data relating to the individual in question; and
- the context in which the SAR is made and its objectives.

Although it is only a first-instance decision, *Elliott* does suggest that employers can argue that they should not be required to perform disproportionate searches or comply with requests, which would not have been made but for the prospect of litigation. ■