

REQUESTS TO ACCESS DATA UNDER DATA PROTECTION LEGISLATION

A LAW SOCIETY OF IRELAND BEST PRACTICE GUIDANCE NOTE FOR SOLICITORS

INTRODUCTION AND GENERAL INFORMATION

Statutory data protection duties apply to solicitors, as data controllers, in exactly the same manner as they apply to other professionals, individuals and companies processing personal data. This Guidance Note provides best practice guidance for solicitors on how to handle access requests which they may receive under data protection legislation. Further information and reference material in relation to data protection obligations generally is available in the members' area of the Society's website under 'Best Practice and Guidance'.

The legislation

First, the relevant statutes are the *Data Protection Act 1988* and the *Data Protection (Amendment) Act 2003* (the "*Act*"). Both of these *Acts* were recently consolidated and restated as part of the statute law restatement project. Solicitors can download the [*Data Protection Act 1988 Restatement*](#) (updated to 14th October 2010) – this is the consolidated and restated version. For convenience, page references for provisions contained in the restatement of the Act have been provided in brackets alongside relevant provisions.

The purpose of this Guidance Note

The purpose of this Guidance Note is to provide recommendations as to good practice on how solicitors should deal with data protection access requests. This Note does not constitute a legal interpretation of the Act and is not legal advice. Because the assessment of whether a right to access data arises will be different in every circumstance, this Guidance Note will not be applicable as best practice to every possible scenario of data access request.

Terminology used in this Guidance Note

Where reference is made in this Guidance Note to a "*data controller*", it can be taken to mean the solicitor and where reference is made to a "*data subject*", it is a reference to the person who has placed a data access request with a solicitor.

How to use links in this Guidance Note to access resource documents

Where text is underlined in this Guidance Note, a link to an external resource document is available by clicking on the underlined text. If you would like to download an accompanying resource document to underlined text in this Guidance Note, simply move the cursor over the underlined text and click on the underlined text. This will open your internet browser and the resource document will be downloaded for you.¹

Document your thought process when processing a data access request

This Guidance Note comprises a series of questions for consideration by a solicitor when processing a data access request. Solicitors may find it helpful to document their thought process while working through these questions so as to determine the manner in which

¹ You may need to log in to the members' area of the Law Society's website in order to access some documents linked to in this Guidance Note

they will deal with the request. A well-documented step-by-step process can then be referenced by the solicitor in communications with the person who has requested access, when either explaining the basis upon which access may be provided or if refusing access.

Follow the Law Society's checklist of steps to take

[Use the Law Society's checklist](#) to ensure you complete all of the steps involved in handling a data protection access request and have a note of the reasons for refusing access.

Adopt an appropriate filing system for data access requests

Where the data subject making the request is not a client, it is not advisable to open a new file referenced under the data subject's name simply for the purposes of compiling all data material you have in relation to that person in one place. In such circumstances, a file on general data access requests by non-clients should be opened.

HOW TO DEAL WITH DATA ACCESS REQUESTS

Solicitors occasionally receive data access requests under data protection legislation. More often than not, these requests come from clients or employees of a firm. On very rare occasions they can arise from non-clients seeking to obtain data in relation to them which you may hold on client files.

Understand what is the right of access

As a starting point, solicitors should approach a data access request by, firstly, familiarising themselves with the statutory right. The right of access to data is contained in *section 4(1)* of the *Act*. In broad terms, it conveys a right on individuals to request, by notice in writing, that a data controller -

- (1) inform them whether they hold personal data in relation to them
- (2) supply them with a description of the categories of data and the personal data constituting the data together with outlining the purposes of processing the data and the recipients to whom the data may be disclosed
- (3) communicate to them the information constituting the personal data and the source of the personal data

HOW TO APPROACH DATA ACCESS REQUEST WITHIN THE FIRST FEW DAYS

Once a solicitor has familiarised themselves with the statutory imperatives of the right of access and the accompanying statutory exemptions, the following questions can be considered and dealt with in turn.

1. Is the request compliant with *section 4*?

Telephone or in person requests for access are not acceptable forms of making a data access request under *section 4*. While the request should be made in writing, any form of notice in writing is acceptable, for example, it can be made by post, email or fax. It is also not necessary for the written request to cite that the request is being made pursuant to *section 4*. It is advisable that, once a data access request has been received, all future communications with the person who has made the access request be communicated in writing only.

2. Will you charge a fee?

A fee may also be payable by the person requesting the information towards the costs of the data controller in processing the data access request – *section 4(1)(c)*. This fee is currently capped at €6.35. Should you decide to charge a fee for processing the data request, once you have informed the data subject of this fee, in writing, the data subject is not compliant with *section 4* until the fee has been paid.

3. Is the person making the data access request the person they claim to be?

It is recommended that a solicitor satisfy themselves that the person requesting the information is the person they claim to be. *Section 4(3)* permits a solicitor to require the person making the data access request to supply them with information which is reasonably required in order to satisfy themselves as to the identity of the individual. Face-to-face photographic verification of identity may be required relying on either a passport or a driver's licence. A copy of the passport or driver's licence should be taken for your records. Where the data subject does not wish to allow a copy to be taken, you should note this on the file and also note that you have satisfied yourself as to their identity on the basis of the documentation provided. Even when a request is received from a client whose identity has already been verified, perhaps as part of your anti-money laundering customer due diligence or simply in accordance with the Society's best practice advice, a solicitor should ensure that the person making the data access request is the person they claim to be.

4. When must the data access request be completed by?

Section 4(1)(a) requires solicitors to comply with a data access request "*as soon as may be*" and "*in any event not more than 40 days*" after the person making the request has complied with *section 4*. As indicated above, if a solicitor decides to charge a fee for the data access request, the time within which you have to comply with a request does not start until that fee has been paid. In addition, if a solicitor decides to follow best practice advice and satisfy themselves by reference to photographic identification evidence that the person making the request is the person they claim to be, then time does also not begin to run until the person making the request has satisfied the solicitor as to their identification. It is important to notify the data subject in writing as early as possible, should you intend to require a fee and identification verification.

5. Write to the data subject – Letter 1 of 2

At this stage you should write to the data subject along the following lines:

- acknowledge receipt of their letter, email or fax
- state the date on which their letter, email or fax was received by your office
- state the amount of the fee for processing the access request and the manner in which this can be paid (should you wish to charge a fee)
- suggest a date and time for the data subject to attend your office so that you can verify their identity as the person they claim to be and note that, should they not be in a position to attend on the date and time suggested, that they might contact your office in writing suggesting an alternative date for verification
- inform the data subject that the statutory timeline of 40 days within which you have to comply with a request can only commence once they have paid the fee (if you intend to charge a fee) and allowed you to verify their identity

HOW TO PROCESS THE DATA ACCESS REQUEST

When the initial stages of the request have been handled by the solicitor and the data subject has paid a fee where required and/or satisfied the solicitor as to their identity, the actual processing of the request can begin. A solicitor can process a data access request by answering the following questions in turn by relying on the logic applied to provide access, to provide access to redacted materials or to refuse access entirely. Even where the end result may be that a data subject may be refused access to data, or there may be no data held by the solicitor relating to them, it is important to be able to explain that the following steps have been completed to both the data subject and, if a complaint is made by the data subject to the Data Protection Commissioner, to an authorised officer.

Important considerations for client and non-client access requests

The majority of data access requests received by solicitors emanate from clients or employees. Very occasionally, a data access request may arise from a third-party. Where data access requests arise from clients, the main focus will be establishing what material constitutes “*personal data*” covered by the legislation. When the access request arises from non-clients (including employees), the question of whether the material is subject to privilege will be of particular concern. Irrespective of whether the request arises from a client or non-client, it is advisable that a solicitor consider all of the following questions and document their thought process throughout.

1. How should I search for data in relation to a data subject?

The manner in which you conduct the search for data is very important. A distinction is drawn by the Act between automated and manual data.

How to conduct a search of your electronic data?

Where the data is stored electronically, it is automated data and, as such, it is subject to all of the provisions of the Act. So, a solicitor, in the first instance, should ascertain whether he holds automated data in relation to the person making the access request, by conducting an electronic search of all electronic files held in a professional capacity by the practice (i.e. not personal files), for references to the name of the person making the personal data access request. The search results then comprise the automated files which should be reviewed further by the solicitor to ascertain whether a legitimate right of access exists. Practitioners may find it useful to print the findings of their electronic search for future reference.

How to conduct a search of your manual filing system?

Solicitors should be particularly careful when conducting a search for manual data held in relation to a person who has made a data access request. In some circumstances, access to all manual data may not be permitted by the Act if it is not information that has been recorded as part of the practitioner’s filing system. Consequently, it is important to have a procedure in place when gathering manual data so as to ensure that the results of the search will fall within the meaning of “*manual data*” and “*relevant filing system*”. In this way, a solicitor can ensure that access is only provided to material explicitly covered by the Act.

In this regard, solicitors should, first, have regard to the statutory definitions of “*manual data*” and “*relevant filing system*”. “*Manual data*” is defined as “*information that is recorded as part of a relevant filing system or with the intention that it should form part of a relevant*

filing system.”² “Relevant filing system” is defined as “any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.”

Practitioners will find it useful to download the [Data Protection Commissioner’s recommended tests and guidance for determining if manual data is part of a relevant filing system](#) to help them when interpreting these definitions. Solicitors may also find it useful when interpreting the meaning of “relevant filing system” to refer to the case studies published on the [Data Protection Commissioner’s website](#).

Where an access request is made by a client, it will be likely that their file will be titled with their name and will, therefore, be part of a relevant filing system. However, solicitors should pay particular attention to the manner in which they search for manual data where a request is received from a non-client as it may be possible that their name will not form part of their filing system. Particular regard should be had to the Data Protection Commissioner’s recommended tests and guidance for determining if manual data is part of a relevant filing system in such circumstances.

2. Is the person entitled to access the data in relation to another individual?

Section 4(4) clarifies that a data controller would not be required to disclose personal data relating to another individual unless that other individual had consented to the disclosure, provided that the details identifying the other individual could not be omitted (redacted). This provision is of particular relevance to solicitors in processing data access requests from non-clients.

3. Do I hold personal data in relation to the data subject?

The type and categories of data to which a person can seek to have access is very broad. The meaning of “personal data” is important in ascertaining the data which a person can access. “Personal data” is defined by the Act as “data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller”.

Solicitors may find it useful when interpreting the meaning of “personal data” to refer to the case studies published by the Data Protection Commissioner. Download an extract from the Guidance section of the Data Protection Commissioner’s website which provides guidance as to that office’s [interpretation of the term “personal data”](#).

Access to particular types of personal data, for example health or social work data, is restricted under various Statutory Instruments. Practitioners should refer to pages 29 to 31 of the restatement of the *Act* for a list of data types to which access has been restricted. Download the [Data Protection Act 1988 Restatement](#).

It is important to note that, where the personal data consists of an expression of an opinion about the person requesting access to the data, consent of the person providing the opinion is not required unless the opinion was explicitly provided in confidence – *section 4(4A)*.

² *Section 1 of the Act*

4. Is the data exempted from the right of access?

Section 5 of the Act contains a number of restrictions to the right of access, including restriction on access in relation to privileged communications and also in relation to data which is compiled for the purpose of preventing an offence.

Privileged communications

Of particular interest to solicitors is the exemption in relation to privileged communications. It goes without saying that the privilege exemption will not be available in relation to access requests made by clients, as privilege is owned by the client and not the solicitor and, as a consequence, the issue should only arise in relation to access request made by non-clients.

The exemption is contained in *section 5(g)* which specifically restricts access to personal data *“in respect of which a claim of privilege could be maintained in proceedings in a court in relation to communications between a client and his professional legal advisers or between those advisers.”*

It is generally accepted that this privilege applies equally to communications which arise in the contemplation of litigation and not exclusively in circumstances where proceedings have already been initiated. The Data Protection Commissioner’s website clarifies the position for data subjects as follows:- *“you do not have a right to see communications between a lawyer and his or her client, where that communication would be subject to legal privilege in court.”*

Some of the case studies published by the Data Protection Commissioner detail circumstances where a claim of privilege has been asserted (not necessarily by a solicitor or barrister). Some interesting case studies are available as a single document for solicitors to download from the Data Protection obligations section in the members’ area of the Law Society’s website. Of particular interest in this regard will be the document entitled [“Case studies relating to privilege and solicitors”](#).

Data processed to prevent offences

Section 5(1)(a) exempts access to data which is compiled for the purpose of preventing an offence. While the matter has not been the subject of any decision to date, it is arguable that this exemption would apply to personal data which is processed in compliance with a solicitor’s anti-money laundering obligations, which could be regarded as data kept for the purpose of *“preventing...offences”*. It is unclear whether the Commissioner would agree with such an interpretation.

5. Inform the data subject of the results of the processing of their data access request – letter 2 of 2

On completion of the processing of the data access request, a solicitor should write to the person making the request informing them of the outcome of the process, within the 40 days statutory time-frame, along the following lines:

- If personal data is held in relation to the data subject and the solicitor has decided that the data subject is entitled to access the data, then the solicitor can satisfy the data access request by providing the data subject with a copy of this data in permanent form, albeit with non-personal data omitted³

³ *Section 4(9)* also provides that a copy of the data need not be provided where the provision of a copy of the data would not be possible or would require a disproportionate effort, or, where the data subject has consented to not

- If no data at all is held in relation to the data subject, then the solicitor should inform the data subject of the type of searches conducted and the failure of those searches
- If the process identifies that data is held in relation to the data subject but the solicitor determines that the data subject does not have a right to access this data under the legislation, the solicitor should outline the reasons why the solicitor believes that the data subject should not be allowed to access the data and should also indicate that the individual may complain to the Data Protection Commissioner about the refusal.⁴ Solicitors should note that the Commissioner's website advises data subjects who have been refused access to contact the data controller to establish the reasons for the refusal prior to contacting the Data Protection Commissioner.

THE POWERS OF THE OFFICE OF THE DATA PROTECTION COMMISSIONER

The broad ranging powers conferred on the Data Protection Commissioner are detailed in *section 10* (pages 38 to 40), *section 12* (pages 44 to 47) and of its authorised officers by *section 24* of the Act (page 56). *Section 10(1)* places a statutory obligation on the Data Protection Commissioner to investigate whether any of the provisions of the Act have been violated, unless the Commissioner forms the opinion that the complaint is frivolous or vexatious. Where a complainant is unhappy with a decision of the Commissioner they have the right to appeal the decision to the Circuit Court. The Data Protection Commissioner, under *section 10(2)*, can order a data controller to take steps to comply with the Act by way of notice in writing. *Section 10(4)(b)* permits a right of appeal to the Circuit Court against such notices. It is an offence to fail or refuse to comply with a requirement specified in an enforcement notice – *section 10(9)*. *Section 12* allows the Commissioner to issue a notice requiring a data controller to provide information. In terms of conducting an investigation, *section 24(2)* provides authorised officers working in the Data Protection Commissioner's office with very broad powers. It is an offence to obstruct or impede an authorised officer.

CONTACT DETAILS

As always, do not hesitate to contact the Society for assistance when interpreting data protection duties affecting you. While we cannot provide you with legal advice, we will endeavour to help you navigate your way through best practice principles. Please contact Emma-Jane Williams, Policy Development Executive, at e.williams@lawsociety.ie.

You may also find it helpful to discuss on an informal basis a data protection access request you have received with the office of the Data Protection Commissioner. [Visit their website for up-to-date contact details.](#)

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receive the data in permanent form although the data held would still have to be communicated to the data subject in "intelligible form" under *section 4(1)(a)(iii)*

⁴ *Section 4(7)*