

AWEW/mjc/NSI 011/14

3 December 2014

To: All NSI approved companies

Dear Colleague

CHANGE TO THE LAW REGARDING ENFORCED SUBJECT ACCESS REQUESTS

From 1 December 2014 it will be a criminal offence under Section 56 of the Data Protection Act 1998 (DPA) to require an individual to make a Subject Access Request (SAR) in certain circumstances relevant to the employment of an individual or the provision of goods, facilities or services to an individual.

An individual has a right under Section 7 of the DPA to make a SAR, for example to the police. However it is now against the law to require an individual to make such a SAR and divulge the results to another person. The reason is that the information revealed by a SAR is likely in many cases to go beyond what is permitted legally, for example spent cautions and convictions. Requiring an individual to make a SAR is known commonly as "enforced subject access".

There is an appropriate way of accessing an individual's criminal records (when it is legitimate to do so) through the criminal records disclosure regime. Organisations can request basic checks which would divulge unspent convictions only; or standard checks, which would include spent and certain unspent convictions, cautions, reprimands and final warnings (though details of the latter may be filtered out in some cases). Enhanced checks would disclose all of the information held in a standard check plus certain relevant information held by the police on an individual.

Organisations can make these requests (where it is possible and necessary to do so) to:

- the Disclosure and Barring Service (DBS) in England and Wales for standard and enhanced checks;
- Disclosure Scotland for Scotland and for basic checks UK wide; and
- Access Northern Ireland for Northern Ireland.

As far as we are aware, the coming into force of Section 56 of the DPA does not affect the operation of the above-mentioned criminal records disclosure regime. Instead one of the reasons for enforcement of Section 56 is understood to be to make it illegal for organisations to by-pass the regime to gain information beyond what is permitted legally.

Therefore, for example, it should still be possible to obtain basic checks from Disclosure Scotland in relation to the application of BS 7858 for the security screening of individuals.

The restriction on SARs under Section 56 of the DPA relates to 'relevant records'. Consequently if the record being sought is not a 'relevant record' the restriction on SARs does not apply (see Annex attached to this letter for further information).



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We draw attention to 4.3.3 d) of BS 7858:2012, which calls for the individual to provide details of all cautions or convictions for criminal offences, including motoring offences and pending actions, subject to the provisions of the Rehabilitation of Offenders Act. An individual has certain rights under the Rehabilitation of Offenders Act, for example not to disclose any spent cautions or convictions.

We draw attention to 4.7 c) of BS 7858:2012, which calls for periods of registered unemployment to be obtained from the Department for Work and Pensions (DWP), or other government agencies. If this requires making a SAR please note there might be a problem in Northern Ireland if this involves the Department of Health and Social Services and is considered to be a 'relevant record' (see Annex).

For further information about subject access requests and the Data Protection Act go the Information Commissioner's Office (ICO) website at <http://ico.org.uk/>.

For further information about criminal records checks go to the Disclosure and Barring Service (DBS) website at <https://www.gov.uk/government/organisations/disclosure-and-barring-service> or the Disclosure Scotland website at <http://www.disclosurescotland.co.uk/> or the Access Northern Ireland website at <http://www.nidirect.gov.uk/access-ni>.

For access to the text of the Data Protection Act 1998, including Section 56, go for example to <http://www.legislation.gov.uk/ukpga/1998/29/data.pdf>.

The above is our understanding of the situation given the information available and it is provisional and subject to review as there appear to be some grey areas. We are expecting further clarification from the ICO in relation to a recent webinar they hosted on the subject of enforced subject access.

Please do not hesitate to contact me if you have any general questions or queries. We are not in a position to provide legal advice. Therefore if you are unsure of the position on something please seek your own independent legal advice.

Yours sincerely

A handwritten signature in blue ink that reads 'Tony Weeks'.

Tony Weeks
Head of Technical Services

Annex – Extract from Clause 6 of Section 56 of the Data Protection Act

(6) In this section "a relevant record" means any record which--

- has been or is to be obtained by a data subject from any data controller specified in the first column of the Table below in the exercise of the right conferred by section 7, and
- contains information relating to any matter specified in relation to that data controller in the second column, and includes a copy of such a record or a part of such a record.

Data controller	Subject-matter
1 Any of the following persons— (a) a chief officer of police of a police force in England and Wales. (b) the chief constable of the Police Service of Scotland. (c) the Chief Constable of the Police Service of Northern Ireland. (d) the Director General of the National Crime Agency.	(a) Convictions. (b) Cautions.
2 The Secretary of State.	(a) Convictions. (b) Cautions. (c) His functions under section 92 of the Powers of Criminal Courts (Sentencing) Act 2000, section 205(2) or 208 of the Criminal Procedure (Scotland) Act 1995 or section 73 of the Children and Young Persons Act (Northern Ireland) 1968 in relation to any person sentenced to detention. (d) His functions under the Prison Act 1952, the Prisons (Scotland) Act 1989 or the Prison Act (Northern Ireland) 1953 in relation to any person imprisoned or detained. (e) His functions under the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Jobseekers Act 1995, Part 1 of the Welfare Reform Act 2007 or Part 1 of the Welfare Reform Act 2012. (f) His functions under Part V of the Police Act 1997.
3 The Department of Health and Social Services for Northern Ireland.	Its functions under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992, the Jobseekers (Northern Ireland) Order 1995 or Part 1 of the Welfare Reform Act (Northern Ireland) 2007.
4 Disclosure and Barring Service.	(a) Its functions under the Safeguarding Vulnerable Groups Act 2006 [or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007]. (b) Its functions under Part 5 of the Police Act 1997.
5 The Scottish Ministers.	Their functions under Parts 1 and 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14).