



Technical bulletin

professional information for CIL A members

TB 38

Date: July 2015

Data Protection Act 1998: Section 56

Background

The Data Protection Act 1998 (DPA) is based around eight principles of good information handling. These give everyone specific rights in relation to their own personal information and place obligations on those organisations that are responsible for processing it.

A criminal offence is created under section 56 of the DPA, commonly known as 'enforced subject access'. This will occur where a person wishes and requests to see another individual's criminal record, but chooses not to use the legally approved system.

From 9th March 2015, section 56 of the 1998 Act has been implemented and it is now a criminal offence to **require** an individual to make a subject access request for information related to their criminal past. The offence relates to circumstances relevant to the employment of an individual, or the provision of goods, facilities or services to an individual.

It is punishable by way of an unlimited fine in England and Wales. In Scotland the fine can be unlimited if heard under solemn procedure, or £10,000. In Northern Ireland, the maximum fine if convicted under a summary offence is £5000, or if convicted on indictment the maximum fine is unlimited (unless expressly limited by statute).

Section 56 (1)(a) & (b) of DPA is designed to cover the process of recruiting employees or checks as part of continued recruitment.

Section 56(1)(c) covers 'any contract for the provision of services....'. Goods, facilities and services is not defined but will include things such as insurance.

Require has a variety of natural meanings, including 'to make compulsory' or 'to make necessary'. The Information Commissioner's Office takes a wide view of what would constitute a 'requirement'. In their view it will cover any circumstance where the data subject is given no choice but to make a subject access request (e.g. make an SAR or your claim will not proceed.).

It can also cover circumstances where a data subject is 'asked' or 'invited' to make a SAR.

This publication has been made available by the Chartered Institute of Loss Adjusters solely for the use and convenience of the reader. The content, views and representations made in this publication are the sole product and responsibility of the Anti Fraud Special Interest Group which has produced it. By making this publication available the CIL A does not offer any endorsement or recommendation of the views and opinions expressed therein. For a full explanation of the terms and conditions upon which the CIL A provides this publication please see our full disclaimer available on the Institute website.



The consequences to the individual of them not making a SAR, whether they are actual, likely or perceived, will be an important consideration in determining whether the request constitutes a 'requirement'.

Claims investigations require adjusters and investigators to seek a variety of information, potentially from a number of different parties and, from time-to-time, to seek evidence to confirm the veracity of the responses provided by the claimant. As part of their information gathering, handlers will ask policyholders for personal data, claim details and other background information and will check the information that was provided when taking the policy out. As part of the claim handling process, Loss Adjusters must validate these declarations by seeking responses to the main questions again.

One declaration question concerns criminal convictions – this question usually appears on proposal / application forms for insurance products and is a declaration question that is generally asked again when policies renew. As such, asking about convictions at claim time is entirely valid and is expected by insurers. In the same way, it is just as valid to ask the other disclosure questions as well, to check if the information provided matches with previous disclosures.

Section 56 of the DPA does not change this position but does restrict the information that is available and which can be requested.

What has changed?

Application of Section 56 does not mean that we cannot ask about criminal convictions at all – Loss Adjusters are still allowed to ask a policyholder if they, or anyone living with them, have any criminal convictions and Loss Adjusters can make a note of the information given. Neither does it mean that Loss Adjusters cannot ask the policyholder to confirm the information given in writing. As such, there is nothing new in this for most claim handlers and/or Loss Adjusters.

However, it is now an offence to ask a policyholder to make what has often been referred to as a 'subject access request' to the police to confirm a criminal record. This request is also sometimes referred to as a SAR, or an SA1, or simply a criminal record check. Asking a policyholder to do this is now termed an 'enforced subject access request'..... and the application of Section 56 makes 'enforced subject access' a criminal offence.

The issue is that the information provided in a SAR includes detail that should not be disclosed. That is, a standard SAR will incorporate all convictions, whether spent or current. Of course, if a conviction is 'spent' under the Rehabilitation of Offenders Act, the subject does not need to disclose it, Loss Adjusters cannot ask to see it and Loss Adjusters certainly cannot take any action because of it. It follows, therefore, that details of 'spent' convictions should not be disclosed to us or insurers.

Solution

In England, Scotland and Wales, a policyholder can be asked to apply for what is known as a 'Basic Disclosure'. This can be done through a number of online organisations (all basic checks for Northern Ireland should be sought from Access Northern Ireland). Obtaining 'Basic Disclosure' does not breach Section 56 of the DPA. **The Information Commissioner's Office confirms that this does not constitute a breach because the information contained in a Basic Disclosure only includes current convictions and cautions.**

This publication has been made available by the Chartered Institute of Loss Adjusters solely for the use and convenience of the reader. The content, views and representations made in this publication are the sole product and responsibility of the Anti Fraud Special Interest Group which has produced it. By making this publication available the CILA does not offer any endorsement or recommendation of the views and opinions expressed therein. For a full explanation of the terms and conditions upon which the CILA provides this publication please see our full disclaimer available on the Institute website.



Any individual can apply for a Basic Disclosure about themselves, for any purpose. The document is issued to the individual. It is then up to the individual what they do with it – in a claim situation Loss Adjusters would be looking for it to be passed to them so they can share it with their principals.

A Basic Disclosure can be obtained by following an online process. There is generally a turnaround time of around 14 days and the service costs £25. The individual completes a form online and submits it with proof of ID.

Summary

- The Basic Disclosure provides ‘unspent’ convictions only, as at the time of applying for the disclosure.
- The Basic Disclosure does not report on convictions that are spent, and does not include police cautions and outstanding charges that have not yet been through the court process. Further, it does not have other police national computer information that would sometimes be included in a police produced subject access report.
- It does not report retrospectively. For example, it will not identify convictions that may have been unspent at the time of policy inception which have since become spent - this is a key difference to a subject access report - it will only provide details of current convictions (unspent) at the time of the basic disclosure request.
- Remember, it is still allowed to ask for and obtain information. It is just how the information is requested that is changing. The request must not be an enforced request to the police.
- Historically, the policyholder would pay the £10 fee charged for a SAR. The Basic Disclosure fee is £25 and this should still be payable by the policyholder. However, given the sum involved has markedly increased, we recommend that insurers are approached on a case by case basis, to ascertain whether they will be prepared to reimburse this.
- In all cases the Policyholder must be treated fairly and ethically.

With the introduction of Section 56 of the DPA, Loss Adjusters must do everything they can to get this sensitive activity right. Loss Adjusters can only request Basic Disclosures via the above means. Any request for a SAR or for the policyholder/claimant to supply their full conviction history will mean that the person making the request has committed a criminal offence. Every claims handling/adjusting firm must implement their own system of checks, to ensure no employee can inadvertently commit an offence.

In conclusion, Loss Adjusters are entitled to ask for a Basic Disclosure, to receive the information provided and to share it with insurers. Should a policyholder decline to provide the Basic Disclosure when requested, Loss Adjusters would be entitled to view this refusal in the same way that Loss Adjusters would consider a policyholder who might have refused to submit a SAR in the past. That is, the claim may not proceed if the claimant refuses/fails to provide necessary information or is deemed to be preventing investigation of their claim. It is recommended that any such refusals should be referred to the insurer, to see how they would want

This publication has been made available by the Chartered Institute of Loss Adjusters solely for the use and convenience of the reader. The content, views and representations made in this publication are the sole product and responsibility of the Anti Fraud Special Interest Group which has produced it. By making this publication available the CILA does not offer any endorsement or recommendation of the views and opinions expressed therein. For a full explanation of the terms and conditions upon which the CILA provides this publication please see our full disclaimer available on the Institute website.



any such refusal to be treated. Recommendations may well be required and the failure to provide the information should not prejudice the Loss Adjusters view.

Anti Fraud Specialist Interest Group

This publication has been made available by the Chartered Institute of Loss Adjusters solely for the use and convenience of the reader. The content, views and representations made in this publication are the sole product and responsibility of the Anti Fraud Specialist Interest Group which has produced it. By making this publication available the CIL A does not offer any endorsement or recommendation of the views and opinions expressed therein. For a full explanation of the terms and conditions upon which the CIL A provides this publication please see our full disclaimer available on the Institute website.