

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's response to the Lord Chancellor's
Department Consultation Paper 'Data
Protection Act 1998: Subject Access'**

January 2003

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Introduction

Liberty welcomes the opportunity to respond to the Lord Chancellors Department Consultation on the Data Protection Act.

For clarity we will respond to the questions in the order that they were put in the consultation document.

1. The arrangements in operation

- (a) Data Subjects
- (b) Data Controllers

Liberty has not had any experiences of note relating to either subject access or as data controller

2. Subject access fee

2.1 Should there continue to be a subject access fee or should the fee be abolished?

We are content for there to be a subject access fee. This deters frivolous requests.

2.2 Should there be an absolute maximum, as now? If so, what should the level be?

There should be an absolute maximum. A data subject should be able to access data held by any data controller without having to pay more than a certain amount. The right to obtain that information should not be affected by the particular nature of the data or the data controller. There is otherwise a risk that persons with lower incomes will find it difficult or impossible to obtain certain data which would undermine the purpose of the legislation.

We believe that the maximum should be £10. This is still a substantial sum, and certainly enough to deter purely frivolous requests. We do not believe that it should be any higher because otherwise many people will find it difficult to access data because of a lack of funds.

2.3 Should cost recovery be permissible? If so, which costs should it cover? Should there be a maximum?

We believe that relating the fee to the recovery of cost is wrong in principle. It suggests somehow that the only person responsible for the information being held by the data controller in the first place is the data subject, or that the data subject is somehow interfering with the data controller's real business when s/he asks to know what personal information they are holding about him/her. The reality, and surely the underlying assumption of data protection legislation, is that the data controller is using the data subject's property (i.e. information about them) for the data controller's own purposes and the data subject is merely seeking to know what information is being used in that way. The substantial share of the cost of giving access to the information to the person whose property it is should be borne by the data controller. The data controller will, of course, recoup some of that cost from the access fee, which should be pitched at a level designed to achieve a balance between deterring frivolous requests and deterring genuine subject access by people of modest means.

Relating the access fee to cost will also increase the cost of data access and make it difficult or impossible for some people to obtain access, thereby undermining the very right of subject access. We do not support the planned £55 upper limit. If £55 for time spent locating information plus the full costs of actual disbursements is charged, it would be expensive to obtain access to data. It would be particularly expensive in situations where there is not much data held but it took a long time to find it (which could be due to inefficiency on the part of the data controller) and where there is a large amount of data. If a data controller holds a lot of data about a person, it is equally important that a person can obtain access. However, the cost of obtaining such access would prohibit access for many people.

Moreover calculating the "cost" of access would itself be a complex and largely artificial accounting exercise. Even if it can be achieved in government, which we doubt, extending such provisions to the private sector would lead either to the loading of commercial costs onto the unwelcome "overhead" of complying with subject

access requests. Alternatively it would require a huge layer of bureaucracy to regulate the charges.

2.4 Should the arrangements for the subject access fee under the 1998 Act and the fee for individual access under the FOI Act be the same?

As a matter of consistency, the 1998 and FOI Act should provide for the same charges. For the reasons set out above, we do not support the proposals in the draft FOI Act regulations. The present charging scheme in the 1998 Act should be adopted for the FOI Act.

3. Response time

3.1 Is the 40-day time limit appropriate or should it be changed?

The requirement of the 1998 that requests are to be dealt with “promptly” or in any event within 40 days is supported by Liberty. The requirement of promptness allows appropriate flexibility whereas the longstop provision of 40 days provides finality, which we support. We do not think it would be realistic to shorten the longstop period of 40 days because this allows for situations where it is time consuming to locate data or there is a large amount of data to find.

3.2 If it should be changed, what should the time limit be?

Not applicable.

3.3 Should there be special arrangements for time-consuming cases or bulk applications? If so, what should that be?

The forty-day time limit should be enough in nearly every case. However, if there are good reasons why an application cannot be processed in time then the Information Commissioner should be able to allow extensions on a case-by-case basis. These should only be permitted if the data controller can satisfy the Information

Commissioner there are compelling reasons for an extension. Any extension should be for a set time and there should be an absolute upper time limit.

3.4 Should the time limit under the 1998 Act and under the FOI Act be the same?

We would support the adoption of the same time limit for the 1998 Act and the FOI Act. This is appropriate as a matter of consistency and also avoids confusion among data subjects seeking access to data and information.

4. Locating the information sought

4.1 Should it continue to be possible for the data controller to require the data subject to provide information to help the data controller locate the information sought?

We support the current system where the data controller requires the data subject to provide certain information. It is in the interests of both parties that a focussed search is possible. It makes it quicker to locate the data, which is in the interests of the data subject. It saves time and money for the data controller involved in the search.

4.2 If the provision remains, should there be any limits on the information required by the data controller? If so, what should they be?

The data controller should only be able to require information relating to the two matters set out in section 7(3) of 1998 Act: (1) to satisfy itself as to the identity of the person making the request and (2) to locate the information which the person seeks.

We would not want a data controller to be able to refuse a subject access request in circumstances where a data subject does not know what information is held but is making a general inquiry as to whether any data is held.

4.3 What other provision could be made to help focus the search?

We would not support the requirement for the provision of any further information than that already required. Although we appreciate that in some cases a very focussed

search may be carried out, this will not always be possible. We would not want to prevent or restrict a data subject from making a general inquiry as to whether data is held.

5. Method of providing information

5.1 Should the basic rule be that a hard copy of the personal data sought must be provided to the applicant? If not, what should the rule be?

We believe that the existing rule provides for the right balance. Flexibility is preserved by, on the one hand, the possibility of the data subject consenting to the provision of other than a hard copy and, on the other, the disproportionate effort defence. The use of e-mail for example is made available by the provision for applicant consent. We do not believe that applicants, many of whom will not have e-mail, should be compelled to accept data electronically.

We would strongly oppose the introduction of a system where only written information about the data, or summary of the data had to be provided. This raises a concern about the accuracy of the description or summary provided. The data subject should be able to look at the actual data him- or herself.

There should not be an automatic right to inspect data. This will often be difficult or impossible due to the location of the data controller's premises or the times available for inspection. We are also concerned that in those circumstances a data subject may not have sufficient time or find it difficult to assimilate the data held.

5.2 Are there any additional circumstances (i.e. beyond impossibility, disproportionate effort and the applicant's agreement) in which the data controller should be able to provide the personal data sought otherwise than through a hard copy?

No.

6. Frequency of requests

6.1 Should there be a fixed period within which repeat applications do not have to be accepted or a full cost-recovery fee can be charged? If so what should the period be?

No. We agree with the present system which provides that a data controller does not have to comply unless “a reasonable interval” has lapsed. This provides the necessary flexibility. In some situations, a request may legitimately be made shortly after a previous request in circumstances where it is known that new data will have been required. The interval in such circumstances may be reasonable even though short.

There is no provision currently for a full cost-recovery. We do not support the introduction of such a fee. It would be open to abuse by data controllers who could contend that the interval was not reasonable and hence costs could be recovered.

6.2 If there is to be such a period, should there be an exception for repeat applications made in special circumstances? If so, in what circumstances?

This is not necessary given our response to question 6.1. We would say that a fixed period makes the system more complicated because it is then necessary to allow flexibility by making exceptions in certain circumstances, which it will be difficult to define. It is for that reason that a flexible system is preferable.

7. Exemptions

7.1 Are any additional exemptions needed in the UK? If so, what should they cover?

At this stage in the consultation no case is made out for the introduction of additional exemptions. If in the light of the responses from data controllers the introduction of additional exemptions is proposed, further consultation on specific proposed extensions is essential.

In the light of Liberty’s experience of the legislation to date, we see no case for the introduction of additional exemptions. The existing legislation, much of which dates

back to 1984, provides a tested balance between the interests of data controllers and data subjects which should certainly not be tilted any further against data subjects.

We do not support the introduction of the exemptions listed as available in other EU states into the 1998 Act.

7.2 Is there any case for more closely aligning the subject access exemptions under the 1998 Act with the exemptions under the FOI Act?

S.40 of the FOI Act makes clear that the two Acts are designed to provide entirely separate codes. This is partly for historical reasons (which can now be ignored) and partly, no doubt, to reflect the distinction between the important personal right of the individual to know what information others are holding about him/herself and the more general political right of citizens to share information held by officialdom. In our view this distinction is justifiable and comprehensible, and alignment simply for the sake of uniformity is unnecessary.

By and large the DPA works by providing a limited range of exemptions which either apply or do not apply, whereas the FOI Act provides a wider range of exemptions most of which are subject to a utilitarian balancing exercise (see Annex C to the consultation paper). The existence of the balancing exercise gives greater discretion to the data/information controller than a more simply stated exemption in specified circumstances, and for that reason we believe that it is inappropriate to extend the balancing exercise to the case of individuals seeking information about themselves, which we believe is an important individual right, analogous to a right of property. Liberty believes that an extension of discretion to data controllers by means of a balancing exercise would be likely to result in a decrease in the availability of personal data. We believe, then, that any extension of exemptions should be considered on a case-by-case basis rather than driven by a desire for uniformity in codes which have quite different functions. At present we see no case for any extension of the exemptions.

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