

Written evidence from the Law Society of England and Wales

House of Commons Public Bill Committee considering the Data Protection Bill [HL] 2017-19

1. Executive Summary

- 1.1. This submission to the Public Bill Committee outlines the Law Society's views on the Data Protection Bill. It has been prepared by members of the Society's Immigration Law Committee, composed of experienced practitioners who are expert in both asylum and general immigration law.
- 1.2. The Law Society welcomes the EU General Data Protection Regulation (GDPR) and the enhanced protection it provides for data subjects in EU Member States including the UK. However, we do not support the proposed exemption within Schedule 2 of the Bill which would exclude these protections for the maintenance of 'effective immigration control'.
- 1.3. **We recommend removing the exemption (Schedule 2, Part 1, paragraph 4 – Exemptions etc from the GDPR – Immigration) to data subjects' rights where personal data is being processed for the maintenance of effective immigration control.**

2. The potential consequences of the immigration exemption

- 2.1. **The Law Society believes that the exemption is disproportionate and could be harmful to those seeking to challenge their case against the Home Office.** We are concerned that the exemption:
 - 2.1.1. removes the accountability and transparency upon which the legitimacy of Home Office immigration functions must be based.
 - 2.1.2. is so wide as to allow limitless use of personal data and sharing of such data on an unprecedented scale.
 - 2.1.3. discriminates against the fundamental rights of non-UK nationals as well as the rights of British citizens.
 - 2.1.4. has grave potential impacts on access to justice.
 - 2.1.5. risks the legitimacy and adequacy of the UK data protection regime once the UK leaves the European Union.

3. Concerns about the exemption

3.1. The proposed exemption will deny people their right to access their own personal data.

- 3.1.1. The GDPR builds on existing legislation and represents an evolution in protecting individuals' personal data as a fundamental human right. Subject Access Requests (SARs) are critical for legal practitioners in obtaining redress and pursuing lawful outcomes in the face of administrative/operational failures and demonstrably poor decision-making.¹

¹ This conclusion has been reached by numerous observers including the Home Affairs Select Committee in its most [recent report](#) (paragraph 27) and previous reports. See also recent and historic reports of the [Chief Inspector of Borders and Immigration](#).

- 3.1.2. SARs are often the only way for lawyers and their clients to see the data being held by the Home Office. If this data is incorrect, this is the sole opportunity to correct it and to rectify the incorrect decisions being made as a result.
- 3.1.3. They are also used to identify systemic failures that compromise security and effective immigration control.
- 3.1.4. This exemption would allow the Home Office to unilaterally deny a SAR, on a case-by-case basis and at any point in an application, including at a judicial review or appeal stage.
- 3.1.5. The below case studies seek to demonstrate how critical SARs can be in immigration cases:²

- **Case Example 1:** X had no right to stay in the UK, but a decision on his case was being delayed, due to it being held in an old case backlog. When the lawyer received the SAR, they discovered that the Home Office had made a decision to grant X indefinite leave to remain (the right to stay in the country, indefinitely, until a citizenship application can be made) a couple of years previously, but had never implemented the decision, nor had they told the client. Without the SAR, the client would never have known he had a legal right to remain in the country simply due to a processing error.
- **Case Example 2:** Y is a child in care for whom a former social worker made a citizenship application in 2016. The child was too young to take control of their application and the social worker did not tell X about the outcome of this, nor keep records of whether and why it was refused. The new social worker has instructed lawyer who used the SAR to find out that the application was refused and the reasons for this. The SAR has also told lawyer that the child's mother is now a British citizen, which neither X nor the social worker was previously aware of. This is a critical piece of information pertaining to the child's immigration status that would not have come to light but for the SAR.
- **Case Example 3:** Z was a failed asylum seeker attempting to reopen his case. The Home Office refused to reopen the case saying that he had previously left the UK voluntarily and had received a resettlement grant from the Home Office. The SAR revealed that a third person had assumed his identity, had applied for and secured voluntary return and the grant had subsequently been removed. The file further revealed that there was no cross checking of signatures, photographs or fingerprints on the Voluntary Assisted Returns scheme. This would have had serious consequences for Y had the SAR not revealed the identity theft and the failures of the Home Office to undertake adequate security checks.

3.2. The pursuit of effective immigration control does not require the elimination of data rights nor does it require a specific legislative exception

- 3.2.1. A criminal activity exemption already exists under Article 23(1)(d) GDPR and can be lawfully used by the Home Office in appropriate cases. It is supported by scores of immigration-related criminal offences³ and is contained in Schedule 2 of the Bill. We therefore see no lawful justification for the creation of a new exemption which bears no relation to the specified grounds for restriction of data rights under Article 23(1) and which fails to meet the test of proportionality within that Article.

² In an annex to this briefing we set out more case examples demonstrating further, the importance of data access rights for those who are subject to immigration control

³ <http://www.migrationobservatory.ox.ac.uk/resources/briefings/immigration-offences-trends-in-legislation-and-criminal-and-civil-enforcement/>

3.3. The breadth of the exemption is so wide as to permit unnecessarily wide data sharing and heightens the risk of administrative abuse.

3.3.1. As it stands this exception is so wide as to permit the wholesale restriction of an individual's data rights (including rights of access, rectification and erasure) and potentially allows limitless data sharing as between government departments and agencies. This also extends to outsourced third party agents.

3.3.2. This is subject only to a test of whether the fulfilment of data rights would prejudice the maintenance of effective immigration control or the investigation of activities that would interfere with it. Given the Home Office's significant past breaches of data protection law⁴, we are not confident that the exception will be used sparingly or justifiably on a case-by-case basis.

3.3.3. We are also concerned about the apparent lack of administrative safeguards. It is unclear how the exemption will work in practice or whether operational guidance for decision makers will be consulted upon or made public. The current drafting of the exemption would mean that a person would have no knowledge of the use of their data.

3.4. This exemption fails to meet the requirements and safeguards set by the GDPR for the imposition of restrictions on data rights and risks post-Brexit data flows.

3.4.1. Article 23(1) GDPR carefully sets out those areas of government regulatory activity where data rights can be restricted, subject to a test of proportionality to safeguard fundamental rights and freedoms. Immigration control is not explicitly listed as one of the grounds on which a democratic society can restrict fundamental rights and freedoms, leading us to question whether the proposal is either (a) necessary or (b) proportionate.

3.4.2. In our view, the proposed exemption unacceptably stretches the provisions of Article 23(2) GDPR, fails to respect the fundamental rights and freedoms of data subjects and does not demonstrate necessity and proportionality. This could influence a European Commission finding of adequacy in relation to the UK data protection regime for the purpose of cross-border data flows post-Brexit. Many UK industries have highlighted the need for continued data flows between the UK and the EU, including the legal services sector. The then Minister for Digital and the Creative Industries, Matt Hancock, has said the UK is seeking an "enhanced mechanism that builds on what the existing model of adequacy provides for third countries". If the UK was not able to secure data equivalence, the reputation of the UK, its legal system and its economy will be significantly impacted.

⁴ https://www.theregister.co.uk/2015/07/07/home_office_kept_30_data_breaches_quiet_last_year/

Annex 1 – Subject Access Requests

Category of SAR Case	Context	Specific case examples
Vulnerable People	<p>Vulnerable people will often make applications to the Home Office and, because of their circumstances, will not have had control nor understanding of their immigration history and may have lost documentation. In these cases, SARs are the only way of obtaining such information. This group includes children, victims of domestic violence and those with mental health issues.</p>	<p>Case 1 X was detained pending deportation, despite protesting that he was British. In detention it became clear that he had severe mental health problems. Lacking mental capacity, X was unable to articulate his case or provide any evidence; he was therefore handled as an undocumented migrant. Having obtained the SAR, the lawyer contacted his father, who brought evidence that he and his son (who had arrived here as a young child) were recognised as refugees. His son was released, and placed in psychiatric hospital for treatment. In total he had been detained 19 months, during which time his mental health had deteriorated substantially.</p> <p>Case 2 Z, a victim of domestic violence had been led to believe her husband had made an application for Indefinite Leave to Remain (ILR) before she fled him. He later turned up at a police station with her passport indicating an application hadn't been made. It was only when lawyers got Z's SAR that they discovered the husband had made an ILR application, but it had been rejected as it was made on the wrong form.</p>
Home Office Practices	<p>Errors made during the Home Office's application and decision-making processes can have disastrous effects for individuals and families. SAR requests are absolutely critical to uncovering these errors and achieving a complete reversal in cases, as the examples in this section demonstrate. Below is a non-exhaustive list of errors and omissions committed by the Home Office:</p> <ol style="list-style-type: none"> a. Lost documents, documents never served b. Misleading/inaccurate assertions from the Home Office and records revealing 	<p>Case 1 W, is a Belarussian asylum seeker whose claim was refused for non-compliance. A SAR proved that the Home Office had sent documents including notices of hearing to the wrong address and that they had received original documents which they claimed not to have received, prior to an original decision. Lawyers were then able to re-open his case.</p> <p>Case 2 X was lawfully resident in the UK from 2005. He had an application refused in 2007 as the Home Office said he had failed to notify them of a change of sponsor. The Home Office maintained this at an appeal which he lost on that point only. He subsequently secured a further visa. A SAR proved that the Home Office had misled the tribunal about not receiving the change of</p>

	<p>Home Office inconsistencies</p> <ul style="list-style-type: none"> c. Home Office failure to act d. Home Office bad conduct in litigation e. Home Office mixing up different persons 	<p>sponsor letter as there were contemporaneous electronic records of the letter being received.</p> <p>Case 3 W is an asylum seeker, whose fresh claim had been pending for years without any answer- it had simply never been actioned at the Home Office. Lawyers were only able to prove its existence through the SAR file as there was no previous disclosure of the claim's existence by the Home Office.</p> <p>Case 4 Home Office argued that X was not complying with the removal process. During unlawful detention proceedings, lawyers were disclosed documents by Home Office's lawyers which were compared with the SAR. This comparison showed that one of the documents had been tampered with (the relevant words were erased with the use of tipp-ex) by the Home Office.</p> <p>Case 5 Y was a nurse with the NHS who had lived lawfully in the UK for many years, who was denied nationality because the Home Office had linked her to another Nigerian woman with a slightly similar name and a poor immigration history. She was only able to challenge this and prove that the Home Office has confused her with another applicant once she had the SAR.</p>
<p>Unlawful Detention</p>	<p>SARs are also an important record of the Home Office's thinking in litigation and unlawful detention cases. Monthly detention reports should demonstrate that detainee cases are being kept under review and that reasons for detention remain lawful. SARs are used during disclosure to show that continuing detention unjustified and cases are not being properly reviewed or at all. Sadly, monthly reports are often consecutively copied and pasted. Information from the SAR is also important in assessing the correct amount of damages in these cases.</p>	<p>Lawyers issued judicial review (JR) proceedings and sought damages against X's detention. The Home Office contested the claim that X was detained simply, and unlawfully, just to make him attend the interview. In the SAR however, there was unequivocal evidence that this was the sole intended purpose (and that they intended to re-release him after 3 days – but that didn't happen). The JR succeeded, and X was awarded damages from the Home Office.</p>
<p>Right of Appeal and Judicial Review</p>	<p>In right of appeal cases, the Home Office is required by Immigration Tribunal Rules to include all the evidence referred to in their 'Reasons for Refusal' letter in their "respondent's bundle". In practice,</p>	<p>X's asylum claim was refused, entirely on the basis of the Home Office's published guidance that stated that there is no real risk of persecution to LGBT persons in Bangladesh, which was subsequently</p>

<p>they often do not do so and when they do, documentation and supporting evidence is usually missing.</p> <p>Furthermore, in judicial review litigation, where disclosure is requested at the pre-action stage, the Home Office will refuse to provide this and will instead direct lawyers to make a SAR. This is obviously inappropriate from a litigation perspective but also reiterates the importance of SARs as these are often the only way that lawyers can obtain disclosure relevant to litigation.</p>	<p>withdrawn. X's application was rejected, and she was denied a right of appeal on the ground that she was raising for the first time a risk of persecution. The SAR proved that this was raised in the s120 Notice. A judicial review against the denial of a right of appeal was successful and demonstrated the serious error of the Home Office.</p>
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