

Ius Laboris Webinar

Speed dating seminar: employees and their right to access their personal data in the EU

Thursday 16 July 2020

14:00 – 14:45 BST

15:00 – 15:45 CEST



SPEAKERS



Alexander Milner-Smith, Partner
UK
Lewis Silkin
Alexander.Milner-Smith@lewissilkin.com



Dr Jessica Jacobi, Partner
Germany
Kliemt.HR Lawyers
jessica.jacobi@kliemt.de



Linda Hynes, Partner
Ireland
Lewis Silkin
Linda.Hynes@lewissilkin.com



Marco Sideri, Partner
Italy
Toffoletto De Luca Tamajo
sms@toffolettodeluca.it



Wouter Van Loon, Associate
Belgium
Clayes & Engels
Wouter.VanLoon@claeysengels.be



Ilse Baijens, Associate
Netherlands
Bronsgest Deur Advocaten
i.baijens@bd-advocaten.nl



Søren Terp Kristoffersen, Associate
Denmark
Norrbon Vinding
SorenTerpKristoffersen@NorrbonVinding.com



Sean Illing, Senior Associate
UK
Lewis Silkin
Sean.Illing@lewissilkin.com

WHAT IS A SUBJECT ACCESS REQUEST?

- **Article 15(1) GDPR:** The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data



OTHER SUBJECT RIGHTS REQUESTS

- Also under the GDPR, individuals can exercise their rights (amongst others) to:
 - rectification
 - erasure
 - restrict processing and
 - data portability
- Today we will be focussing on access requests BUT all types of request are relevant (note in UK use of 5R email!)

KEY POINTS

- Timeframe to respond – 1 month (default) or 3 months (if the requests are complex or numerous)
- Data controller normally cannot charge a fee for complying with a SAR
- **Article 12** – data sent to a data subject should be in a concise, transparent, intelligible and easily accessible form
- **Article 15** – in addition to a copy of their personal data, individuals must be provided with further proscribed information, including:
 - the purposes of the processing
 - the categories of the personal data concerned
 - the recipients or categories of recipient to whom the personal data has been or will be disclosed, particularly in third parties or international organisations
 - where possible, the envisioned period for which the personal data will be stored, or, if not possible, the criteria used to determine that period and
 - the existence of the right to request rectification or erasure, or restriction of processing, or to object to such processing

KEY POINTS

- **Article 15** information (cont.)
 - the right to lodge a complaint with a supervisory authority
 - where the personal data are not collected from the data subject, any available information as to their source
 - the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject and
 - where personal data are transferred to a non-EU country or to an international organisation, the data subject shall have the right to be informed of the safeguards taken relating to the transfer

KEY POINTS

- Do we need to provide everything?
 - Proportionality
 - Recital 63
 - [UK example only - There are exemptions found in the **Data Protection Act 2019 Schedules 2, 3 and 4** including:
 - Privilege (legal advice and litigation)
 - Third party data
 - Confidential references etc.]

WHY ARE SARs USED?

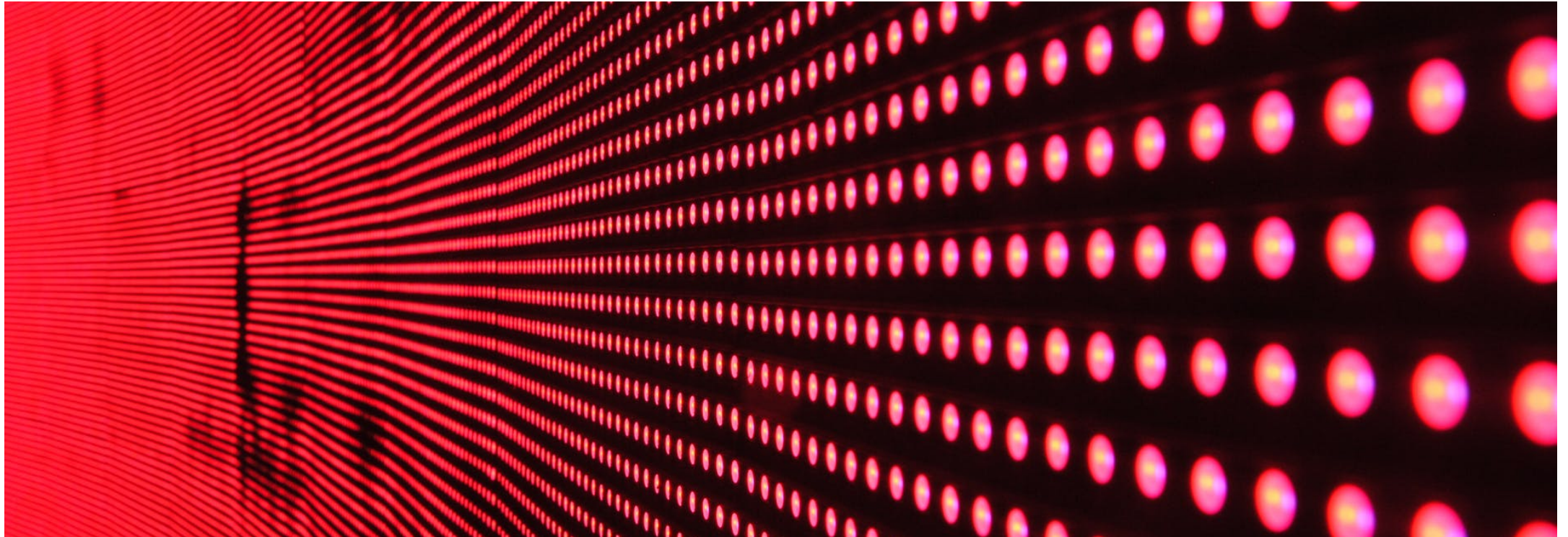
- Workers genuinely want to know how their data is processed

OR

- Tactics – SARs are commonly used as a tactical weapon
 - They can help a data subject gain leverage in settlement negotiations
 - Actual/potential litigants often use them as a fishing expedition to obtain early disclosure
 - Individuals may threaten a complaint to the regulator, or private action under Article 82
- It is important to note that the motive of the requester is generally not a reason for refusing to comply with a SAR and not something regulators look at

SPEED DATING 1:

**ARE SARs, AND SPECIALLY WORKPLACE SARs, COMMON IN YOUR COUNTRY?
DO YOU SEE THIS CHANGING?**



SECTION II: CONTROLLER TACTICS



WHO IS YOUR AUDIENCE?

- In your correspondence with a data subject, you are ultimately outlining your reasoning and processes to the regulator
- The way you acknowledge the SAR will depend on whether you are asserting that it is complex. If you are, you need to outline the steps you are taking to deal with these issues ASAP
- It is important that from the very early stages you outline your reasoning and show that you are trying to assist the data subject
- Be reasonable, polite and proportionate at all times

FAIL TO PREPARE, PREPARE TO FAIL

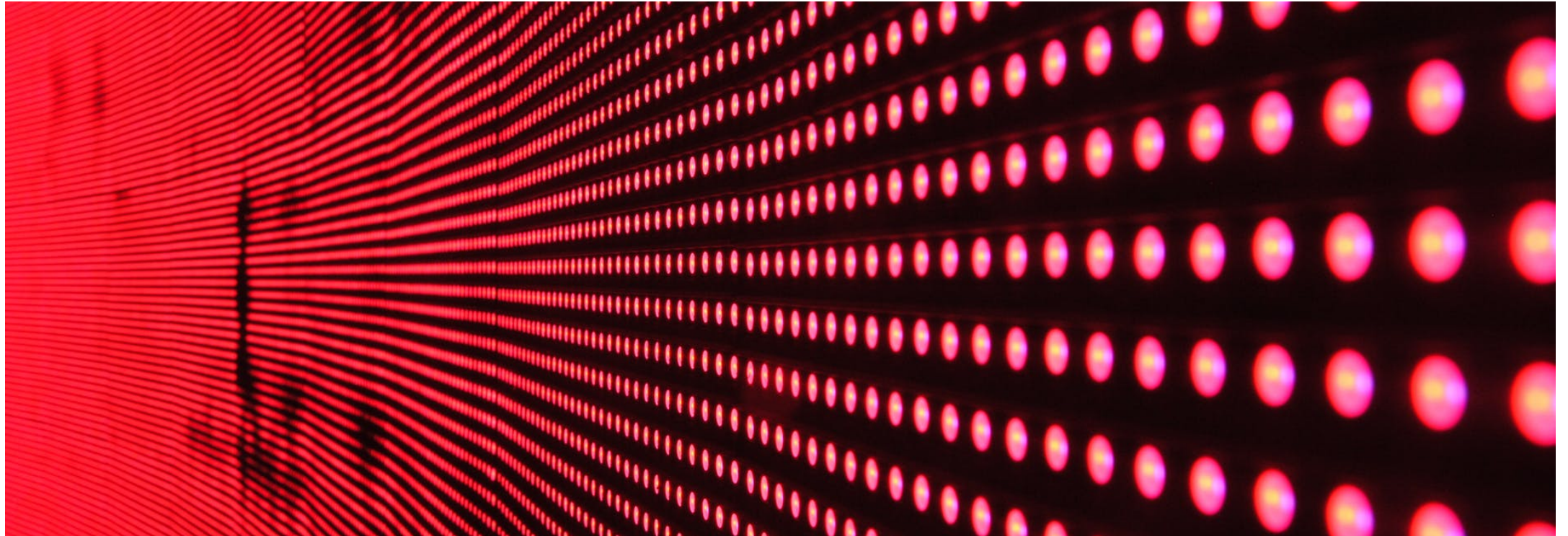
- Responding to a SAR necessitates a multi-disciplinary approach bringing in teams from across an organisation to search for the data, review it, and respond to the data subject. IT, legal and HR teams will be crucial to the response
- Understand the background to a SAR, e.g. is settlement happening in a week? Is there underlying litigation? Etc.
- Understand from start that Action A in week 1 will impact Action D in week 4 or month 3 – you need to plan how you are going to respond. Steps you take early on will impact how you deal with the SAR
- Do you need a policy or protocol in place to guide your response? (at least in summary – don't be hamstrung by process)

PLAN

- From receipt to delivery, what do we need to do?
- How are we going to respond initially?
- Initial high-level searches?
- Extension of time required (is the request complex or not)?
- Are we going to introduce narrowing searches? Engage with data subject or not?
- How are we reviewing the data? (External, internal, review platform)
- How are we providing the data? (Extract or copies or descriptions)
- Review protocol and records of decisions made
- Cover letter

SPEED DATING 2:

**WHAT IS THE MOST IMPORTANT THING YOU NEED TO KNOW ABOUT
RESPONDING TO SARs IN YOUR COUNTRY?**



SECTION III: CASE LAW IN THE UK



DAWSON-DAMER V TAYLOR WESSING [2017] EWCA CIV 74

CASE

- Law firm acting for trustees in a trusts dispute receives SARs from beneficiaries
- The requests were refused on basis that all data was going to be covered by privilege and therefore not responsive to SARs (would have been disproportionate to look for data)
- A claim was brought by the beneficiaries in the High Court for compliance

FINDINGS

High Court refuses claims, in part on basis of improper motive – appeal upheld by Court of Appeal – key conclusions:

- TW was **not entitled to rely** on proportionality arguments which were not evidence-based.
- The SAR regime does not recognise a motive test.

B V GENERAL MEDICAL COUNCIL [2018] EWCA CIV 1497

CASE

- Application of mixed data exemption
- GMC proposing to disclose a report containing an assessment of a doctor's competence when treating a patient
- Request made in circumstances where the patient was threatening to sue the doctor. GMC want to disclose the report. The doctor challenges the proposed disclosure

FINDINGS

- High Court allows the challenge, overturned by Court of Appeal.
- CA accepted that in a mixed data claim, the requester's motive may be relevant to the balancing exercise.
- The court should not second-guess the controller's decision on how to strike a balance between the competing rights of parties.

ITTIHADIEH V CHEYNE GARDENS/DEER V OXFORD UNI

[2017] EWCA CIV 121

CASE

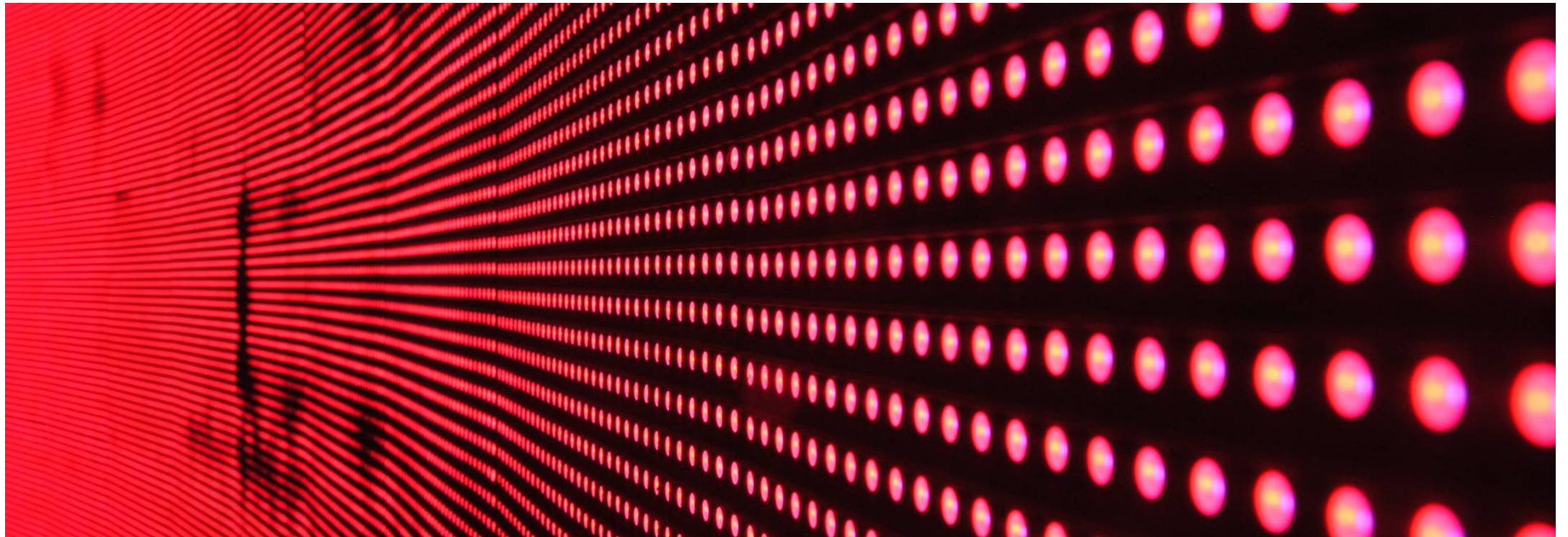
- Court of Appeal considered the limits on a data controller's obligations when responding to a SAR.

FINDINGS

- Motive – 'Collateral purposes will not invalidate a SAR' but 'absence of a legitimate reason may have a bearing on the court's discretion' and 'there is a sufficient safety net in the form of the EU doctrine of "abuse of rights"'.
• Proportionality – A requester may be entitled to know what data about them was processed at a meeting they attended but where they have already received that data from the controller outside of the SAR process 'that may go to the exercise of the court's discretion'.
• Searches – The requirement is for reasonable and proportionate searches, not to leave every stone unturned.

SPEED DATING 3:

IS THERE ANY CASE LAW IN YOUR COUNTRY?



CONCLUSION

SARs ARE COMING TO A PLACE NEAR YOU – BE PREPARED





North America: Canada - Mexico - United States

Central & South America: Argentina - Brazil - Chile - Colombia - Panama - Peru - Venezuela

Western Europe: Austria - Belgium - Cyprus - Denmark - Finland - France - Germany - Greece - Ireland - Italy
Luxembourg - Malta - Netherlands - Norway - Portugal - Spain - Sweden - Switzerland - United Kingdom

Eastern Europe: Belarus - Bulgaria - Croatia - Czech Republic - Estonia - Hungary - Latvia - Lithuania - Poland - Romania - Russia - Serbia - Slovakia - Slovenia -
Turkey - Ukraine

Middle East & Asia Pacific: Australia - Bahrain - China - Hong Kong - India - Israel - Japan - Kazakhstan - New Zealand - Papua New Guinea - Saudi Arabia -
Singapore - South Korea - Thailand - United Arab Emirates

www.iuslaboris.com