

Ius Laboris Webinar

ACCESS all AREAS

Thursday, 19 January 2023

11:00 – 12:00 am CET

SPEAKERS



Alexander Milner-Smith, Partner
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Lewis Silkin (Ireland)

Introduction

“My most important objective is to safeguard and empower people, by upholding their information rights.”

John Edwards, Information Commissioner UK, July 2022

“The overall aim of the right of access is to provide individuals with sufficient, transparent and easily accessible information about the processing of their personal data so that they can be aware of and verify the lawfulness of the processing and the accuracy of the processed data. This will make it easier - but is not a condition - for the individual to exercise other rights such as the right to erasure or rectification.”

EDPB Guidelines 1/2022, January 2022

“The right of individuals to access and challenge personal data is generally regarded as perhaps the most important privacy protection safeguard.”

OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data

What is a SAR?

- Article 15 GDPR/UK GDPR – right of access
 - Gives an individual (data subject) the right to request access to any and all **personal data** that a controller processes about them. It also allows the **data subject** the right to access other supplementary information.
- Types of SAR
- Routinely used in employment disputes (and other disputes)
 - Commonly used as a tactical weapon (to obtain early disclosure or gain leverage in settlement negotiations)
- Getting it wrong can result in both
 - **legal action** (brought by the requester or affected third party individuals) and
 - **Regulatory action** (by the ICO and other regulators)

What happens next?

- Timescales - [Article 12\(3\)](#) GDPR/UK GDPR - one month + additional two months depending on complexity and number of the requests
- What do you need to provide?
 - Everything? **No...**
 - There are certain limits and exemptions put in place that allow you the right to not provide certain documents to the data subject, e.g.
 - [Article 15\(4\)](#) GDPR - right to retain a copy shall not adversely affect the rights and freedoms of others (including controller's rights) and Recital 63 GDPR
 - “That right should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software.”
 - “However, the result of those considerations should not be a refusal to provide all information to the data subject.”
 - Specific exemptions provided under the [Data Protection Act 2018](#) (third party data and legally privileged data being the most common)
 - Proportionality limits under general EU principles (although see new guidance) but also ICO guidance and case law
 - Duty to provide copy data applies only to ‘data’ not to ‘documents’

Outside E-uropa

- This is not just a E-uropa issue
- Similar rights exist in Hong Kong in the PDPO – they are in California's CCPA and in South Africa's POIPA
- All based around similar principles but all subtly different



Access Obligations

Singapore

Access Obligations - Singapore

Section 21(1) of Singapore's Personal Data Protection Act (PDPA) provides that, upon request by an individual, an organisation shall provide the individual with the following as soon as reasonably possible:

- a)** personal data about the individual that is in the possession or under the control of the organisation; and
- b)** information about the ways in which that personal data has been or may have been used or disclosed by the organisation within a year before the date of the individual's request.

Access Obligations - Singapore

- Organisations not required to provide access if the burden or expense of providing access would be unreasonable to the organisation or disproportionate to the individual's interest or if the request is otherwise frivolous or vexatious
- Provide access within reasonable time and to inform subject if not able to provide access within 30 days
- Able to charge an administrative fee (on a costs recovery basis) to accede to the access request

Access Obligations - Singapore

[redacted] v HSBC Bank (Singapore) Limited Case No. DP-1810-B2892R

- An individual unsuccessfully applied to HSBC for a credit card
- He then sought access to HSBC's internal evaluation report when deciding on his application
- HSBC provided a copy but redacted some data on the basis that it was opinion data kept solely for evaluation purpose (which is an exception to disclosure under the PDPA)
- The individual was dissatisfied and sought a review from the regulators (the Personal Data Protection Commission (PDPC))

Access Obligations - Singapore

[redacted] v HSBC Bank (Singapore) Limited Case No. DP-1810-B2892R

- the PDPC held that the redacted data was opinion data kept solely for evaluation and fell within the exception. HSBC was entitled not to disclose to the individual. The policy is that such opinion data use for evaluation can be kept confidential.
- Another interesting point was that the redacted data was opinion data auto-generated by HSBC's proprietary algorithm that determined an individual's suitability for a credit card. HSBC had provided the individual with HSBC's written guidelines on ethical use of Big Data and AI, to show how technology was used to conduct credit card facility assessments. The PDPC held that HSBC had acted reasonably by providing this information.



Right of access

Romania

Right of Access - the practice of Romanian DPA

➤ Complaints submitted to DPA

- Violation of data subjects' rights - amongst top triggers of complains received by DPA
- The DPA 2021 Report (the most recent available) expressly lists the access right amongst the cases of violation of data subjects which trigger the complains with such authority.
- The violation of data subjects is listed as “top 6 reasons of complains with Romanian DPA” in 2021 Annual Report of such authority

➤ 8 sanctions based on GDPR

- Lack of answer or lack of complete answer to data subject request/answer within the deadline – sanctions ranging between warning and 5000 EUR
- The data subject was not provided with a copy of video recordings – fines between 2000-3000 EUR –the same hypermarket

DPA ordered a hypermarket to provide all requested video recordings, while blurring images which identify other persons

The Romanian DPA has held repeatedly that the “copy of data” under art. 15 GDPR refers to the copy of the documents or recordings where such data are contained

No official position of Romanian DPA on this topic, either before or after the Opinion of CJEU Advocate General in C-487/21 case



Right of access

Belgium

DPA 4/2020 – 29 July 2020

➤ Facts:

- Hospital fires medical doctor who is in charge of a department following negative audit
- Doctor asks for a copy of the audit report
- Hospital refuses based on a number of arguments

➤ Does the report include personal data?

- DPA: YES, the doctor's name is mentioned and the report reviews the way the department was managed by the doctor

➤ Is the right of access limited by copyright?

- NO, there is no proof that the expert objected to providing a copy
- If copyright would be an issue the hospital could have only given right to access

➤ Is the right of access limited by the confidentiality of the report?

- NO, in particular as the report was used against the doctor in litigation

➤ DPA decision: hospital was given a reprimand and must provide access to doctor

DPA 70/2020 – 27 October 2020

- Employee asked in 7 months time at least 4 times to have access to appraisal forms
- Employer reacted only once: we have to check whether rights of others are at stake
- DPA confirms the need to anonymise identifiable data of other persons, but can not be a reason to refuse access nor to extend delay for response
- Employer was ordered to provide data within 14 days delay

DPA 15/2021 – 9 February 2021

➤ Facts:

- IT consultant and employee representative
- Asks access and copy of various documents among which:
 - Mailbox
 - All IT logs
 - Internal notes and comments made in his personnel file by his manager and the HR responsible

➤ On the notes and comments in personnel file

- Right of access is limited by privacy rights of manager and HR but that does not mean employer can refuse to provide any information
- **Data have to be anonymised**

➤ On the IT Logs

- Right of access must be in balance with the enormous administrative burden the search on all IT logs would bring along
- Can be refused based on proportionality principle

➤ E-mails

- Employee having access to his mailbox is no ground for refusal
- To protect the rights of other persons involved: anonymise
- Confidentiality of company data justifies refusal to provide a copy of the mailbox



SARs Overview

Ireland

Ireland

- No more IDPC SARs complaint backlog
- 42% of IDPC complaints in 2021 related to SARs – will only continue
- Concerns raised by IDPC in last report about controllers responding to SARs
- IDPC revised SAR guidance for controllers in October 2022
- IDPC report case studies that are useful re SARs:
 - Zoom recording SAR case study
 - CCTV SAR case study
 - Clamping SAR case study

Practical considerations

- Ask yourself
 - **ID?** Have you checked the data subject is who they say they are?
 - **Start a high level search.** This may run to hundreds of thousands of documents
 - **Acknowledge the SAR.** Would you regard this request as vanilla or complex? Is this request manifestly excessive?
 - Commence **further correspondence** with the data subject to narrow down the scope?
 - **Hone the searches.** Will key search terms in conjunction with the data subject's name narrow the number of documents?
 - **Review** - What are your review parameters? Are you going to release third party data that is already known without redaction? What is your risk tolerance? How are you applying exemptions?
 - **Cover letter** setting out all of the information that is required by Article 15 UK GDPR (which could be by reference to a privacy notice) and provision of personal data
 - Prepare to follow up on any **complaints** about your handling of the process

Practical considerations (continued)

- Think tactically at all times
 - What is Data Subject trying to achieve?
 - Who is my audience for correspondence?
- Requestor's right to data v other data subjects right to privacy
- Competing obligations when responding to a DSAR and complying with a tribunal/court disclosure exercise

UK developments

➤ **Proposals in Data Protection and Digital Information Bill**

- Proposed change in threshold for refusing to deal with a SAR will be amended from the current "*manifestly unfounded*" to "*vexatious or excessive*" (aligning it with the UK's FOI regime)

➤ **Retained EU Law (Revocation and Reform) Bill**

- DCMS lobbying to ensure data protection regime remains and not at risk of sunseting!

➤ **ICO reprimands rather than fines**

- Naming and shaming 7 organisations in September 2022 for failing to comply with SARs in a timely manner
- ICO25 collaborative approach
- Different approach to other jurisdictions and regulators?
- Guidance
 - ICO - Right of access | ICO (high level guidance)
 - ICO - Right of access | ICO (detailed guidance)
 - EDPB - Guidelines 01/2022 on data subject rights - Right of access

Regulatory action and caselaw

- **Finland** – €750,000 fine for debt collection company for not responding to SAR requests + did not comply with the obligation to co-operate with the supervisory authority
- **France** – €300,000 fine for telecoms provider for failing to adequately respond to access and erasure requests and other GDPR breaches
- **Germany** - Higher Regional Court overturned the decision of a lower court, holding that the motivation of a data subject's access request is irrelevant to the legitimacy of the request
- **Belgium** – DPA ordered a company to fulfil a data subject's requests within 30 days
- **Sweden** - Administrative Court confirmed DPA decision that right of access obliges the controller to disclose information regarding the specific recipients of personal data to the best of its abilities if a data subject expressly asks for it


Final comments



Ideas. People. Possibilities

MORE ON DATA PRIVACY

Insights: <https://iuslaboris.com/topic/data-privacy/>



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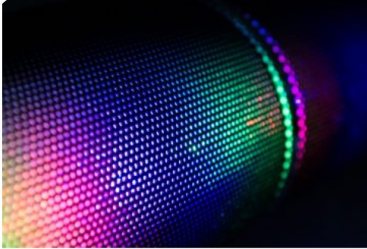
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Data Privacy

We look at data privacy from an employment perspective and consider how to navigate this increasingly complex area of law.




Video surveillance of employees in Germany: get ready for compliance checks!

GERMANY | 11.03.21 5'



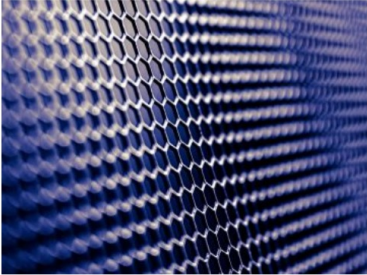
Data and diversity - what kind of data can employers collect? A guide from Belgium

BELGIUM | 16.02.21 4'



The Brexit Agreement and data flows: a view from Finland

FINLAND | 20.01.21 4'

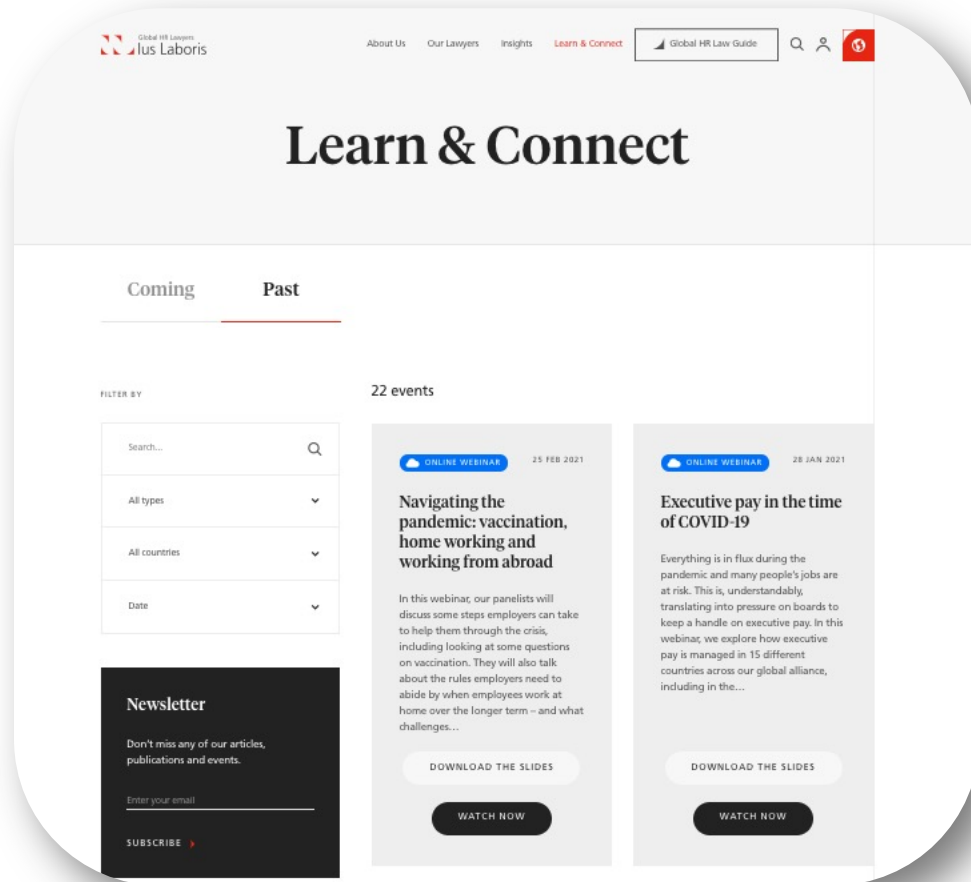


Brexit: what's the deal with data?

UNITED KINGDOM | 11.01.21 4'

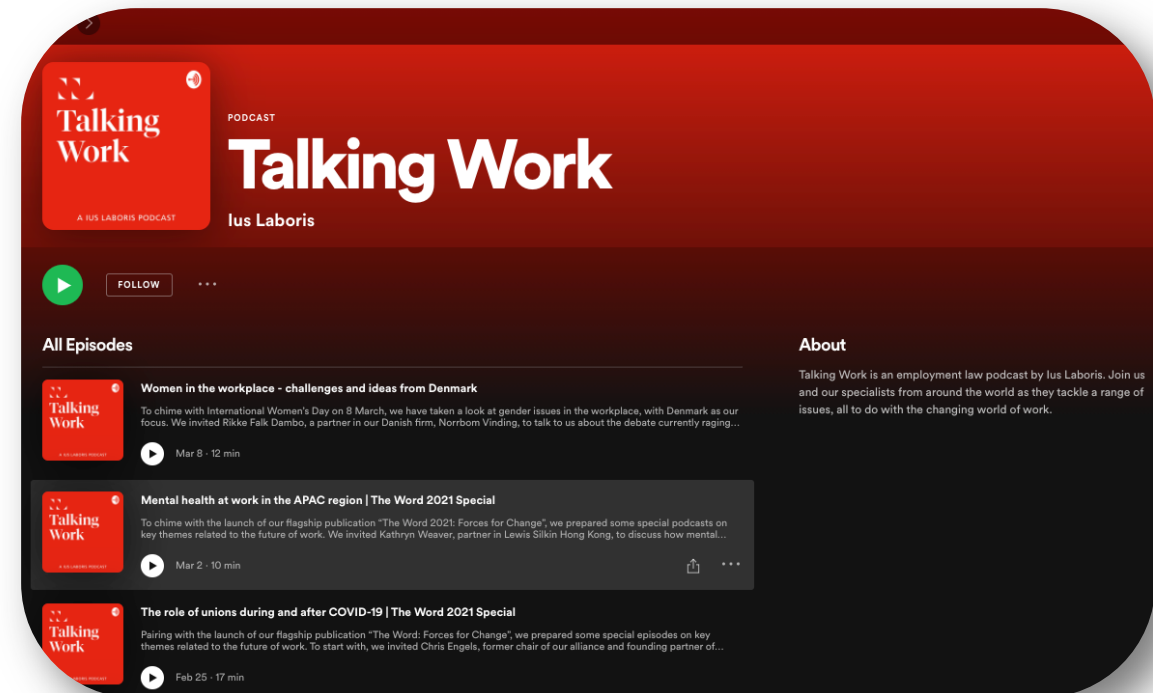
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