

## **The Information Commissioner's response to the Ministry of Justice's consultation: Guardianship of the Property and Affairs of Missing Persons**

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000, the Environmental Information Regulations and the Privacy and Electronic Communications Regulations 2003 (PECR). He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner welcomes the opportunity to respond to this consultation. We have confined our response to Question 2, which asks for views on the proposals for the status, role and duties of a guardian, because this is the question that is relevant to our main information rights responsibilities mentioned above. We have not responded to those questions that fall outside of our regulatory remit.

### Response to Question 2

The section of the consultation headed, "Access to Information" refers to those aspects of the role and duties of a guardian that are of most relevance to the Information Commissioner's information rights' responsibilities. The Commissioner welcomes the consideration given to whether a guardian should be able to access information about the missing person and if so whether there should be any limits on the information that the guardian is able to access.

Section 7 of the Data Protection Act 1998 (DPA) gives individuals the right to get a copy of the information about them that is held by an organisation that is processing their information. This is one of the fundamental rights for individuals under the DPA and enables individuals to check that the information held about them by an organisation is accurate. It also allows individuals to find out why an organisation is holding information about them and who this information is disclosed to. The consultation outlines the powers it is proposed will be conferred on a guardian of the property and affairs of a missing person and includes the exercise of a legal right. It is the Commissioner's view that where a

guardian is being given the power to exercise a legal right these powers would include the right of subject access under the Data Protection Act.

The Commissioner's subject access code of practice contains practical advice for organisations on how to deal with requests for personal information from individuals. The code includes a short section on requests made on behalf of others, such as where an attorney makes a request to an organisation for a copy of the personal information about the donor that it holds:

[http://ico.org.uk/for\\_organisations/data\\_protection/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/subject-access-code-of-practice.PDF](http://ico.org.uk/for_organisations/data_protection/~media/documents/library/Data_Protection/Detailed_specialist_guides/subject-access-code-of-practice.PDF)

The code explains that although there are no specific statutory provisions enabling third parties to exercise subject access on behalf of someone who does not have the mental capacity to manage their own affairs, it is reasonable to assume that an attorney with authority to manage an individual's property and affairs, or a person appointed by the Court of Protection to make decisions about such matters, will have the appropriate authority. Similarly, the Commissioner's view is that a guardian with power to manage the property and affairs of a missing person appointed in accordance with the proposals in this consultation would also be able to make subject access requests on behalf of the missing person.

The right of individuals to access their personal information under the DPA is a relatively broad one. If the requested information is the individual's personal data, is solely about the individual and no subject access exemption applies, the individual (or his authorised representative) must be given access to the data. The Commissioner recognises that access to all of the missing person's information may give the guardian access to information that the missing person would properly regard as confidential, even as against the person appointed as guardian. However, we accept that the guardian may need access to the missing person's information to exercise his or her powers in the best interests of the missing person. Therefore, the Commissioner agrees with the proposal that the right of subject access should be available to guardians, but that this right should be limited to circumstances where the guardian reasonably considers it necessary to have access to the information in question in their capacity as guardian.

When exercising the right of subject access on behalf of a missing person, the guardian will only be entitled to be given access to the information that would have been made available to the missing person him or herself. Therefore, although the right of subject access will give the guardian the right to have a copy of the personal data of the missing

person, there may be occasions where the guardian considers it necessary, in order to carry out their duties as guardian, to have access to information that is not the personal data of the missing person. In these circumstances the guardian may have to consider alternative means of access to information, possibly involving an application to the court for disclosure.

The Commissioner recognises that the proposal for enabling the appointment of a guardian for a missing person is different from the appointment of an attorney because the guardian will be able to deal with the property and affairs of a missing person without his or her express consent. The Commissioner does not consider that the lack of express consent should prevent a guardian from being able to access the missing person's information, but considers that it makes it even more important that the safeguards surrounding the appointment of the guardian are rigorous. Further, because of the lack of consent from the missing person, it is essential that the circumstances in which the guardian should request access to the missing person's information are clearly defined and explained to guardians on their appointment.

The Commissioner welcomes the proposal in the consultation that a guardian should only be able to request access to the missing person's information that he or she "reasonably considers necessary in his or her capacity" and that he or she would be under an obligation "to use it only for that purpose". This is in accordance with the circumstances in which the Commissioner would expect a guardian to access personal data under the right of subject access in that a guardian would be accessing information as the authorised representative of, and on behalf of, the missing person. Where the guardian is seeking personal data about the missing person for his or her own use, rather than on behalf of and in the interests of the missing person, he or she will not be acting as the authorised representative of the data subject but will be acting in his or her own interests. Consequently, in such circumstances the guardian should not be able to access the data subject's personal data under the right of subject access.

The Commissioner notes that a guardian could be held liable for breach of duty if he or she accessed information unnecessarily or misused it. As well as being held liable for breach of duty, if it was found that a guardian had used the missing person's personal data obtained under the right of subject access otherwise than in the interests of the data subject, the guardian would also have breached the DPA. In these circumstances the guardian may also be guilty of an offence of unlawfully obtaining personal data under section 55 of the DPA. The Commissioner considers that these provisions, together with the requirement that guardians can only act in the "best interests of the missing person" are important safeguards against misuse of the right to access information by guardians.

Given the serious consequences of abusing the right of subject access by a guardian, the Commissioner considers it is imperative that the circumstances in which guardians exercise the right of subject access are clearly explained to them upon appointment so that they understand the limits on their ability to gain access to the missing person's personal data. It is also important that guardians are made aware of the potential consequences if they abuse the right of subject access.

The consultation proposes that third parties would not be required to make a judgement as to whether the guardian was only requesting the information that is required for carrying out his or her role. This is in keeping with the ICO's approach to subject access and recognises the practical difficulties for data controllers to make such a judgement. The subject access code of practice says that an individual making a subject access request is not required to tell the organisation their reason for making the request or what they intend to do with the information requested. It is however important that organisations check that the individual has the authority to make the request on behalf of the missing person; in this case the organisation would need to check that the requester has been appointed as guardian of the missing person.

We note that the consultation says "we anticipate" there will be guidance for guardians. The Commissioner considers that having readily available and easily accessible guidance for guardians outlining their role and explaining terms such as "necessary" and "best interests" is a key aspect of the safeguards for missing persons. We also consider it is important that the guidance explains the potential consequences for guardians who breach their duties. We therefore suggest that the preparation of such guidance is incorporated into the process for creating any new role of guardian for the property and affairs of a missing person.

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