

# Enforced subject access (section 56)

## Data Protection Act

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## Introduction

1. The Data Protection Act 1998 (DPA) is based around eight principles of good information handling. These give people specific rights in relation to their personal information and place certain obligations on those organisations that are responsible for processing it.
2. The DPA also creates a number of criminal offences around how personal data is used. An overview of the main provisions of the DPA can be found in [The Guide to Data Protection](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help data controllers to fully understand their obligations and promote good practice.
4. This guidance explains the criminal offence created under section 56 of the DPA, commonly known as enforced subject access.
5. Enforced subject access will typically occur where a person wishes to see another individual's criminal record, but chooses not to use the established legal system.
6. This guidance examines the subsections of section 56 to explain how the ICO has interpreted these provisions.

## Overview

Section 56 of the DPA makes it a criminal offence to require an individual to exercise their subject access rights (under section 7 of the DPA) to gain access to information about their convictions and cautions and provide that information to a person. This may be used, for example, to provide as supporting evidence regarding a job application or before entering into a contract for goods, facilities or services. The law sets out varying levels of fine depending on where in the UK the offence has been committed (see paragraph 27 for more information).

There is an appropriate way of accessing an individual's criminal records (when it is legitimate to do so) through the criminal records disclosure regime. Organisations can request basic checks which would divulge unspent convictions, or standard checks, which would include spent and certain unspent convictions, cautions, reprimands and final warnings (though details of the latter may be filtered out in some cases). Enhanced checks would disclose all of the

information held in a standard check plus certain relevant information held by the police on an individual.

Organisations can make these requests (where it is possible and necessary to do so) to:

- the Disclosure and Barring Service (DBS) in England and Wales for standard and enhanced checks;
- Disclosure Scotland for Scotland and for all Great Britain basic checks (Disclosure Scotland do standard, enhanced and Protecting Vulnerable Groups Scheme checks (PVG checks) for organisations in Scotland); and
- Access Northern Ireland for Northern Ireland (all basic checks for Northern Ireland should be sought from Access Northern Ireland).

An individual providing the results of a subject access request, rather than using the appropriate channel set out above, runs the risk of greater, and sometimes excessive disclosure. This is because a subject access request requires all personal information to be disclosed (subject to some exemptions), and does not distinguish, for instance, between spent and unspent convictions.

For more information on subject access requests, read the ICO's [Subject access: code of practice](#).

Making this type of request is a right set out in the DPA, but there is a distinction between someone doing so of their own volition and somebody being required to make such a request by someone else.

## The criminal offence

### Subsection 56(1) DPA

7. Section 56(1) DPA states:

*'(1) A person must not, in connection with—*

*(a) the recruitment of another person as an employee,*

*(b) the continued employment of another person, or*

*(c) any contract for the provision of services to him by another person,*

*require that other person or a third party to supply him with a relevant record or to produce a relevant record to him.'*

8. This subsection makes it a criminal offence for a person (this can be an individual or a legal person, such as an employer or organiser) to require another person (or a third party) to make, and provide the results of, a subject access request for a 'relevant record'. The use of the words 'in connection with' mean that this subsection has a broad scope.
9. The 'relevant record' will be a person's personal data, contained within one of the types of information defined in subsection 56(6) of the DPA. This can be in relation to the recruitment of that person as an employee ('employee' being defined in subsection 56(10) DPA), their continued employment or any contract for the provision of goods or services to the person imposing the requirement by any other person.

### **Example**

An individual applies for a position as a waiter at a restaurant but is told that they cannot be offered the position until they provide a copy of their criminal record. The employer states that they must make a subject access request in order to gain this information and they will only be appointed if it is supplied. The employer is likely to have committed an offence under subsection 56(1)(a) of the DPA.

### **Example**

A shop owner decides to extend the size of their premises. A local builder submits the successful tender. The shop owner requires the builder to confirm whether or not they have ever been in prison, before they will allow the work to go ahead, explaining that the builder can make a subject access request to the Prison Service to do this. In this instance, the shopkeeper is committing an offence under subsection of the 56(1)(c) DPA.

## **Subsection 56(2) DPA**

10. Section 56(2) DPA states:

*'A person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public must not, as a condition of providing or offering to provide any goods, facilities or services to another person, require that other person or a third party to supply him with a relevant record or to produce a relevant record to him.'*

11. It is an offence under subsection 56(2) DPA if a person providing goods, facilities or services requires an individual to make a subject access request as a condition of providing them with goods, facilities or services.
12. The terms goods, facilities or services are used in their normal plain English sense.
13. Providing the opportunity for individuals to do voluntary work is caught by the provision of goods, facilities or services.

#### **Example**

An individual makes an application for insurance to an insurance provider. The individual wants to be provided with a service. The insurer agrees to insure the individual but explains that it is a condition of the insurance that the individual must make a subject access request for their criminal record. The insurance company is likely to have committed an offence.

#### **Example**

An individual applies to do voluntary work with a charity. The charity explains that the individual can work for them but they will first need to exercise their subject access rights and provide the charity with their criminal record, before they can start. The charity is likely to have committed an offence.

#### **What does 'require' mean?**

14. In relation to section 56 DPA, the ICO takes a broad interpretation of the word 'require'. It has several plain English meanings but the most appropriate in this case is 'to make

necessary<sup>1</sup>. This means that a person makes it necessary for an individual to make a subject access request and provide them with that information before they will, for example, offer an individual a job.

15. A 'requirement' in relation to an enforced subject access request should be looked at in a wider context than simply an individual not receiving a job if he or she does not make a subject access request.
16. For instance, it would be considered a requirement if an individual would be left in a detrimental position by not making a subject access request. Similarly, if making a request is incentivised, an individual misses out by not making it.

### **Example**

An individual applies for a job and is successful. Their potential employer informs them that they will be given the job whether or not they make a subject access request for their criminal record. However, the potential employer explains that if they do not make a subject access request, their annual salary will be at a reduced rate than that advertised. This would obviously leave the individual in a detrimental position if they did not make a subject access request.

17. It is the act of 'requiring' an individual to make a subject access request that is the offence. The requirement is enough, and is not dependant on the withdrawal of the offer of employment or the provision of goods, facilities or services.
18. An individual will have been required to make a subject access request if they are given the option to either be subjected to an appropriate and lawful criminal records check (through the Disclosure and Barring Service (DBS), Disclosure Scotland or Access Northern Ireland) or make a subject access request.
19. It is worth noting that the cost of making a subject access request (usually £10 or sometimes free) is less expensive than going through the appropriate criminal record check (which can be at least twice as expensive). The act of encouraging or incentivising the data subject to use their subject access rights to obtain the information would be sufficient to constitute a requirement.

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<sup>1</sup> <http://www.oxforddictionaries.com/definition/english/require>

## **What does a 'condition' mean in this context?**

20. In relation to subsection 56(2) of the DPA, the term 'condition' uses its everyday meaning, ie a situation or state of affairs that must exist before something else can exist or be permitted. Therefore, the requirement will be a condition where the provision of the goods, facilities or services is dependent on the subject access request being made.

## **Exceptions and penalties**

### **Subsection 56(3) and (4) DPA**

21. Subsection 56(3)(a) DPA explains that it will not be a criminal offence for a person to request an individual to make a subject access request for their personal data if there is another piece of legislation which allows this to be done, if any rule of law allows it or if a court orders an individual to make a subject access request.
22. Subsection 56(3)(b) DPA makes an enforced subject access request allowable, if that requirement can be justified as being in the public interest. Given the importance of subject access as a core right within the DPA, and also noting the reference in article 8(2) of the EU Charter of Fundamental Rights, there will need to be an extremely strong justification for enforced subject access to be justified as being in the public interest, supported by clear, specific and cogent evidence.
23. This may be difficult to achieve as there is already clear public policy and laws relating to criminal record checking and rehabilitation, which reflect the availability of such information.
24. Subsection 56(4) DPA explains that the public interest defence provided in subsection 56(3) DPA (ie why requiring a subject access request to be made is in the public interest) cannot be used as a defence when the justifying argument is that the public interest relates to the prevention or detection of crime.
25. This is because Part V of the Police Act 1997 defines in what circumstances certain types of criminal records check can be made. Given that the Police Act 1997 outlines the circumstances for criminal records checking, it is not possible to justify enforced subject access on the basis that it would assist with the prevention or detection of crime.

### **Subsection 56(5) DPA**

26. This subsection confirms that an individual who requires someone to make a subject access request is committing a criminal offence. This is an offence which can be heard either by a magistrates court or a crown court, in England, Wales and Northern Ireland. In Scotland it will be heard in a sheriff court. Committing such an offence in England and Wales can carry an unlimited fine, while in Scotland the fine can be unlimited if heard under solemn procedure or £10,000. In Northern Ireland, the maximum fine if convicted under a summary offence is £5000, or if convicted on indictment the maximum fine is unlimited (unless expressly limited by statute).
27. Any ICO prosecutions will be carried out in line with the [ICO prosecution policy statement](#).

## Relevant records

### **Subsection 56(6), (6A) and (7) DPA**

28. These subsections describe what is considered to be a 'relevant record'. Subsection 56(6)(a) explains, in relation to the adjoining table, the list of data controllers who can hold a 'relevant record' (the left hand column of the table). Subsection 56(6)(b) DPA explains the type of information to which a relevant record can relate eg criminal convictions (the right hand column of the table). A copy of the table is available in the annex.
29. Subsection 56(6A) DPA explains that where a subject access request is made for information which is purely information that is category '(e)' data (as defined under section 1 DPA), this is not a request for a relevant record. Category '(e)' data does not constitute a relevant record under section 56 DPA. It follows that this could not be considered as an enforced request.
30. Subsection 56(7) DPA explains the definitions of 'caution' and 'conviction' in relation to the table found under subsection 56(6) DPA.

### **Subsection 56(9) DPA**

31. This subsection explains that a subject access request is still considered as enforced even if the response states that no information is being processed about an individual. Such a response reveals information in itself, and the act of requiring



is enough to be an offence under section 56 DPA, as mentioned previously.

### **Subsection 56(10) DPA**

32. This subsection defines what an employee is for the purposes of section 56 DPA. It explains that it can be an individual who works under a contract of employment under [section 230\(2\) of the Employment Rights Act 1996](#) or someone who holds any office, whether or not the individual is entitled to payment for their position.

### **Other considerations**

33. This guidance makes it clear that making an enforced subject access request is a criminal offence and should not be done. A person may seek access to an individual's criminal past using the criminal records regime set out in the Police Act 1997, where the regime allows them to do so. Individuals may also apply for a 'Basic Check' disclosure of their own record by applying to Disclosure Scotland or Access Northern Ireland.
34. Organisations should consider if they have a good reason for requesting a criminal records check. Once they have this information, they will then be a data controller for sensitive personal data with all the compliance responsibilities found under the DPA.
35. If it is necessary to do so, detailed standard and enhanced criminal record checks can be done through the appropriate statutory procedures (DBS in England and Wales, Disclosure Scotland in Scotland and Access Northern Ireland in Northern Ireland).

### **More information**

37. Further information on other parts of the DPA is available on [our guidance pages](#)
38. As this guidance has been developed by drawing on ICO experience, it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

39. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
40. If you need any more information about this or any other aspect of data protection, please [contact us](#), or visit our website at [www.ico.org.uk](http://www.ico.org.uk).

## Annex

### Section 56 DPA

#### **56 Prohibition of requirement as to production of certain records**

- (1) A person must not, in connection with--
  - (a) the recruitment of another person as an employee,
  - (b) the continued employment of another person, or
  - (c) any contract for the provision of services to him by another person,

require that other person or a third party to supply him with a relevant record or to produce a relevant record to him.

- (2) A person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public must not, as a condition of providing or offering to provide any goods, facilities or services to another person, require that other person or a third party to supply him with a relevant record or to produce a relevant record to him.

- (3) Subsections (1) and (2) do not apply to a person who shows--

- (a) that the imposition of the requirement was required or authorised by or under any enactment, by any rule of law or by the order of a court, or
- (b) that in the particular circumstances the imposition of the requirement was justified as being in the public interest.

(4) Having regard to the provisions of Part V of the Police Act 1997 (certificates of criminal records etc), the imposition of the requirement referred to in subsection (1) or (2) is not to be regarded as being justified as being in the public interest on the ground that it would assist in the prevention or detection of crime.

(5) A person who contravenes subsection (1) or (2) is guilty of an offence.

(6) In this section "a relevant record" means any record which--

(a) has been or is to be obtained by a data subject from any data controller specified in the first column of the Table below in the exercise of the right conferred by section 7, and

(b) contains information relating to any matter specified in relation to that data controller in the second column,

and includes a copy of such a record or a part of such a record.

TABLE

Data controller	Subject-matter
1 Any of the following persons--	(a) Convictions.
(a) a chief officer of police of a police force in England and Wales.	(b) Cautions.
(b) the chief constable of the Police Service of Scotland.	
(c) the Chief Constable of the Police Service of Northern Ireland.	
(d) the Director General of the National Crime Agency.	
2 The Secretary of State.	(a) Convictions.
	(b) Cautions.
	(c) His functions under section 92 of the Powers of Criminal Courts (Sentencing) Act 2000, section 205(2) or 208 of the Criminal Procedure (Scotland) Act

	<p>1995 or section 73 of the Children and Young Persons Act (Northern Ireland) 1968 in relation to any person sentenced to detention.</p> <p>(d) His functions under the Prison Act 1952, the Prisons (Scotland) Act 1989 or the Prison Act (Northern Ireland) 1953 in relation to any person imprisoned or detained.</p> <p>(e) His functions under the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Jobseekers Act 1995, Part 1 of the Welfare Reform Act 2007 or Part 1 of the Welfare Reform Act 2012.</p> <p>(f) His functions under Part V of the Police Act 1997.</p>
3 The Department of Health and Social Services for Northern Ireland.	<p>Its functions under the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992, the Jobseekers (Northern Ireland) Order 1995 or Part 1 of the Welfare Reform Act (Northern Ireland) 2007.</p>
4 Disclosure and Barring Service.	<p>(a) Its functions under the Safeguarding Vulnerable Groups Act 2006 [or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.</p> <p>(b) Its functions under Part 5 of the Police Act 1997.</p>
5 The Scottish Ministers.	<p>Their functions under Parts 1 and 2 of the Protection of Vulnerable Groups (Scotland) Act 2007 (asp</p>

14).

(6A) A record is not a relevant record to the extent that it relates, or is to relate, only to personal data falling within paragraph (e) of the definition of "data" in section 1(1).

(7) In the Table in subsection (6)--

"caution" means a caution given to any person in England and Wales or Northern Ireland in respect of an offence which, at the time when the caution is given, is admitted;

"conviction" has the same meaning as in the Rehabilitation of Offenders Act 1974 or the Rehabilitation of Offenders (Northern Ireland) Order 1978.

(8) The Secretary of State may by order amend--

(a) the Table in subsection (6), and

(b) subsection (7).

(9) For the purposes of this section a record which states that a data controller is not processing any personal data relating to a particular matter shall be taken to be a record containing information relating to that matter.

(10) In this section "employee" means an individual who--

(a) works under a contract of employment, as defined by section 230(2) of the Employment Rights Act 1996, or

(b) holds any office,

whether or not he is entitled to remuneration; and "employment" shall be construed accordingly.