

POLICY INTERNAL KNOWLEDGE BASE

DPA or PECR	Section/Regulation	Issue
DPA	Section 10	Section 10 DPA and section 42 assessment

Summary:

Section 10(4) refers to the power of the court to order compliance with a section 10 notice.

The Commissioner is still able to make a s42 assessment on processing that may be in breach of the sixth principle (complying with a section 10 notice).

This CWAN sets out our current position:

The right to serve a section 10(1) notice is one of the 'rights of data subjects' falling under the sixth principle. A data subject should only serve a section 10 notice if the processing of their personal data is causing them unwarranted damage or distress.

It is a fairly limited right, only applying where a data controller is processing personal data under the schedule 2 conditions for processing in paragraphs 5 and 6. It won't apply if the personal data is being processed under schedule 2 conditions 1 - 4.

The data controller must still respond to the data subject within 21 days (section 10(3)) even if the right doesn't apply.

Failure to comply with a justified notice **or** failure to respond to a valid section 10 notice is a breach of the sixth principle.

The Commissioner can make an assessment of whether processing has been or is being carried out in compliance with the provisions of the DPA - in this case a breach of the sixth principle arising from a failure to comply with a data subject's section 10 rights.

We can make an assessment of:

- any non-compliant processing causing unwarranted damage or distress which means that the notice is justified; and/or
- the data controller's compliance with the procedural obligations under 10(3) to:
 - respond within 21 days of receiving the objection;
 - explain whether it intends to comply with the objection;and,
 - if it does not intend to comply with the objection in some way, give reasons for the decision.

Processing that causes unwarranted damage or distress is likely to be:

- unjustified;

- unfair; or
- unlawful

and thus not in compliance with the DPA.

Considerations for caseworker

If you are dealing with a Helpline query or handling any reported concerns on section 10 you will need to take into account a number of matters. The following list, though not exhaustive, is a starting point for the type of information you should consider:

Initial steps

- Check whether the data subject has already applied to the court for an order to comply with the s10 notice – if so we may decide not to investigate the data controller's compliance with their obligations under s10(3) on the basis that the data subject is more concerned that the data controller stops processing their data and has taken steps to achieve this;
- Establish as early as possible the data subject's main concern and any other breach of principle that may be involved;
- Don't get too side-tracked by section 10 – think about the processing of personal data and how that has led to the data subject serving the s10 notice. Is there an opportunity to work with the data controller to improve their information rights practices?

Have we received a copy of the section 10 notice?

It should be in writing and must specify the reasons why the processing of the data subject's personal data is likely to cause:

- substantial unwarranted damage; or
- substantial unwarranted distress.

Is the section 10 notice valid?

Does it:

- specify what the processing is that is causing the problem (eg if the damage and distress was as a result of the DC holding inaccurate information then the DS must explicitly state this in the notice); **and**
- explain why the processing is causing, or is likely to cause substantial unwarranted damage or distress (eg if the processing is causing the DS severe embarrassment then the notice must clearly explain why this is the case).

Technically the DC doesn't have to respond to an invalid notice although it makes sense for the DC to contact the DS as a matter of good practice for any clarification. It may be helpful for you to contact the DS to explain how to exercise their section 10 rights.

Has the organisation responded to a valid section 10 notice in writing within 21 days explaining:

- whether it has complied or intends to comply with the notice in full; or
- why it considers the notice is not justified.

The organisation must still respond within 21 days even if the notice is not justified.

If the organisation hasn't responded at all, or didn't respond within 21 days you can:

- make a s42 assessment of compliance unlikely (breach of 6th principle – failing to comply with the procedural obligations under s10(3))

You CAN also:

- carry out a s42 assessment on whether the data controller has complied with its obligations under s10(1), but to do so you would need information on:
 - the nature of the processing i.e. what is the DS's underlying concern – for example, do they think that their personal data is being processed unfairly, or in an unsecure manner;
 - in what way the processing is said to be causing damage or distress to the data subject; and
 - whether the damage or distress is unwarranted.

More guidance can be found on our website under:

[Preventing processing likely to cause damage or distress](#)

Problems with the previous line on ASK knowledge base

The previous line said that:

'the only situation where the ICO can get involved with a request made under section 10 is where the organisation hasn't provided any response within 21 days, we cannot assist with any matters relating to compliance with the request....'

This line may have arisen as a result of our preferences or priorities in terms of the types of complaints we take on as an office where there is a technical limitation on our legal powers, or it may be that we decided for operational reasons that we would not

make assessments on a data controller's compliance with their section 10(1) obligations.

Just because s10 refers to the powers of the court to order compliance with a section 10 notice does not preclude the Commissioner from making an assessment on processing that is in breach of principle 6.

Other sections of the DPA that relate to principle 6 refer to the order making powers of the court. For example, section 7(9) allows the court to order compliance with a SAR, but wouldn't prevent the Commissioner from making her own assessment on whether or not a data controller should comply with a section 7 request.

Source of Casework Advice Note	Policy Delivery	Details	Reconsideration of our previous line on section 10 DPA and s42 request for assessment
Related Documents	POL845		
Contact: KH/JP			
Date: 28/07/2016	Reference number: CWAN 025		